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**IRREPARABLE HARM TO WHOM?  
PARSING UTAH'S ODD ARGUMENT**

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**Abstract:** In *Kitchen v. Herbert*, a federal judge in Utah struck down Amendment 3 to the state's constitution, which prohibited same-sex couples from marrying. Utah rushed to stay the decision pending appeal, which would prevent same-sex couples from marrying in the interim. Although both the District Court and Court of Appeals denied the state's request, the Supreme Court granted the stay—but not until nearly 1,300 same-sex couples had already married in Utah. In arguing in favor of a stay, Utah posited that same-sex couples would suffer an irreparable harm in the form of "dignitary losses" if they were to marry and then, when the District Court's decision was eventually overturned on appeal, have their marriage taken away from them. This article critiques the curious logic behind the state's argument, as well as the state's earnestness in its concern for dignitary losses considering its decision, after the Supreme Court granted the stay, not to recognize the legal validity of the 1,300 same-sex marriages that had taken place. In the recent wave of similar challenges to same-sex marriage prohibitions taking place in many states around the country, and due to the subsequent stay requests that will surely follow, the author hopes to provide guidance to both judges and the legal community as to how to approach "dignitary loss" arguments made by states.

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## IRREPARABLE HARM TO WHOM? PARSING UTAH'S ODD ARGUMENT

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### INTRODUCTION



On December 20th, 2013, in *Kitchen v. Herbert*, District Court Judge Robert J. Shelby deemed Amendment 3 to the Utah Constitution, which limited legal marriages to those between a man and a woman, unconstitutional on both due process and equal protection grounds.<sup>1</sup> Soon after, the state of Utah filed for a stay pending an appeal to the Tenth Circuit and, on Christmas Eve, was denied. Utah then appealed to the Supreme Court of the United States for a stay and, on January 6th, the Court granted the stay in a short opinion that included no legal analysis or written dissents.<sup>2</sup>

There are three criteria the Supreme Court looks to when deciding whether or not to grant a stay: “(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay.”<sup>3</sup> A “likelihood of irreparable harm” is understood to mean that if a stay is not granted there is a serious degree of probability that harm to some party will occur that cannot be remedied in the future.<sup>4</sup> In *Kitchen v. Herbert*, appellants argued that any later reversal of the District Court’s ruling, which would invalidate same-sex marriages granted in the interim, would cause irreparable harm to the same-sex couples (and their children).

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<sup>1</sup> *Kitchen v. Herbert*, No. 2:13-CV-217, 2013 WL 6697874 (D. Utah Dec. 20, 2013).

<sup>2</sup> *Kitchen v. Herbert*, 134 S. Ct. 893 (2014).

<sup>3</sup> *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers)

<sup>4</sup> See generally Bethany M. Bates, *Reconciliation After Winter: The Standard for Preliminary Injunctions in Federal Courts*, 111 COLUM. L. REV. 1522 (2011).

This Comment posits that the State's argument in reference to irreparable harm to same-sex couples is flawed and would be an improper basis for granting a stay. This is because (1) most same-sex couples applying for marriage already know their marriages exist on a murky legal basis, and if they know, the fact that they are marrying is direct evidence that they would prefer a stay not be granted; (2) any lack of knowledge can be easily remedied by a judicial decree mandating that county clerks inform couples of the possibility of invalidation upon application for a marriage license; (3) due to information asymmetries and a lack of time to conduct a detailed inquiry, and considering their membership in the class and representation before the Court, respondents' wishes should be weighted heavily; and finally, (4) the state contradicts its own argument given its decision not to recognize marriage licenses granted to same-sex couples upon the Supreme Court's decision not to stay.

Because the Supreme Court did not include any legal rationale in their short opinion overturning the Tenth Circuit's decision, it is impossible to know the extent to which the Justices relied upon Utah's argument in granting the stay. Nonetheless, it is important to analyze the state's reasoning to the extent that this was the main argument it made. Additionally, similar constitutional challenges to same-sex marriage bans are gaining momentum in federal courts across the country, meaning other states may draw upon Utah's argument.<sup>5</sup>

## I.

### AN EXAMINATION OF THE STATE'S ARGUMENT

The state of Utah gave a number of reasons why denying a stay would cause irreparable harm: it would impair state rights, undermine the democratic will of Utah's citizens, and burden the state with administrative and financial costs associated with unraveling interim marriages once the state prevails on appeal.<sup>6</sup> However, Utah also specifically named "same-sex couples and their children" as parties that would be hurt by a decision rejecting a stay.<sup>7</sup> Crucially, rather than arguing that same-sex couples and their children would be indirect victims of the harms listed above simply by virtue of being citizens of Utah, the state detailed harms specific and exclusive to same-sex couples that would occur if the stay were denied, arguing the following in its application to the Court:

The State's responsibility for the welfare of *all* of its citizens makes it relevant, as well, that Respondents and any other same-sex couples who choose to marry during the period before the Tenth Circuit and

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<sup>5</sup> See Sean Murphy, *Gay Marriage Rulings in 2 US States Build Momentum*, Deseret News (Jan 16, 2014), <http://www.deseretnews.com/article/print/765645762/Gay-marriage-rulings-in-2-US-states-build-momentum.html>.

<sup>6</sup> Application to Stay Judgment Pending Appeal (Dec. 31, 2013), at 19–21, *available at*: <http://attorneygeneral.utah.gov/wp-content/uploads/sites/6/2013/12/Application-for-Stay.pdf>.

<sup>7</sup> *Id.* at 21.

this Court resolve this dispute on the merits will likely be irreparably harmed without a stay. They and their children will likely suffer dignitary and financial losses from the invalidation of their marriages if appellate review affirms the validity of Utah's marriage laws. The State thus seeks a stay, in part, to avoid needless injuries to same-sex couples and their families that would follow if the marriage licenses that they obtain as a result of the district court's injunction are ultimately found invalid . . . .<sup>8</sup>

It is important from the onset to identify the exact argument that Utah is trying to make: that if Judge Shelby's decision is overturned on appeal, same-sex couples who obtain marriages before the appeal process concludes, and their children, will suffer dignitary and financial losses. Although the state does not attempt to actually specify what these losses are, they can be inferred. Dignitary losses would be feelings of remorse and sadness upon having their marriages invalidated, while financial losses would stem from transaction costs incurred or consequential actions taken as a result of the couple's belief that their marriage would remain legal.<sup>9</sup> In part because of these harms to its own citizens, the state argues the stay should be granted.<sup>10</sup>

*A. Most Couples Already Know the Legal Murkiness of Their Marriages*

The state assumes that dignitary harms suffered by its citizens would be akin to the dignitary harm that results from receiving a cherished and long-sought promotion and then losing it shortly thereafter: sadness over something you briefly had and suddenly lost. Cornell Law Professor Michael Dorf characterizes the harm in a more direct and stark manner: "heartbreak and chaos."<sup>11</sup> In making this argument, the state seems to assume that the same-sex couples applying for marriage licenses are unaware *ex ante* of the questionable legality of their union, ostensibly because of the complicated nature of appeals. Yet there is a good argument to be made that most, if not all, of the couples rushing to the courthouse steps know that their marriages may not last. If that is the case, then while there may be some dignitary harm to couples and their children when their marriages are voided upon appeal, this damage is drastically mitigated by the fact that these couples were not blindsided.

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<sup>8</sup> *Id.*

<sup>9</sup> Transaction costs include expenses incurred in traveling to obtain a marriage certificate. As an example of a consequential action, marriage confers state benefits to same-sex couples which may otherwise cause the couple to spend their disposable income differently, assuming an increased budget as a result of marriage, only to learn later they never received those benefits.

<sup>10</sup> Application to Stay Judgment Pending Appeal, *supra* note 6.

<sup>11</sup> Michael C. Dorf, *Was the 10th Circuit Correct Not to Stay the District Court SSM Ruling?*, DORF ON LAW (Dec. 24, 2013), <http://www.dorfonlaw.org/2013/12/was-10th-circuit-correct-not-to-stay.html>.

There are a number of reasons to presume that same-sex couples are *ex ante* well aware of the legal uncertainty of their marriages. First, some of these couples may understand the appeals process. Second, even if not self-informed, knowledgeable friends or family may inform couples of the legal uncertainty. Third, a couple ready to marry will likely have already been in a long-term relationship and may have researched the issue. Finally, as Prof. Dorf posits, some couples may marry specifically as an act of political activism, which means they are likely aware of the tenuous legality of their marriage.<sup>12</sup>

If we assume that same-sex couples in Utah do overwhelmingly know about the legal murkiness of their marriage, the fact that they are still marrying in significant numbers (at least 1,300 marriages as of January 13<sup>th</sup>)<sup>13</sup> should be clear empirical evidence that these couples deliberately assumed the risk of dignitary and financial losses. Utah could argue that although these couples may not properly internalize the eventual harm despite knowledge of the risks. However, this would stretch the argument that a state ought to trust its citizens with some agency to make important personal decisions. States typically argue, in regards to complex health and economic issues, that they need to protect their citizens from risks they cannot appreciate. Here, a state would be using a similar rationale to argue that its interest in regulating the emotional wellbeing of its citizens should bar couples from marrying.<sup>14</sup> It would be quite a large step for a state to make policy based on potential feelings of sadness.<sup>15</sup>

While traditional state regulations having secondary effects on an individual's wellbeing, such as protecting someone's lungs from dangerous inhalants or protecting someone's pocketbook from predatory businesses, can improve emotional quality of life, regulations rarely, if ever, intend to protect individuals solely from the emotional consequences of their actions.<sup>16</sup> Moreover, the state's

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<sup>12</sup> *Id.*

<sup>13</sup> Richard A. Epstein, *Legal and Moral Dimensions of Utah's Same-Sex Marriage Fight*, N.Y.U. J. L. & LIBERTY BLOG (Jan. 13, 2014), <http://lawandlibertyblog.com/nyujll/2014/1/13/legal-and-moral-dimensions-of-utahs-same-sex-marriage-fight>.

<sup>14</sup> The modern administrative state is based on the idea that regulations are necessary (in lieu of the slower and more resource-consuming judicial redress) to protect citizens and institutions from unwanted negative externalities that have arisen from the rapid advancement in technology and business in the post-industrial era (usually due to variations of what economists call "information asymmetry," such as adverse selection and moral hazard). See generally Edward J. Glaeser and Andrei Shleifer, *The Rise of the Regulatory State* (Nat'l Bureau of Econ. Research, Working Paper 8650, 2001), available at <http://www.nber.org/papers/w8650.pdf>.

<sup>15</sup> The Mercatus Center, a research group at George Mason University, recently ranked Utah as the seventh least regulated state in the country. See #7 Utah, FREEDOM IN THE 50 STATES, <http://freedominthe50states.org/regulatory/utah> (last visited Mar. 4, 2014).

<sup>16</sup> For example, many regulations are forms of what Cass Sunstein and Richard Thaler call "nudges," or government policies that use behavioral economics to encourage citizens to make better decisions about their physical and economic wellbeing. See Benjamin Wallace-Wells, *Cass Sunstein Wants to Nudge Us*, N.Y. TIMES (May 13, 2010), [http://www.nytimes.com/2010/05/16/magazine/16Sunstein-t.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/05/16/magazine/16Sunstein-t.html?pagewanted=all&_r=0). But these "nudges" are much different from Utah's argument, which is far from a gentle push but a straightforward prohibition on an activity

purported concern with potential hurt feelings that may stem from important life decisions is being applied discriminately—maybe all marriages should be banned due to the devastating emotional effects of divorce.<sup>17</sup> The point is that Utah has taken interest in entering the uncharted waters of directly regulating emotional wellbeing, which is odd considering the state’s recent history of spurning invasive government intervention,<sup>18</sup> and that this seems to be the only arena in which they have pursued the endeavor.

*B. Any Lack of Knowledge Can Be Easily Remedied*

The state does not proffer what percentage of couples would have to be in the dark upon getting married for their argument to carry weight, but let us assume for the moment maximal ignorance: every single same-sex couple that applies for a marriage license will be shocked when their unions are voided upon appeal. To remedy this asymmetry, the state can simply provide county clerks with a prewritten statement to be read to the couple upon application, ensuring that no couple has the rug pulled out from under them once the state’s prediction of success on appeal comes to fruition.<sup>19</sup> The statement would need to be worded so as not to discourage same-sex couples from marrying, as a policy that did so could face equal protection challenges itself.<sup>20</sup> So long as the notice is carefully drafted to avoid any equal protection issues and informs couples of the legal limbo of their marriages pending the appeal, it serves as an effective remedy to the state’s concern.

*C. Given Information Asymmetry, Respondents’ Wishes Should Be Heavily Weighed*

Because the state’s argument claims to protect the class whose members are petitioning for the right to marry, the class itself should determine whether it agrees with the state’s paternalistic approach to protecting same-sex couples from irreparable harm. If the state wants to argue that the wishes of same-sex couples

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solely in the primary interest of emotional wellbeing. This goes well beyond “soft paternalism” in a manner relatively unique to modern regulatory theory.

<sup>17</sup> Utah has an above average divorce rate compared to the nation at large and Utah women have the fourth highest divorce rate in the country. See Kim Johnson, *Can this Marriage be Saved? A Look Behind Utah’s Divorce Rate*, 4UTAH.COM (Nov. 13, 2013, 11:19 AM), [http://www.4utah.com/story/can-this-marriage-be-saved-a-look-behind-utahs-divorce-rate/d/story/KvDrr-3W9kyAALePA\\_67QQ](http://www.4utah.com/story/can-this-marriage-be-saved-a-look-behind-utahs-divorce-rate/d/story/KvDrr-3W9kyAALePA_67QQ).

<sup>18</sup> See #7 Utah, FREEDOM IN THE 50 STATES, *supra* note 15.

<sup>19</sup> Necessary adjustments can reasonably be made for the visually and sight-impaired.

<sup>20</sup> Because such a statement would facially discriminate based on gender and sexual orientation, an equal protection claim is possible. See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011). However, this only seems realistic if the statement were to continue after the appeals process had been exhausted, in which case it would seem superfluous at best and intimidating at worst.

are not enough, and that the state knows what is best for its citizens, it risks undermining the agency of a group it is purportedly seeking to protect. Given the nature of a stay, appellate courts do not have the time to conduct a detailed inquiry into whether the class agrees with the state's argument.<sup>21</sup> Thus, a court may be best served by defaulting to the class's opinion or putting a thumb on the scale in favor of their recommendation, given their quasi-representation of gay couples via their lawsuit.

Admittedly, there are some issues with this approach. First, and most prominently, respondents have a conflict of interest as they oppose the motion for a stay, making it unlikely they will concede any of the state's arguments. However, because their goal as litigants is to ultimately win on the merits, they may not necessarily oppose a stay if they feel it truly would protect the class at large. Second, same-sex couples only represent a portion of the state's overall gay and bisexual population and thus could be said to not adequately represent all gay persons in Utah. However, much of Utah's gay population would also likely oppose a stay, as gay advocacy groups have overwhelmingly voiced objection to the decision.<sup>22</sup> If the Court believes that Utah's dignitary harm concern is overly aggressive paternalism but is still unsure whether the gay community at large shares the concern, respondents may be the best proxy to settle the uncertainty. Or, in the alternative, the Court could assume respondents' position to be correct, and the burden would be on the state to prove otherwise. Either way, respondents' wishes should be taken into account in some regard.

*D. Utah's Decision Not To Recognize The Legal Validity of Same-sex Marriage Licenses Contradicts Its Own Argument*

Even assuming the entirety of the state's argument that denying a stay would lead to financial and dignitary losses, a sad reality exists: those losses have already been incurred due to Utah's decision not to recognize same-sex marriages after the Supreme Court granted the state's request for a stay.<sup>23</sup> Importantly, these losses did not have to manifest to couples who married in the interim, since the *timing* of harms manifested would be the only difference if Utah prevails on appeal.<sup>24</sup> The Governor's Chief of Staff, in an email to government officials di-

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<sup>21</sup> Stays are inherently time-sensitive requests. Moreover, even if the court found a perfect answer to the complicated inquiry, it relates to only one argument under one prong of three.

<sup>22</sup> See Chris Johnson, *HRC Urges Feds to Recognize Utah Same-sex Marriages*, WASHINGTON BLADE (Jan. 9, 2014), <http://www.washingtonblade.com/2014/01/09/hrc-urges-feds-recognize-utah-sex-marriages>.

<sup>23</sup> *Governor's Office Gives Direction to State Agencies on Same-Sex Marriages*, UTAH GOVERNOR GARY HERBERT (Jan. 8, 2014), available at [http://www.utah.gov/governor/news\\_media/article.html?article=9617](http://www.utah.gov/governor/news_media/article.html?article=9617).

<sup>24</sup> The state could argue that it is better to have these harms occur earlier rather than later, because there is daily accumulation of increasing potential harm. However, even assuming that argument's validity, these concerns are alleviated by both the marginal difference in magnitude between these harms and the strong possibility that if the state loses these harms will never manifest.

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recting them on how to deal with same-sex couples petitioning for rights derived from their newfound marriages, stated that:

“[S]tate recognition of same-sex marital status is ON HOLD until further notice. Please understand this position is not intended to comment on the legal status of those same-sex marriages – that is for the courts to decide. The intent of this communication is to direct state agency compliance with current laws that prohibit the state from recognizing same-sex marriages.”<sup>25</sup>

The only “benefit” the state permitted to stand concerned driver’s licenses that had already been changed to reflect a spouse’s last name.<sup>26</sup> The state thereby takes the position that these “interim marriages” will not be recognized by the state of Utah until final appellate decision on the merits.

It is important to note the questionable at best legality of the state’s refusal to recognize marriage certificates granted by the state that meet all procedural requirements.<sup>27</sup> If the issue is ever litigated, it will be a question of first impression whether a state can put legally granted marriage licenses on hold until the appeals process concludes, especially since the state had already begun providing conferred benefits to these couples prior to the stay.<sup>28</sup> However, it does suggest that Utah has a curious way of shielding same-sex couples from irreparable harm. The dignitary losses the state asked the Supreme Court to prevent via stay have now, under the state’s logic, come to fruition through a course of action the state had the opportunity to avoid. Utah could have simply acknowledged the stay by not permitting future licenses, while continuing to recognize those granted before the Court’s decision.

It is possible that in its original dignitary harm argument the state was referring solely to the harm to marriages that would be performed after a stay was denied, thereby justifying non-recognition of prior marriages since they would be outside the purview of the original argument. However, if Utah was only referring to counterfactual, post-stay marriages, it should have been more transparent in its motion. By its own language, it seems as if the state is referring to all same-sex marriages that have taken place after the District Court decision. In fact, the state says explicitly in its motion that it has a responsibility to protect “[r]espondents and any other same-sex couples *who choose to marry during the period before the Tenth Circuit and this Court resolve this dispute on the merits*”

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<sup>25</sup> *Governor’s Office Gives Direction to State Agencies on Same-Sex Marriages*, *supra* note 19.

<sup>26</sup> *Id.*

<sup>27</sup> See Michael Dorf, *What Now for the 900+ Utah Same-Sex Marriages that Occurred before the SCOTUS Granted Its Stay?*, DORF ON LAW (Jan. 7, 2014), <http://www.dorfonlaw.org/2014/01/what-now-for-900-utah-same-sex.html>.

<sup>28</sup> See Jack Healy & Adam Liptak, *Justices’ Halt to Gay Marriage Leaves Utah Couples in Limbo*, N.Y. TIMES (Jan. 6, 2014), [http://www.nytimes.com/2014/01/07/us/justices-block-gay-marriage-in-utah-pending-appeal?\\_r=0](http://www.nytimes.com/2014/01/07/us/justices-block-gay-marriage-in-utah-pending-appeal?_r=0).

from irreparable harm.<sup>29</sup> Notice that all marriages now invalidated by the court *pendente lite* are same-sex couples who married during this period specifically carved out by the state.

Compounding this confusing legal situation is the possibility that other states could recognize the marriages despite Utah's refusal to do so.<sup>30</sup> Likewise, Attorney General Eric Holder announced on January 10th, 2014 that the federal government would recognize the nearly 1,300 marriages.<sup>31</sup> Utah could have avoided the alleged dignitary losses and this confusing and costly legal situation by simply preventing post-stay marriage licenses while recognizing those already granted. However, after receiving the stay, Utah's actions belie the earnestness of their argument.

### CONCLUSION

Utah's concern for irreparable harm done to same-sex couples in its state seems disingenuous. Besides the fact that the potential harms seem unlikely to manifest and are easily remediable, the state showed little concern for these dignitary and financial losses when unilaterally declaring non-recognition of the same-sex marriages, despite their being granted in a procedurally legitimate manner. Going forward, courts should be wary of states that argue for protecting same-sex couples from future harm by staying their right to marry until the end of the appeals process. Not only is the harm questionable and remediable, but there remains a strong possibility that other states, mimicking Utah, will forget about these dignitary losses the moment they have the opportunity to do so.



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<sup>29</sup> See Application to Stay Judgment Pending Appeal, *supra* note 6, at 21 (emphasis added).

<sup>30</sup> See Governor's Office Gives Direction to State Agencies on Same-sex Marriages, *supra* note 19.

<sup>31</sup> See Charlie Savage and Jack Healy, *U.S. to Recognize 1,300 Marriages Disputed by Utah*, N.Y. TIMES (Jan. 10, 2014), [http://www.nytimes.com/2014/01/11/us/politics/same-sex-marriage-utah.html?\\_r=0](http://www.nytimes.com/2014/01/11/us/politics/same-sex-marriage-utah.html?_r=0).