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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

SUSAN LATTA and TRACI EHLERS, LORI WATSEN and SHARENE WATSEN, SHELIA ROBERTSON and ANDREA ALTMAYER, AMBER BEIERLE and RACHAEL ROBERTSON, Plaintiffs, vs. C.L. (BUTCH) OTTER, as Governor of the State of Idaho, in his official capacity, and CHRISTOPHER RICH, as Recorder of Ada County, Idaho, in his official capacity, Defendants, and STATE OF IDAHO, Defendant-Intervenor.	)	Case No. 1:13-cv-00482-CWD **DEFENDANT GOVERNOR OTTER'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

Since before recorded history, nearly all human societies have had a social institution of marriage that included the core meaning of "the union of a man and a woman." Over the millennia, the man-woman marriage institution has uniquely provided valuable social goods necessary to the well-being and stability of society and the development of the individual.

However, toward the end of the twentieth century, various individuals and groups began a campaign to use the force of law to replace the man-woman marriage institution with an institution that would still be called "marriage" but would have a very different core meaning: "the union of any two persons" (hereafter "genderless marriage"). This civil action is an important part of that campaign.

In the face of the early parts of that campaign, the Idaho legislature gave the man-woman marriage institution statutory protection in the State by enacting Idaho Code §§ 32-201 and 32-209. 1995 Idaho Sess. Laws ch. 104, § 3; 1996 Idaho Sess. Laws ch. 331, § 1.[1] Subsequently, a large majority of Idaho's citizen-voters voted to give the man-woman marriage institution the strongest protection available by adding to the State's constitution the following language: "A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state." Idaho Const. art. III, § 28. ("Amendment 2") (We refer to these statutes and the amendment to the State constitution collectively as "Idaho's Marriage Laws.")

[1] Section 32-201 provides in pertinent part: "Marriage is a personal relation arising out of a civil contract between a man and a woman . . . ." Section 32-209 provides in pertinent part: "All marriages contracted without this state, which would be valid by the laws of the state or country in which the same were contracted, are valid in this state, unless they violate the public policy of this state. Marriages that violate the public policy of this state include, but are not limited to, same-sex marriages, and marriages entered into under the laws of another state or country with the intent to evade the prohibitions of the marriage laws of this state."

The plaintiffs, a group of four same-sex couples, claim that Idaho's Marriage Laws discriminate on the basis of sexual orientation and sex in a way that violates both the Due Process and Equal Protection Clauses of the federal Constitution's Fourteenth Amendment. They ask this Court to declare Idaho's Marriage Laws (and perforce the man-woman marriage institution) unconstitutional and to require the government defendants to allow them to marry; thereafter, "marriage" in Idaho would of necessity mean the union of any two persons.

A society can have *only one* social institution denominated "marriage." Society cannot simultaneously have as shared, core, constitutive meanings of the marriage institution *both* "the union of a man and a woman" *and* "the union of any two persons"—any more than it can have monogamy as a core meaning if it also allows polygamy. One meaning necessarily displaces or precludes the other. Given the role of language and meaning in constituting and sustaining institutions, it is factually impossible for Idaho to have two social institutions known as "marriage." So, every society must choose either to retain man-woman marriage or, by force of law, replace it with a radically different genderless marriage regime. Idaho's citizens have decided convincingly to reaffirm and perpetuate the man-woman definition of marriage.

As with other issues of domestic-relations law, choosing a definition of marriage in today's world presents a clash between deeply held interests and values. On one hand are the interests of Idaho citizens who have formed intimate, committed relationships with someone of the same sex—and in some cases are raising or wish to raise children together—and who want the State to confer on them the benefits of marriage. Governor Otter respects and values those citizens as both equal before the law and fully entitled to order their private lives in the manner they have chosen.

On the other hand are the long-term interests of all Idaho's children—both now and in future generations. They cannot defend their own interests. The State thus has a duty to consider their interests in deciding whether to abandon the man-woman definition of marriage. And Idaho voters, in enacting Amendment 2, reaffirmed among other things their firm belief—also supported by sound social science—that moms and dads are different, not interchangeable, and that the diversity of having both a mom and a dad is the ideal parenting environment.

That model is not intended to demean other family structures. As between mutually exclusive models of marriage, the man-woman model is simply the one the State and its people believe best advances the interests of children.

What makes the decision about redefining marriage particularly poignant is not merely the uncertainty inherent in predicting its long-term effects. It is also the mounting evidence that such a redefinition poses real, concrete risks to children—especially in future generations. Many of those risks flow from the inevitable effect of shifting the public meaning of marriage away from a largely child-centric institution toward a more adult-centric view. Given the stakes, Idaho has important and compelling interests in minimizing those risks.

Determining the proper balance between competing interests in the marriage debate falls squarely within what the Supreme Court in *Windsor* called the States' "broad[ ] authority to regulate the subject of domestic relations . . . ." *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013). Some States have struck a different balance than Idaho's, and *Windsor* held that choice is protected by the States' "historic and essential authority to define the marital relation" free from "federal intrusion." *Id*. at 2692. Yet States like Idaho that decide to place greater weight on the benefits to *children* of retaining the gendered definition of marriage are entitled to the same deference and respect. Anything less would effectively federalize domestic relations law.

This Court should give proper deference to the choice of Idaho's legislature and citizens, and grant summary judgment in favor of the Defendants.

BACKGROUND

The States' traditional authority over marriage. In cases spanning three centuries, the Supreme Court has emphasized that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States." *Ex parte Burrus*, 136 U.S. 586, 593–94 (1890); *Simms v. Simms*, 175 U.S. 162, 167 (1899) (same); *Rose v. Rose*, 481 U.S. 619, 625 (1987) (same); *Windsor*, 133 S. Ct. at 2691 (quoting *Burrus*). The States' power to define marriage flows from the fact that "the states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . . [and] the Constitution delegated no authority to the government of the United States on the subject . . . ." *Haddock v. Haddock*, 201 U.S. 562, 575 (1906), *overruled on other grounds, Williams v. North Carolina*, 317 U.S. 287 (1942).

Thus, marriage and domestic relations is "an area that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). And Supreme Court precedent over the years has taught "solicitude for state interests, particularly in the field of family and family-property arrangements." *United States v. Yazell*, 382 U.S. 341, 352 (1966). Indeed, "[i]nsofar as marriage is within temporal control, the States lay on the guiding hand." *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979).

In *Windsor*, the Supreme Court reaffirmed the States' traditional authority over marriage. 133 S. Ct. at 2691. In declaring § 3 of the federal Defense of Marriage Act unconstitutional, the Court emphasized the States' "historic and essential authority to define the marital relation," *id.* at 2692, on the understanding that "[t]he definition of marriage is the foundation of the State's

broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities,'" *id.* at 2691 (quoting *Williams*, 317 U.S. at 298 (alteration in original)). The Court further noted that, "[c]onsistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations." *Id.* Specifically, the Court held that New York's recognition of same-sex marriage was "without doubt a proper exercise of its sovereign authority within our federal system, all in the way that the Framers of the Constitution intended." *Id.* at 2692. Congress went astray there, the Court held, by "interfer[ing] with the equal dignity of same-sex marriages . . . conferred by the States in the exercise of their sovereign power." *Id.* at 2693.

History of the man-woman definition. The understanding of marriage as a union between a man and a woman and its purpose of uniting members of the opposite sex and their children into family units recognized by society was, until recently, universally accepted by courts, legal scholars, philosophers and sociologists. *See, e.g.*, William Blackstone, 1 *Commentaries* *422 (describing the relationship between parent and child as "consequential to that of marriage, being its principal end and design: and it is by virtue of this relation that infants are protected, maintained, and educated"). In the words of sociologist Kingsley Davis:

> The family is the part of the institutional system through which the creation, nurture, and socialization of the next generation is mainly accomplished. . . . The genius of the family system is that, through it, the society normally holds the biological parents responsible for each other and for their offspring. By identifying children with their parents . . . the social system powerfully motivates individuals to settle into a sexual union and take care of the ensuing offspring.[2]

[2] *The Meaning and Significance of Marriage in Contemporary Society*, *in* Contemporary Marriage: Comparative Perspectives on a Changing Institution 7–8 (Kingsley Davis ed., 1985), Appendix in Support of Defendant Governor Otter's Motion for Summary Judgment ("App.") 897–99; *see also Amicus Curiae* Brief of Scholars of History and Related Disciplines in Support of Petitioners at 11–22, 133 S. Ct. 2652 (2013) (No.12-144), App. 997–1008.

This historic understanding was reflected in prominent dictionaries from the time of the Fourteenth Amendment's framing and ratification.[3] Indeed, the country's leading expert on family law during that era opined that: "[m]arriage between two persons of one sex could have no validity, as none of the ends of matrimony could be accomplished thereby. It has always, therefore, been deemed requisite to the entire validity of every marriage . . . that the parties should be of different sex."[4]

The Supreme Court has taken the same view:

> [C]ertainly, no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate states of the Union, than that which seeks to establish it on the basis of the idea of the family, *as consisting in and springing from the union for life of one man and one woman* . . . .

Murphy v. Ramsey, 114 U.S. 15, 45 (1885) (emphasis added).

More recently, the Supreme Court has continued to acknowledge the historical roots and societal importance of man-woman marriage. *See, e.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (Marriage "is the foundation of the family in our society. . . . [I]f appellee's right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place."); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race."). Indeed, just last year the Supreme Court reiterated that until recently, "marriage between a man and a woman no

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[3] *E.g.*, Noah Webster, *Etymological Dictionary* 130 (1st ed. 1869); Joseph E. Worcester, *A Primary Dictionary of the English Language* 176 (1871); John Bouvier, *A Law Dictionary Adapted to the Constitution and Laws of the United States* 105 (1856).

[4] Joel Prentiss Bishop, 1 *Commentaries on the Law of Marriage & Divorce* 175 (1st ed. 1852).

doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." *Windsor*, 133 S. Ct. at 2689.

This conception is not uniquely American. Until a decade ago, "it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex." *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006). In the words of eminent anthropologist Claude Levi-Strauss, "the family—based on a union, more or less durable, but socially approved, of two individuals of opposite sexes who establish a household and bear and raise children—appears to be a practically universal phenomenon, present in every type of society." *The View From Afar* 40–41 (1985), App. 902–03. In short, marriage has long been understood as "a social institution with a biological foundation." 1 Claude Levi-Strauss, *Introduction, in A History of the Family: Distant Worlds, Ancient Worlds* 5 (Andre Burguiere, et al. eds., 1996).

History of Idaho's Marriage Laws and other facts related to this case. The history of Idaho's Marriage Laws is not disputed. That history and other undisputed facts material to this case are set forth in the Defendant Governor Otter's Statement of Material Facts.

STANDARD OF REVIEW

Summary judgment is appropriate if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986).

SUMMARY OF THE ARGUMENT

The material facts in this case are not in dispute, and the case is ripe for a decision on the law.

A few short months ago, the Supreme Court held in *United States v. Windsor* that states have the authority under the federal Constitution to abandon the traditional man-woman definition of marriage and to redefine it in genderless terms—a power the Court said falls within the States' "broad[ ] authority to regulate the subject of domestic relations . . . ." 133 S. Ct. 2675, 2691 (2013). The question here is whether Idaho can use that same authority to *retain* the man-woman definition that has prevailed not only since the origins of this Nation, but since the beginning of history. For three independent reasons, Idaho retains that authority.

A. One reason the State retains that authority is that the Supreme Court has already held as much in *Baker v. Nelson*, 409 U.S. 810 (1972). That decision dismissed on the merits the same Fourteenth Amendment challenges to the man-woman definition that Plaintiffs raise in this case. *Baker* is therefore binding here. *See, e.g.*, *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam). *Baker* is also fully consistent with *Windsor*; indeed, it reflects the same principles of federalism that *Windsor* reaffirms.

In any event, as this Court is well aware, lower federal courts do not have authority to depart from binding Supreme Court precedent merely because they believe it has been undercut by what a lower court may perceive as subsequent "doctrinal developments." The Supreme Court has held in no uncertain terms that, "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions," lower courts "should follow the case which directly controls, leaving to this Court the prerogative of

overruling its own decisions." *Rodriquez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

B. Even if *Baker* were not controlling, the Fourteenth Amendment does not deprive Idaho of its authority to retain the man-woman definition of marriage. In reviewing Fourteenth Amendment challenges to State actions, the courts defer to legitimate legislative facts chosen by government decision-makers. Multiple legitimate legislative facts support Idaho's decision to retain the man-woman definition of marriage.

There is no fundamental Fourteenth Amendment right to a State marriage certificate allowing two people of the same sex to marry. As many courts around the country have held, such a "right" clearly does not satisfy the standard for fundamental *constitutional* rights set by the Supreme Court in *Washington v. Glucksberg*, 521 U.S. 702 (1997), namely, that the alleged right be "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed." *Id.* at 720–21 (quotations and citations omitted).

The Plaintiffs' equal-protection claims are governed by rational-basis review. There is no reasonable argument that the State acted with "animus" in retaining its traditional definition of marriage that has existed for the State's entire history. And a finding that the State acted solely from animus would be necessary to apply the "heightened scrutiny" standard recently articulated by the Ninth Circuit in *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014).

C. Regardless of the level of judicial scrutiny that applies, Idaho's chosen definition is still well within its constitutional authority. Besides avoiding risks to religious freedom and

civic peace, Idaho's decision to retain that definition substantially advances multiple distinct State interests that are not only legitimate, but important and compelling.

First, maintaining the man-woman definition helps prevent further erosion of the traditional *concept* of marriage as being principally a child-centered institution, one focused first and foremost on the welfare of children rather than the emotional interests of adults. *See Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting) (discussing distinction between "conjugal" and "consent-based" views of marriage). Idaho can have but one understanding of marriage: It is either a uniquely man-woman institution, or it is not. Because man-woman unions are unique in their ability to produce children, maintaining the man-woman definition reinforces the child-centric view of marriage. And by reinforcing that understanding, the State encourages parents to routinely sacrifice their own interests to the legitimate needs and interests of their children. Given its enormous benefits to children generally, the State has an important and compelling interest in encouraging selfless parenting.

Second, and more specifically, maintaining the man-woman definition increases the likelihood that children will be raised by their biological mothers and fathers—or at least *a* mother and father—in intact families. Common sense and a wealth of social-science data teach that children do best emotionally, socially, intellectually and even economically when reared in an intact home by both biological parents. Such arrangements benefit children by (a) harnessing the strong biological connections that parents and children naturally feel for each other, and (b) providing what experts have called "gender complementarity"—i.e., diversity—in parenting.

In a variety of ways explained in detail below, the traditional definition of marriage encourages parents and would-be parents to raise their children in the State's preferred arrangement. And in a variety of ways, redefining marriage in genderless terms would likely

reduce, over time, the proportion of children being raised in that arrangement—thus placing at risk the welfare of children who will be raised in other arrangements as a result.

For all these reasons, Idaho has ample authority under the Constitution to retain its man-woman definition of marriage.

ARGUMENT

I. IDAHO HAS CONSTITUTIONAL AUTHORITY TO RETAIN ITS CURRENT DEFINITION OF MARRIAGE.

A. *Baker v. Nelson* is both controlling and consistent with *Windsor* and the federalism principles it reaffirms.

Baker v. Nelson, 409 U.S. 810 (1972), anticipates and mirrors the principles of federalism and popular sovereignty later reiterated in *Windsor*.

1. *Baker* is controlling.

In *Baker*, the U.S. Supreme Court summarily dismissed, "for want of a substantial federal question," 409 U.S. at 810, "an appeal by two men whom the State of Minnesota denied a marriage license "on the sole ground that petitioners were of the same sex." *Baker v. Nelson*, 191 N.W.2d 185, 185 (Minn. 1971). Such a summary dismissal is a decision on the merits by which "lower courts are bound . . . until such time as the Court informs (them) that (they) are not." *Hicks v. Miranda*, 422 U.S. 332, 344–45 (1975) (internal quotation marks omitted). A summary dismissal like the one in *Baker* "without doubt reject[s] the specific challenges presented in the statement of jurisdiction," and "prevent[s] lower courts from coming to opposite conclusions [1] on the precise issues presented and [2] necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam). This case meets both *Mandel* prerequisites.

First, *Baker* unmistakably presented the "precise issues" raised in this case. *See Baker*, 191 N.W.2d. at 186. *Baker* plaintiffs specifically claimed that the State's denial of a marriage license "deprive[d] [them] of their liberty to marry and of their property without due process of law under the Fourteenth Amendment" and "violate[d] their rights under the equal protection clause of the Fourteenth Amendment." Jurisdictional Statement at 3, *Baker v. Nelson*, No. 71-1072 (U.S. Feb. 11, 1971), App. 969.

Second, the Minnesota Supreme Court "necessarily decided" these issues when it rejected claims that, by the denial of their application for a marriage license, "petitioners are deprived of liberty and property without due process and are denied the equal protection of the laws, both guaranteed by the Fourteenth Amendment." *Baker*, 191 N.W.2d. at 186. The court sharply rebuffed the claim that same-sex marriage was a fundamental right, holding that "[t]he due process clause of the Fourteenth Amendment is not a charter for restructuring [marriage] by judicial legislation." *Id.* And the court held that equal protection was not offended by limiting marriage to a man and a woman without requiring proof of ability or willingness to procreate. According to the court, "the classification is no more than theoretically imperfect," and "'[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.'" *Id.* at 187 and n.4 (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940) (alteration in original)). The court also repudiated any analogy between the traditional definition of marriage and the anti-miscegenation laws invalidated in *Loving*: "[I]n commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex." *Id.* at 187.

Given the analysis in the Minnesota Supreme Court's opinion and in the jurisdictional statement challenging that decision, numerous courts have recognized the Supreme Court's *Baker* decision as controlling on the constitutionality of State laws defining marriage as the union of a man and a woman. *See e.g.*, *Massachusetts v. U. S. Dep't Health & Human Servs.*, 682 F.3d 1, 8 (1st Cir. 2012) ("*Baker* does not resolve our own case [under DOMA], but it does limit the arguments to ones that do not presume or rest on a constitutional right to same-sex marriage."); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 870–871 (8th Cir. 2006) (*Baker* mandates "restraint" before concluding "a state statute or constitutional provision codifying the traditional definition of marriage violates the Equal Protection Clause or any other provision of the United States Constitution"); *Adams v. Howerton*, 673 F.2d 1036, 1039 n.2 (9th Cir. 1982) (*Baker* is "a decision on the merits") (quotation omitted); *Donaldson v. State*, 292 P.3d 364, 371 n.5 (Mont. 2012); ("The U.S. Supreme Court's action in *Baker* has been described as binding precedent.") (citations omitted). To our knowledge, no other federal circuit or State supreme court has gone the other way.

2. *Windsor* is consistent with *Baker*.

Windsor did not undercut *Baker*. Indeed, the *Windsor* majority expressly disclaimed any intention to reach the issue decided in *Baker*, stating that its "opinion and its holding are confined to those lawful marriages" *already* authorized by state law. 133 S. Ct. at 2696. That is why the majority did not even address *Baker*—much less criticize it—which the Court surely would have done had it intended to overrule it. Similarly, neither *Romer v. Evans*, 517 U.S. 620 (1996), nor *Lawrence v. Texas*, 539 U.S. 558 (2003), addressed the constitutionality of state marriage laws, and neither mentions *Baker*.

Nor is there any inconsistency between the legal analysis in *Baker* and *Windsor*. *Windsor* invalidated § 3 of the federal Defense of Marriage Act (DOMA) because New York conferred an "equal dignity" on same-sex couples that the federal statute "displace[d]" by "treating those persons as living in marriages less respected than others." 133 S. Ct. at 2696. In concluding that DOMA "injure[d] those whom the State, by *its* marriage laws, sought to protect in personhood and dignity," *id.* (emphasis added), the Court did not create a free-standing substantive due process right for same-sex couples to marry.

Indeed, *Windsor* reinforced and complemented *Baker* by emphasizing the need to safeguard the States' "historic and essential authority to define the marital relation" free from "federal intrusion." 133 S. Ct. at 2692. The majority stressed that, "[b]y history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States." *Id.* at 2689–90. Most significantly, the Court reaffirmed that "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.'" *Id.* at 2691 (quoting *Williams v. North Carolina*, 317 U.S. 287, 298 (1942)) (alteration in original). And it was precisely *because* of its understanding of the marital relation as "'a virtually exclusive province of the States,'" *id.* at 2691 (quoting *Sosna*, 419 U.S. at 404), that the Court concluded that DOMA's refusal to respect New York's decision to permit same-sex marriage represented an impermissible "federal intrusion on state power." *Id.* at 2692.

When read together, *Baker* and *Windsor* establish a principled, federalism-based resolution to the difficult question of same-sex marriage: *Baker* leaves the definition of marriage for every State to decide for itself, while *Windsor* prohibits the federal government from

interfering in the decision to allow same-sex marriage. As stated by a group of federalism scholars cited by the *Windsor* majority, such "diversity of outcomes enables the democratic process to accommodate a higher proportion of our citizens' views on [same-sex marriage] than would a uniform national answer. And it prevents the majority of States from impressing their policy preferences on the minority who want to recognize gay marriage." Brief of Federalism Scholars as *Amici Curiae* in Support of Respondent Windsor at 9, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307). Respecting that federalism-mandated diversity is also essential to individual freedom—or what Justice Kennedy has called "liberty in the fundamental political sense of the term." *See Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) (the Framers "used the principles of separation of powers and federalism to secure liberty in the fundamental political sense of the term").[5]

This Court should respect the principled compromise the Supreme Court reached in *Baker* and *Windsor*, one that permits a "diversity of outcomes" on the question of marriage rather than mandating a "uniform national answer."

B. Idaho's Marriage Laws do not violate either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment.

The ultimate issue here is whether the State of Idaho has sufficiently good reasons to preserve "the union of a man and a woman" as a core meaning of the marriage institution, whether the theory is due process or equal protection and, if equal protection, whether the theory

[5] As Justice Kennedy has also noted, federalism "allows the States great latitude under their police power to legislate as to the lives, limbs, health, comfort and quiet of all persons." *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (quotations and citations omitted). That principle applies with special force to State decisions about marriage, which have enormous implications for the emotional and physical "health" and "comfort" of the State's children.

is sexual orientation discrimination or sex discrimination.[6] The standard for what constitutes *sufficiently good* may vary depending on the particular theory, but the ultimate issue is the same.

1. Regardless of the level of review, when parties present legitimate competing legislative facts, the courts defer to those chosen by the government decision-maker.

The reasons for preserving man-woman marriage reside in the realm of legislative facts, not adjudicative facts. "Adjudicative facts are facts about the parties and their activities . . . , usually answering the questions of who did what, where, when, how, why, with what motive or intent"—the types of "facts that go to a jury in a jury case," or to the fact finder in a bench trial. *Marshall v. Sawyer*, 365 F.2d 105, 111 (9th Cir. 1966) (quoting Kenneth C. Davis, *The Requirement of a Trial-Type Hearing*, 70 Harv. L. Rev. 193, 199 (1956)) (internal quotation marks omitted). "Legislative facts," by contrast, "do not usually concern [only] the immediate parties but are general facts which help the tribunal decide questions of law, policy, and discretion." *Id.* "Legislative facts are . . . 'without reference to specific parties,' and 'need not be developed through evidentiary hearings.'" *Libertarian Nat'l Comm., Inc. v. FEC*, 930 F. Supp. 2d 154, 157 (D.D.C. 2013) (quoting *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1161–62 (D.C. Cir. 1979)). A legislative fact "is a question of social factors and happenings . . . ." *Dunigan v. City of Oxford, Mississippi*, 718 F.2d 738, 748 n.8 (5th Cir. 1983).

Many legislative facts may not be contested. But sometimes legislative facts are contested in the sense that informed and thoughtful people disagree on the validity of a proffered legislative fact. In such cases, the courts do not step in to declare one view to be true and the competing view false. Rather, if the legislative fact is fairly debatable, the courts defer to the

[6] *Compare United States v. Juvenile Male*, 670 F.3d 999, 1011–13 (9th Cir. 2012) (substantive due process), *with High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990) (sexual orientation discrimination), *and United States v. Virginia*, 518 U.S. 515 (1996) (sex discrimination).

government decision-maker's choice. The courts do this for several important reasons. First, the courts understand and value the phenomenon of collective wisdom. Our democratic ethos privileges the reasonable understandings and conclusions reached—the legislative facts chosen—by the people through our democratic processes, not those of this or that elite no matter how confidently asserted. *See, e.g.*, *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) ("We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure . . . . [T]he Constitution does not empower this Court to second-guess state officials . . . .").

A Washington State case asserting a right to assisted suicide provides a powerful example of this privileging of the reasonable legislative facts chosen through our democratic processes. Washington prohibited assisted suicide. The Ninth Circuit en banc held that prohibition unconstitutional. *Compassion in Dying v. Washington*, 79 F.3d 790, 798 (9th Cir. 1996) (en banc). In doing so, the court dismissed some of the State's assessments of social practices and their likely impacts. For example, the State asserted an interest in protecting the integrity and ethics of the medical profession, but the Ninth Circuit concluded that "the integrity of the medical profession would [not] be threatened in any way by [physician-assisted suicide]," despite the contrary assessment of the State and responsible observers of the medical profession. *Id.* at 827. As another example, the State asserted an interest in protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes, but the Ninth Circuit dismissed the State's concern that disadvantaged persons might be pressured into physician-assisted suicide as "ludicrous on its face." *Id.* at 825. On these two points and others

like them, the Supreme Court flatly rejected the Ninth Circuit's substitution of its own assessments of the relevant social practices and their likely impacts for those of the State and unanimously reversed the Ninth Circuit's judgment. *Washington v. Glucksberg*, 521 U.S. 702, 728–36 (1997). The Supreme Court deferred to the reasonable understandings and conclusions reached—the legislative facts chosen—by the people through democratic processes.

Second, many of the most important legislative facts in these types of cases are really predictions of what will happen in society in the future assuming this or that present governmental action. Given the complexity of human society, one sensible prediction ought not be accepted as an objective "truth" in the face of a contrary but still rationally made prediction. *E.g.*, *FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775, 813–14 (1978) ("However, to the extent that factual determinations were involved . . . , they were primarily of a judgmental or predictive nature . . . . In such circumstances complete factual support in the record for the . . . judgment or prediction is not possible or required; 'a forecast of the direction in which future public interest lies necessarily involves deductions . . . .'") (quoting *FPC v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961)); *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 665–66 (1994) (Kennedy, J., plurality opinion) (noting that "[s]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable" and highlighting a "substantial deference" to the government decision-maker in such situations).

Third, the courts understand the limits on their own competence. "It makes no difference that the [legislative] facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety." *Vance v. Bradley*, 440 U.S. 93, 112 (1979) (internal quotations omitted).

In rational basis review, the contest between competing legislative facts can be quite lopsided against the government and the government will still prevail. The courts uphold the challenged government action if there is any reasonably conceivable state of legislative facts that could provide a rational basis for it. *See, e.g.*, *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). The action is presumed constitutional and "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it[.]" *Heller v. Doe*, 509 U.S. 312, 320 (1993) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). If any basis is even minimally debatable, plaintiffs lose. The government, by contrast, has no duty "to produce evidence to sustain the rationality of a statutory classification." *Id.* "[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Commc'ns*, 508 U.S. at 315. Moreover, even if all defendants fail to articulate the requisite rational basis, a court will still uphold the challenged government action if it on its own can identify rational grounds. *See, e.g.*, *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 463 (1988).

This settled law has an impact on summary judgment jurisprudence. As the court correctly observed in the Hawai'i marriage case:

> Disputes of fact that might normally preclude summary judgment in other civil cases, will generally not be substantively material in a rational basis review. That is, the question before this Court is not whether the legislative facts are true, but whether they are "at least debatable."

Jackson v. Abercrombie, 884 F. Supp. 2d 1065, 1105 (D. Haw. 2012) (citations omitted).

Even if the level of judicial scrutiny is heightened, the courts will still not step in to declare as "true" or "false" a well-contested legislative fact, but instead will use the legislative facts chosen by the government decision-maker. The reasons for such judicial deference—the limits of the courts' competence, the uncertainty of predictions of society-wide consequences,

and the wisdom of respecting democratically made choices between competing legislative facts—still remain. Although under heightened scrutiny the courts may not accept some minimally plausible legislative fact conjured up in support of the challenged government action, they will defer to robustly supported legislative facts even if "opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety." *Vance*, 440 U.S. at 112.

All this is demonstrated by *Grutter v. Bollinger*, 539 U.S. 306 (2003), which applied the highest and most rigorous level of judicial scrutiny because of the presence of racial classifications. The plaintiff in that case challenged the consideration of race and ethnicity in admission decisions of the University of Michigan Law School, specifically consideration in favor of applicants from three underrepresented minority groups: African Americans, Hispanics, and Native Americans. This public law school's leaders made an "assessment that diversity will, *in fact*, yield educational benefits." *Id*. at 328 (emphasis added). That legislative fact chosen by the government decision-makers was vigorously contested, with many able voices making powerful showings in favor of just the opposite legislative fact, that the diversity sought did not yield educational benefits and even harmed those intended to be benefitted.[7] Nevertheless, the majority of the Supreme Court deferred, expressly and unabashedly, "to the Law School's

[7] In dissent, Justice Thomas marshaled those voices and added his own, stating:

> The Court's deference to the Law School's conclusion that its racial experimentation leads to educational benefits will, if adhered to, have serious collateral consequences. The Court relies heavily on social science evidence to justify its deference. The Court never acknowledges, however, the growing evidence that racial (and other sorts) of heterogeneity actually impairs learning among black students.

539 U.S. at 364 (Thomas J., dissenting) (citations omitted).

conclusion that its racial experimentation leads to educational benefits." In the majority's own words:

> The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici.* Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university.

Id. at 328. On the basis of this deference to the government decision-maker's choice of a contested legislative fact (and, necessarily, rejection of contrary assessments), the Court upheld the law school's admissions program. The Court did not anoint one assessment as "true" and the contrary assessment as "false." It deferred to the government decision-maker's choice.

2. There is no fundamental due-process right to marry someone of the same sex.

As to Plaintiffs' due process claims, the Supreme Court has expressed "reluctan[ce] to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (citation omitted). As a result, courts must "exercise the utmost care whenever . . . asked to break new ground in this field." *Id.*

A large majority of the courts that have considered the issue have declined to hold that the Constitution recognizes a fundamental right to same-sex marriage. *See, e.g.*, *Andersen v. King Cnty.*, 138 P.3d 963, 979 (Wash. 2006) (en banc) ("Plaintiffs have not established that at this time the fundamental right to marry includes the right to marry a person of the same sex."); *Hernandez v. Robles*, 855 N.E.2d 1, 10 (N.Y. 2006) ("by defining marriage as it has, the New York Legislature has not restricted the exercise of a fundamental right"); *Lewis v. Harris*, 908 A.2d 196, 211 (N.J. 2006) ("we cannot find that a right to same-sex marriage is so deeply rooted

in the traditions, history, and conscience of the people of this State that it ranks as a fundamental right"); *Dean v. District of Columbia*, 653 A.2d 307, 333 (D.C. 1995) ("same-sex marriage cannot be called a fundamental right protected by the due process clause"); *Baker*, 191 N.W.2d at 186 ("The due process clause of the Fourteenth Amendment is not a charter for restructuring [marriage] by judicial legislation.").[8] Indeed, "*no* appellate court applying a federal constitutional analysis has reached this result." *Andersen*, 138 P.3d at 979 (emphasis added), including the Supreme Court.

Determining whether there is a fundamental right to same-sex marriage is controlled by *Washington v. Glucksberg*, 521 U.S. 702 (1997), and requires two steps. The first is "a *careful* description of the asserted fundamental liberty interest," and the second is adding to the canon only "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id.* at 720–21 (quotations and citations omitted) (emphasis added). Carefully described, the interest asserted here is the fundamental right to marry someone of the same sex. As the decisions cited above have recognized, such an interest is not "deeply rooted" but only recently recognized, and even then by only a minority of states. Thirty-three states—66% of the country—are governed by laws like Idaho's, defining marriage as between one man and one woman.

Plaintiffs assert that they are seeking access to an *existing* right, rather than the declaration of a new one. First Amended Complaint ("FAC"), ¶¶ 11, 13, 56. Tellingly, however, every Supreme Court decision recognizing a fundamental right to marry has been premised on a male-female relationship. *See Zablocki*, 434 U.S. at 379 ("[A]ppellee and the

[8] *Accord Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1098 (D. Haw. 2012) (no fundamental right to same sex marriage); *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1017 n.9 (D. Nev. 2012).

woman he desired to marry were expecting a child in March 1975 and wished to be lawfully married before that time."); *Loving*, 388 U.S. at 2 (describing the complainants as "Mildred Jeter, a Negro woman, and Richard Loving, a white man"). Indeed, the Supreme Court's most recent pronouncement on the subject, *Windsor*, indicated that same-sex marriage is a "new" right, and rejected the Plaintiffs' assumption here that same-sex marriage is subsumed by the Court's "right to marry" precedents:

> It seems fair to conclude that, *until recent years*, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage. For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization.

133 S. Ct. at 2689 (emphasis added). *Windsor* went on to note that "the limitation of lawful marriage to heterosexual couples . . . for centuries ha[s] been deemed both necessary and *fundamental*." *Id.* (emphasis added); *see also Lawrence*, 539 U.S. at 567, 578 (right to intimate same-sex relationship free of criminal penalty does not imply a right to "formal recognition" of that relationship). Under *Windsor*'s characterization, then, same-sex-marriage is the antithesis of a fundamental right.

In *Glucksberg*, which involved an asserted right to assisted suicide, the Supreme Court concluded there was no fundamental right at stake because of a "consistent and almost universal tradition that has long *rejected* the asserted right, and *continues explicitly to reject it today* . . . ." 521 U.S. at 723 (emphasis added). The same is true of the asserted right to same-sex marriage here. The Court in *Glucksberg* emphasized that simply because "many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping

conclusion that any and all important, intimate, and personal decisions are so protected . . . ." *Id.* at 727–28 (citation omitted).[9]

Furthermore, Plaintiffs' attempt to compare Idaho's Marriage Laws to anti-miscegenation laws is misplaced. Anti-miscegenation laws were odious measures that rested on invidious racial discrimination. In contrast, as the *Windsor* majority put it, "marriage between a man and a woman no doubt ha[s] been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." 133 S. Ct. at 2689. In other words, defining marriage as the union of one man and one woman may be controversial in today's political climate, but it is hardly invidious.

For all these reasons, this Court should follow the many federal circuit and State supreme court decisions uniformly declining to recognize a fundamental right to same-sex marriage.

3. Idaho's Marriage Laws do not violate the Equal Protection Clause.

Idaho has legitimate and compelling public interests in defining marriage as the union between one man and one woman. Numerous courts have held that state laws defining marriage as only between a man and a woman pass equal-protection scrutiny. *E.g.*, *Bruning*, 455 F.3d at 867–68; *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1015–16 (D. Nev. 2012).[10]

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[9] *Accord Stenberg v. Carhart*, 530 U.S. 914, 956–57, 961 (2000) (Kennedy, J., dissenting) (criticizing the majority for neglecting the States' "critical and legitimate role in legislating on the subject of abortion" and pointing out that the Constitution permits States to "take sides in the abortion debate and come down on the side of life, even life in the unborn"); *Gonzales v. Carhart*, 550 U.S. 124, 133 (2007) (sustaining a federal statute premised on governmental interests the majority had rejected in *Stenberg*).

[10] *Accord Jackson*, 884 F. Supp. 2d at 1111–15; *In re Kandu*, 315 B.R. 123, 145–46 (Bankr. W.D. Wash. 2004); *Adams v. Howerton*, 486 F. Supp. 1119, 1124–25 (C.D. Cal. 1980), *aff'd on other grounds*, 673 F.2d 1036 (9th Cir. 1982); *Dean v. District of Columbia*, 653 A.2d 307, 363 (D.C. 1995) (Steadman, A.J., concurring); *Morrison v. Sadler*, 821 N.E.2d 15, 23–31 (Ind. Ct. App. 2005); *Hernandez v. Robles*, 855 N.E.2d 1, 7–9 (N.Y. 2006) (plurality op.); *Baker*, 191 N.W.2d at 186–87; *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 676–78 (Tex. App. 2010).

Rational basis applies. An overwhelming majority of the courts that have considered equal protection challenges to classifications based on sexual orientation have applied rational basis review.[11] Most importantly, the Supreme Court continues to analyze sexual orientation cases under rational basis review despite repeated invitations to apply heightened scrutiny, including most recently in *Windsor*. *See, e.g.*, Brief for the United States on the Merits Question at 18–36, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) (arguing that "classifications based on sexual orientation should be subject to heightened scrutiny"). On the contrary, *Windsor* held that DOMA § 3 was invalid for lacking a "*legitimate* purpose," 133 S. Ct. at 2696 (emphasis added). This is standard rational-basis language, and it contrasts sharply with the requirements of strict scrutiny, *see, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (strict scrutiny requires showing that law is "narrowly tailored" to "further *compelling* governmental interests") (emphasis added), and intermediate scrutiny, *see, e.g.*, *Craig v. Boren*, 429 U.S. 190, 197 (1976) (intermediate scrutiny requires that gender classifications "serve *important* governmental objectives" and be "substantially related to achievement of those objectives") (emphasis added).

The Supreme Court has never articulated and applied to equality claims any standard of review other than those three distinct ones.

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[11] *See, e.g.*, *Davis* v. *Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012); *Cook* v. *Gates*, 528 F.3d 42, 61–62 (1st Cir. 2008); *Bruning*, 455 F.3d at 866–67; *Price-Cornelison* v. *Brooks*, 524 F.3d 1103, 1113 (10th Cir. 2008); *Johnson* v. *Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Lofton* v. *Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004); *Thomasson* v. *Perry*, 80 F.3d 915, 927–28 (4th Cir. 1996); *High Tech Gays* v. *Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573–74 (9th Cir. 1990); *Ben-Shalom* v. *Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Woodward* v. *United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Padula* v. *Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987).

Plaintiffs assert that *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014),[12] a recent decision by a Ninth Circuit panel, requires a level of "heightened scrutiny" in this case. FAC, ¶ ¶ 72, 85. *SmithKline* involved a jury trial between private parties in which the lawyer for one party peremptorily struck a prospective juror because he was gay. The court found that this sexual orientation discrimination was intentional and targeted. *See id.*at 478 ("counsel engaged in intentional discrimination when he exercised the strike"), 479 ("strike of Juror B was impermissibly made on the basis of his sexual orientation"). The court then noted, however, that the Supreme Court had stated that "[p]arties may . . . exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review." *Id*. at 479 (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143 (1994)) (alteration in original) (internal quotation marks omitted).

Thus, the determinative question was whether sexual orientation discrimination was subject to rational basis review or "heightened scrutiny," a phrase always before referencing intermediate or strict scrutiny or both. *See, e.g., Ahlmeyer v. Nevada Sys. of Higher Educ*., 555 F.3d 1051, 1059 n.8 (9th Cir. 2009) ("Where claims of discrimination based on race or sex are entitled to heightened scrutiny, age discrimination claims under the Constitution are subject to rational basis scrutiny.") (citation omitted). The *SmithKline* court reasoned that, based on prior Ninth Circuit law, "we are bound here to apply rational basis review to the equal protection claim in the absence of a . . . change in the law by the Supreme Court or an en banc court." 740 F.3d at 480 (citation omitted). There clearly having been no change by an en banc court, the panel turned to *Windsor*, "the Supreme Court's most recent case on the relationship between

[12] The panel decision in *SmithKline* is still subject to en banc and Supreme Court review, but because of the exigencies of the briefing schedule governing the parties in this case, we address that panel decision now, without waiving the Defendant's position that the decision is not binding because no mandate has issued.

equal protection and classifications based on sexual orientation," *id.*, and concluded that *Windsor* compelled application of "heightened scrutiny" to sexual orientation discrimination even though "*Windsor*, of course, did not expressly announce the level of scrutiny it applied to the equal protection claim at issue in that case," *id.*

The *SmithKline* panel thus contemplated a new form of "heightened scrutiny" for classifications based on sexual orientation—one neither intermediate scrutiny nor strict scrutiny. The decision nowhere described its "heightened scrutiny" as intermediate scrutiny and, more telling, did not engage the Supreme Court's four-part test for identifying a new suspect class. (That test considers immutability, relative political power, history of discrimination, and ability to contribute to society. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515 (1996)). Nor is it plausible to argue that the *SmithKline* "heightened scrutiny" was strict scrutiny. The decision never intimated such a position.

The "heightened scrutiny" announced in *SmithKline* is a new constitutional standard, one not articulated in any Fourteenth Amendment decision of the Supreme Court.

SmithKline purported to ground this newly minted standard of "heightened scrutiny" in *Windsor*. *Windsor* therefore must be both the animating spirit and the limiting principle of the *SmithKline* "heightened scrutiny."

Windsor struck down DOMA because it reflected, the court held, a bare desire to harm a disfavored minority. In this regard, *Windsor* was actually the third in a series of Supreme Court equal protection decisions taking that approach, the first being *Moreno*[13] and the second being *Romer*.[14] In taking this approach, *Windsor* indeed looked carefully for animus, applying rigorously two steps: an inquiry into how unusual the challenged government action was and an

[13] *Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).
[14] *Romer v. Evans*, 517 U.S. 620 (1996).

inquiry into the proffered "benign" motives for that action. The Supreme Court's view in the *Moreno-Romer-Windsor* trilogy is that the more unusual the action and the less plausible the "benign" motives, the more likely that the classification should be explained as nothing more than sheer animus against an unpopular group. *Windsor* thus has real boundaries and a not unlimited scope; it applies to equality claims where there is some basis for believing that the challenged state action is the product of animus, of a bare desire to harm a disfavored group.

The *SmithKline* court concluded that the lawyer's peremptory challenge of the gay juror was intentional, 740 F.3d at 478 ("counsel engaged in intentional discrimination when he exercised the strike"); that the strike was made exactly because the juror was gay, that is, the lawyer targeted the juror because he was a gay man, *id.* at 479 ("strike of Juror B was impermissibly made on the basis of his sexual orientation"); and that the "benign" reasons later proffered (one at the trial and others on appeal) to justify that strike were not credible, *id.* at 478–79. Accordingly, the court concluded that the government-sanctioned peremptory challenge—just like the challenged state actions in *Moreno*, *Romer*, and *Windsor*—was the result of constitutionally impermissible animus. On that basis, the panel held that its case was subject to the "heightened scrutiny" that it perceived in *Windsor*.

The key point is that the "careful" examination of a law applied in *Windsor* applies only to laws whose only basis is animus—not to every classification implicating sexual orientation. Any other reading of *SmithKline* suggests that the panel used *Windsor* as a pretense for imposing "heightened scrutiny" on all sexual orientation discrimination claims without both complying with the well-established test for invoking intermediate scrutiny and openly refusing to follow prior Ninth Circuit law applying rational basis review to claims of sexual orientation

discrimination. *E.g.*, *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 571–74 (9th Cir. 1990).

Plaintiffs' causes of action do not raise a plausible claim of animus. Idaho's citizens have no more chosen to preserve the vital social institution of man-woman marriage out of animus towards gay men and lesbians than they have chosen to preserve the vital social institution of private property out of animus towards people with few worldly goods.[15] This conclusion is reinforced by application of the Supreme Court's analytical approach in *Windsor*. There the Court inquired whether DOMA's discrimination between two classes of lawfully married couples in disregard of State law was "of an unusual character" and whether DOMA was "motivated by an improper animus or purpose." *Windsor*, 133 S. Ct. at 2693 (referencing *Moreno*, 413 U.S. at 534–35, and *Romer*, 517 U.S. at 633). The Court got to a "yes" answer on both questions, while here, under the same analytical approach, "no" is without doubt the right answer to both questions.

First, as *Windsor* reaffirmed forcefully, it is for the several States to define and regulate marriage within their respective jurisdictions; their authority there is virtually plenary. Over the history of this Nation, the States *usually* have exercised that power to give the law's imprimatur and protection to the man-woman marriage institution. Indeed, before 2003, that is exactly how *every* State had always exercised that power. Since 2003, that has continued as the *usual* way, as shown by the enshrining, protecting, and perpetuating efforts of the large majority of the States.[16] Indeed, DOMA's rejection of New York's marriage definition was as *unusual* a government

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[15] Regarding the connection between the institutional analyses of marriage and of private property, see Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision*, 1 Duke J. Const. L. & Pub. Pol'y 1, 7–15 (2006), and Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 Can. J. Fam. L. 11, 114–15 (2004).

[16] *See* Addendum to this Memorandum in Support of Motion for Summary Judgment at A-1 to A-7.

action as Idaho's perpetuation of man-woman marriage is a *usual* one. Those actions are literally at opposite ends of the *unusual/usual* spectrum. The absence of any *unusual* government action is strong evidence of "no," as *Windsor* teaches.

Second, Plaintiffs cannot derive an animus conclusion from a supposed absence of legitimate reasons for the governmental action because, as shown by robust legislative facts, *there are multiple, compelling, legitimate reasons for Idaho's Marriage Laws*. Faced with that reality but still desiring to get traction from the Supreme Court's animus doctrine, the Plaintiffs do the only thing they can do—they ignore those legislative facts. Plaintiffs can present no credible evidence of a "bare desire to harm." In contrast, a wide and deep body of scholarly work is in full harmony with the judgments, intuitions, perceptions, assessments, and conclusions given voice in the votes of Idaho's legislature and citizens in favor of preserving the man-woman marriage institution and the valuable benefits it materially and even uniquely provides. Those legislative facts negate the animus slander.

Because Plaintiffs' causes of action do not raise a plausible claim of animus, *SmithKline* "heightened scrutiny" does not apply in this case.

Plaintiffs' assertion that heightened scrutiny applies because Idaho's marriage definition discriminates on the basis of sex also is misplaced. In allowing only marriages between men and women, Idaho law affects men as a class and women as a class identically, to the disadvantage of neither. Again, comparison to the anti-miscegenation laws at issue in *Loving* is inappropriate. In the sex-discrimination context, "[a]ll of the [Supreme Court's] seminal . . . decisions . . . have invalidated statutes that single out men or women *as a discrete class* for unequal treatment." *Baker v. State*, 744 A.2d 864, 880 n.13 (Vt. 1999) (collecting cases) (emphasis added). In contrast, Idaho's marriage definition is not "directed toward persons of any particular gender"

and does not "affect people of any particular gender disproportionately such that a gender-based animus [could] reasonably be perceived." *Sevcik*, 911 F. Supp. 2d at 1005.[17]

Accordingly, rational basis is the appropriate standard of judicial review.

4. Idaho has legitimate compelling reasons, supported by common sense and substantial social science, for retaining the man-woman definition of marriage.

A careful examination of Idaho's reasons for upholding marriage as the union of husband and wife reveals that those reasons are not just rational, they are compelling. Indeed, they are so compelling that until only a few years ago there was nearly unanimous agreement among learned thinkers—from philosophers, anthropologists and sociologists to eminent jurists and policy makers—that stable marriages between men and women are indispensable to the welfare of both children and society. Society has an existential need to secure a sufficient social and economic base to care for the elderly; to fund social welfare programs; and to foster the hope, self-sacrifice and civic virtue that come only from a culture that treasures children as its greatest asset. That is why, as the Eleventh Circuit observed, "It is hard to conceive an interest more legitimate and more paramount for the state than promoting an optimal social structure for educating, socializing, and preparing its future citizens to become productive participants in civil society . . . ." *Lofton* v. *Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 819 (11th Cir. 2004).

We next examine just three of the compelling reasons underlying Idaho's decision to retain its gendered definition of marriage. Each represents a vital State interest. And each of them suffices to sustain Idaho's decision under any form of judicial scrutiny. And although

[17] *Accord, e.g.*, *Jackson*, 884 F. Supp. 2d at 1098–99; *Smelt* v. *County*, 374 F. Supp. 2d 861, 876–77 (C.D. Cal. 2005) *aff'd in part, vacated in part*, 447 F. 3d 673 (9th Cir. 2006); *Wilson* v. *Ake*, 354 F. Supp. 2d 1298, 1307–08 (M.D. Fla. 2005).

Defendants are not obligated to show harm, we nevertheless demonstrate some of the common-sense harms and risks that redefining marriage would likely pose to each of these State interests in the welfare of its children, present and future.

a. Idaho's marriage definition furthers the State's vital interest in fostering a child-centric marriage culture that encourages parents to subordinate their own interests to the needs of their children.

At the most basic level, Idaho has a critical interest in preserving the child-centric, husband-wife marriage culture it has carefully nurtured and facilitated since its inception as a State. Shifting to an adult-centric model undermines that culture to the detriment of all Idaho's children.

The historic rationale for man-woman marriage. That culture—and the man-woman definition on which it is based—arises from a biological and sociological reality: Procreation is an inherently gendered enterprise; no child can be conceived without a man and a woman. And although sex between men and women naturally—and often accidentally—produces children, it does not necessarily or automatically produce stable families dedicated to protecting and nurturing those children.

Thus the perennial challenge for societies throughout history has been to establish a means of formally linking mothers *and* fathers with their offspring so as to maximize the welfare of children, and hence of the community.[18] Marriage between the man and woman who create a child provides that essential link.

Hence, as the New York Court of Appeals noted, until recently "it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex." *Hernandez*, 855 N.E.2d at 8. Indeed, this

[18] Sherif Girgis et al., *What is Marriage? Man and Woman: A Defense* 28–30, 33–36 (2012), App. 294–96, 299–302, cited in *Windsor*, 133 S. Ct. at 2715, 2718 (Alito, J., dissenting).

gendered and child-centered understanding of marriage has long been so ubiquitous, and considered so compelling by eminent authorities, that to cite and quote even a small percentage of those authorities could easily consume an entire book.[19]

Marriage as a social institution. Because of its critical social functions, marriage is also one of our most important social institutions. Such institutions are maintained by shared public meanings—webs of expectations and understandings that profoundly influence behavior.[20] Because shared public meanings are the components of social institutions, those institutions necessarily are changed when those meanings are changed or are no longer sufficiently shared.[21]

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[19] *See, e.g.*, 2 Charles de Montesquieu, *The Spirit of Laws* 101 (Thomas Nugent ed. 1873); Bronislaw Malinowski, *Sex, Culture, and Myth* 11 (1962), App. 305; G. Robina Quale, *A History Of Marriage Systems* 2 (1988), App. 309 ("Marriage, as the socially recognized linking of a specific man to a specific woman and her offspring, can be found in all societies."); James Q. Wilson, *The Marriage Problem* 41 (2002), App. 314 ("Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve."); W. Bradford Wilcox et al., Institute for American Values, *Why Marriage Matters: Thirty Conclusions from the Social Sciences* 20 (3d ed. 2011), App. 337 ("[M]arriage across societies is a publicly acknowledged and supported sexual union that creates kinship obligations and resource pooling between men, women, and the children that their sexual union may produce.").

[20] As noted by the father of modern social anthropology, A.R. Radcliffe-Brown, social institutions like marriage are "the ordering by society of the interactions of persons in social relationships." A.R. Radcliffe-Brown, *Structure and Function in Primitive Society* 10–11 (1952). Accordingly, "a person [in a social institution] knows that he [or she] is expected to behave according to these norms and that the other person should do the same." *Id.*

[21] *See, e.g.*, Eerik Lagerspetz, *The Opposite Mirrors: An Essay on the Conventionalist Theory of Institutions* 28 (1995); Eerik Lagerspetz, *On the Existence of Institutions, in On the Nature of Social and Institutional Reality* 70, 82 (Eerik Lagerspetz et al. eds., 2001); Stewart, *Genderless Marriage*, *supra* note 15, at 10–11; John R. Searle, *Making the Social World: The Structure of Human Civilization* 89–108 (2010), App. 368–79; John R. Searle, *The Construction of Social Reality* 32, 57, 117 (1995), App. 388, 396, 428. As Prof. Searle explains:

> The secret of understanding the continued existence of institutional facts is simply that the individuals directly involved and a sufficient number of members of the relevant community must continue to recognize and accept the existence of such facts. . . . The moment, for example, that all or most of the members of a society refuse to acknowledge [the social institution of] property rights, as in a revolution or other upheaval, property rights cease to exist in that society.

And if public meanings and norms change enough, the institution can be effectively "deinstitutionalized." When that happens, another institution, with different meanings and norms, can take the place of the old one, and the social benefits generated by the original meanings and norms either dissipate or disappear.[22]

Accordingly, if the man-woman definition at the core of society's understanding of marriage were replaced by a different meaning (i.e., the union of any two or more consenting adults), the existing meaning would become deinstitutionalized. As a result, the benefits produced by that meaning would either wane or be lost.

A given society, moreover, can have only one social institution denominated "marriage."[23] It cannot simultaneously have as shared, core meanings of the marriage institution *both* "the union of a man and a woman" *and* "the union of any two persons." One meaning necessarily displaces the other, leading to different understandings, incentives and behaviors. Moreover, as the new meaning is mandated in texts, in schools, and in other parts of the public square, the old institution no longer channels or shapes perceptions and conduct.[24]

The law plays a critical role in shaping and preserving social institutions like marriage, even when it does not create them. As the eminent legal scholar Joseph Raz has explained, the law often supports social institutions "in order to give them formal recognition, bring legal and administrative arrangements into line with them, facilitate their use by members of the

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Searle, *Construction*, *supra*, at 117, App. 428.

[22] *See, e.g.*, Monte Neil Stewart, *Marriage Facts*, 31 Harv. J.L. & Pub. Pol'y 313, 327–28 (2008), and sources cited therein.

[23] *See, e.g.*, Stewart, *Genderless Marriage*, *supra* note 15, at 24–26, and sources cited therein.

[24] *See* Carl E. Schneider, *The Channeling Function in Family Law*, 20 Hofstra L. Rev. 495, 498 (1992) ("[I]t is [social institutions'] very presence, the social currency they have, and the governmental support they receive which combine to make it seem reasonable and even natural for people to use them. Thus people can be said to be channeled into them.").

community who wish to do so, and encourage the transmission of belief in their value to future generations. In many countries this is the significance of the legal recognition of monogamous marriage . . . ."[25] To be sure, marriage, like many other social institutions, has its own social conventions, norms, and shared understandings that extend beyond the law's reach. Yet the law can also change the institution by suppressing, rather than reinforcing and encouraging, existing conventions, norms, and shared understandings.

Idaho's *public* interest in marriage. As presently understood in Idaho, and as understood throughout most of history, marriage's most vital public purpose is to encourage the creation of stable, husband-wife unions for the benefit of their children.[26] People may also place great weight on romance, companionship and mutual economic support—which the one man-one woman marriage institution also supports and nurtures. But these *private* ends—though important—are not the principal interests the State pursues by regulating marriage. The State's fundamental *public* interest in marriage lies in maximizing the welfare of children—present and future. After all, children are the most vulnerable members of society, and the least capable of protecting their own interests.

First and foremost, the man-woman definition of marriage promotes the interests of children by fostering a generally child-centric marriage culture that encourages parents routinely to subordinate their own private interests—emotional, sexual, career, recreational, etc.—to the needs of their children, present and future. That encouragement flows not just from the law—including prohibitions on such things as child neglect[27]—but also from the cultural expectations,

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[25] Joseph Raz, *The Morality Of Freedom* 161 (1986).

[26] The philosopher Bertrand Russell bluntly noted that, "[b]ut for children, there would be no need of any institution concerned with sex." Bertrand Russell, *Marriage & Morals* 77 (Liveright 1970).

[27] *See, e.g.*, Idaho Child Protective Act, Idaho Code §§ 16-1601 to -1643.

norms and ideals that make marriage a social institution.[28] In a host of ways, such rules, norms and expectations guide husband-wife couples to sacrifice their personal desires for the benefit of their children. They teach, as one New York court aptly put it, that marriage is "not primarily about adult needs for official recognition and support, but about the well-being of children and society . . . ." *Hernandez v. Robles*, 805 N.Y.S.2d 354, 360 (N.Y. App. Div. 2005), *aff'd* 855 N.E.2d 1 (N.Y. 2006).

Child-centered vs. adult-centered marriage. Plaintiffs' arguments rest on a very different understanding of the principal public purpose and meaning of marriage—one centered on accommodating adult relationship choices. In their view, the most important purpose of marriage is to provide state recognition and approval of a *couple's* choice to live with each other, to remain committed to one another and to form a household based on their own feelings about one another, and to join in an economic partnership and support one another and any dependents. This formulation ignores Idaho's stated rationale for its marriage definition. And tellingly, it does not focus on children as a principal object of the marital relationship.

While this adult-centric conception of marriage may have gained ascendancy in other jurisdictions, it does not hold in Idaho, where the People, through the democratic process, have reaffirmed and perpetuated the child-centric model. They and, hence, the State have steadfastly sought to reserve unique social recognition for man-woman marriage so as to encourage potentially procreative couples into the optimal, conjugal childrearing model. Accordingly, redefining marriage as a genderless, adult-centric institution would fundamentally change Idaho's child-centered meaning and purpose of marriage. As the New Jersey Supreme Court put

[28] Radcliffe-Brown, *supra* note 20, at 10–11.

it in *Lewis v. Harris*, 908 A.2d 196, 222 (N.J. 2006): "To alter that meaning would render a profound change in the public consciousness of a social institution of ancient origin."

A statement on marriage and the law by 101 legal scholars and social scientists notes that "the basic understanding of marriage" underlying much of the advocacy for redefining marriage "is seriously flawed." Institute for American Values, *Marriage and the Law: A Statement of Principles* 18 (2006), App. 451. That is because "[i]t is adult-centric, turning on the rights of adults to make choices," and because it "fail[s] to treat with intellectual seriousness any potential consequences that changing the basic legal definition of marriage may have for the children of society," such as "disconnect[ing] marriage from its historic connection to procreation." *Id.* Definitions matter—especially for so essential a social institution as marriage. And while other jurisdictions may choose to elevate adult-centric relationships, Idaho has chosen a different course—using its constitutionally protected police power, including its authority over domestic-relations law, to further its considered judgment about how best to protect the interests of all its children.

Effects of redefinition. Idaho's self-sacrificing, child-centric view of marriage and parenting is important to a range of parental decisions beyond ensuring that the child is raised by both her father and her mother. For example, it might encourage parents to forego abusing alcohol or drugs; avoid destabilizing extramarital affairs; avoid excessively demanding work schedules; or limit time-consuming hobbies or other interests that take them away from their children.

This is not to say that other parents cannot make the same selfless, child-centric choices as a biological mother and father; they clearly can. But, as Justice Alito noted in *Windsor*, redefining marriage to include same-sex couples would be a powerful symbolic statement that, at

bottom, marriage is more about the interests of adults than the needs of children, and it would thereby undermine the self-sacrificing, child-centric model of marriage that Idaho seeks to foster. *Windsor*, 133 S. Ct. at 2715–16, n.6 (Alito, J., dissenting). That redefinition might result (at least in the short term) in a few more children living in "married" households—but at the price of reorienting the whole concept of marriage toward adult interests and away from the welfare of children.

Idaho cannot simply ignore this seismic shift. As the 101 legal and social-science experts put it:

> One may see these kinds of social consequences of legal change as good, or as questionable, or as both. But to argue that these kinds of cultural effects of law do not exist, and need not be taken into account when contemplating major changes in family law, is to demonstrate a fundamental lack of intellectual seriousness about the power of law in American society.

Marriage and the Law, *supra*, at 26, App. 459.

In sum, the redefinition Plaintiffs seek would change the public meaning of marriage so as to convey that marriage is more about the interests of adults than the needs of children. In myriad ways, that would pose serious risks to the interests of children generally. Idaho has an important—indeed, compelling—interest in preventing those risks. *See e.g.*, *United States v. Griffin*, 7 F.3d 1512, 1517 (10th Cir. 1993) ("Important government interests include . . . minimizing the risk of harm to . . . the public."); *Marcavage v. City of New York*, 689 F.3d 98, 105 (2d Cir. 2012) (managing potential risks "advances a substantial government interest").

b. Idaho's marriage definition furthers the State's vital interest in children being raised by their biological mothers and fathers—or at least by a married mother and father—in a stable home.

The most obvious and important impact of a redefinition of marriage in genderless terms would be the loss of the State's ability to give special preference and recognition to families

consisting of children being raised either by both biological parents or at least by two parents of opposite sex. Common sense, long experience, and sociological evidence confirm that, in the aggregate, children do best when raised by their biological mothers and fathers in stable marriage unions. These child-welfare benefits flow both from biology and gender complementarity (i.e. diversity) in parenting, and would be seriously disrupted or reduced if Idaho were forced to redefine its marriage law to include same-sex couples.

The importance of mother-father parenting. Intuitively, a family structure based on the biological connection between parents and their natural children helps maximize the commitment of *both* parents to their children's welfare, unifying the parents' emotional and social commitments with instinctive biological attachments. That intuition finds confirmation in a wealth of social science research. As one reviewer explains, "research clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by *two biological parents* in a low-conflict marriage."[29]

This biological advantage is further enhanced by the unique, gender-based contributions that fathers and mothers make to their children's wellbeing. While the value of gender diversity in parenting is common sense to many, the notion likewise finds confirmation in a growing body of social science research. As a group of 70 scholars recently concluded, the "empirical literature on child well-being suggests that the two sexes bring different talents to the parenting enterprise, and that children benefit from growing up with both biological parents."[30] In other words, the benefits flow not just from having *two* parents of any gender, but from what scholars

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[29] Kristin Anderson Moore et al., *Marriage From a Child's Perspective: How Does Family Structure Affect Children and What Can We Do About It*, Child Trends Research Brief 6 (June 2002), App. 483 (emphasis added); *accord id.* at 1–2, App. 478–79 ("[I]t is not simply the presence of two parents, . . . but the presence of *two biological parents* that seems to support children's development.").

[30] Witherspoon Institute, *Marriage and the Public Good: Ten Principles* 18 (2008) App. 507.

call "gender-differentiated" or mother-father parenting: "The burden of social science evidence supports the idea that gender-differentiated parenting is important for human development and that the contribution of fathers to childrearing is unique and irreplaceable."[31] Indeed, research shows that men and women parent children differently, and in so doing contribute distinctly to healthy child development.[32]

Moreover, the law itself "historically . . . has recognized that natural bonds of affection"—i.e., biological connections—"lead parents to act in the best interests of their children." *Parham v. J.R.*, 442 U.S. 584, 602 (1979).[33] *Accord, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) ("Respect for human life finds an ultimate expression in the bond of love the mother has for her child."). And, as New York's high court put it, "[i]ntuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what *both* a man and a woman are like." *Hernandez*, 855 N.E.2d at 7 (emphasis added). And Justice Brennan summarized it well: "the optimal situation for the child is to have

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[31] David Popenoe, *Life Without Father: Compelling New Evidence That Fatherhood & Marriage are Indispensable for the Good of Children & Society* 146 (1996), App. 530; *accord, e.g.*, Norval D. Glenn, *The Struggle for Same-Sex Marriage*, 41 Soc'y 25, 27 (2004) ("[T]here are strong theoretical reasons for believing that both fathers and mothers are important, and the huge amount of evidence of relatively poor average outcomes among fatherless children makes it seem unlikely that these outcomes are solely the result of the correlates of fatherlessness and not of fatherlessness itself."); Wilson, *The Marriage Problem*, *supra* note 19, at 169, App. 316; ("The weight of scientific evidence seems clearly to support the view that fathers matter.").

[32] Although he later embraced the movement to redefine marriage to include same-sex couples, child-development expert Michael Lamb pointed out nearly 40 years ago that "[b]oth mothers and fathers play crucial and qualitatively different roles in the socialization of the child." Michael E. Lamb, *Fathers: Forgotten Contributors to Child Development*, 18 Human Development 245, 246 (1975); *accord* Dean Byrd, *Gender Complementarity and Child-Rearing: Where Tradition and Science Agree*, 6 J. L. & Fam. Studs. 213 (2004); *see also* A. Dean Byrd & Kristen M. Byrd, *Dual-Gender Parenting: A Social Science Perspective for Optimal Child Rearing*, *in* Family Law: Balancing Interests and Pursing Priorities 382–87 (2007).

[33] As Blackstone put it centuries ago, there is "implant[ed] in the breast of every parent that natural . . . insuperable degree of affection, which not even the deformity of person or mind, not even the wickedness, ingratitude, and rebellion of children, can totally suppress or extinguish." William Blackstone, 1 *Commentaries*, *447.

both an involved mother and an involved father." *Bowen v. Gilliard*, 483 U.S. 587, 614 (1987) (Brennan, J., dissenting).[34]

Conversely, experience and research alike confirm that children suffer when procreation and childrearing occur outside stable man-woman marriages. As a leading research survey explains:

> Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes than do children in intact families headed by two biological parents. Parental divorce is also linked to a range of poorer academic and behavioral outcomes among children. There is thus value for children in promoting strong, stable marriages between biological parents.[35]

These findings are reinforced by a study comparing three groups of young adults: those who were conceived by sperm donors, those adopted as infants, and those raised by their biological parents. Researchers "learned that, on average, young adults conceived through sperm

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[34] The importance of mother-father parenting is so universally recognized that the United Nations Convention on the Rights of the Child declares that a child "as far as possible, [has the right] to know and be cared for by his or her parents." Convention on the Rights of the Child 1577 U.N.T.S. 3, 47.

[35] Moore, *supra* note 29, at 6, App. 483; *accord* Witherspoon Institute, *Marriage and the Public Good*, *supra* note 30, at 17, App. 506 ("[C]hildren raised in single-parent families without the benefit of a married mother and father are two to three times more likely to experience serious negative life outcomes such as imprisonment, depression, teenage pregnancy, and high school failure, compared to children from intact, married families—even after controlling for socioeconomic factors that might distort the relationship between family structure and child well-being."); Bruce J. Ellis et. al, *Does Father Absence Place Daughters at Special Risk for Early Sexual Activity and Teenage Pregnancy?*, 74 Child Dev. 801 (2003) (concluding that father absence is associated with early sexual behavior of girls, even when other factors, such as stress and poverty, were accounted for); Stephanie Weiland Bowling & Ronald J. Werner-Wilson, *Father-Daughter Relationships and Adolescent Female Sexuality: Paternal Qualities Associated with Responsible Sexual Behavior*, 3 J. HIV/AIDS Prevention & Educ. Adolescents & Child. 5, 13 (2003) ("Daughters whose fathers gave them little time and attention were more likely to seek out early sexual attention from male peers."); Douglas W. Allen, *High School Graduation Rates Among Children of Same-Sex Households*, 11 Rev. Econ. Household 635, 653 (2013), App. 923 ("[C]hildren living in gay and lesbian households [in Canada in 2006] are only about 65% as likely to graduate from high school compared to [children living in opposite sex married households.] . . . [D]aughters [of same sex parents] are struggling more than sons.").

donation are hurting more, are more confused, and feel more isolated from their families. They fare worse than their peers raised by biological parents on important outcomes such as depression, delinquency and substance abuse."[36] Studies also show that, even when they have two caregivers of the same sex, children who grow up without a father or a mother are socialized in a way that undermines their ability to function effectively in a dual-gender society.[37]

This body of research explains why delinquency rates among boys whose fathers are absent from their homes are significantly higher than the rates for boys with a father at home.[38] It also explains why "daughters raised outside of intact marriages . . . are approximately three

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[36] Elizabeth Marquardt et al., Institute for American Values, *My Daddy's Name is Donor: A New Study of Young Adults Conceived Through Sperm Donation* 5 (2010), App. 545.

[37] *See* Lawrence L. Wu & Brian C. Martinson, *Family Structure and the Risk of a Premarital Birth*, 54 Am. Soc. Rev. 210, 227–28 (1993), App. 697–98 (teens of married parents have fewer pregnancies out of wedlock); Mark D. Regnerus, *How Different Are the Adult Children of Parents Who Have Same-Sex Relationships? Findings from the New Family Structures Study*, 41 Soc. Sci. Res. 752, 752–70 (2012), App. 703–21 (finding significant differences between children raised by married mothers and fathers and those raised in other family structures, including those raised by same-sex couples). Professor Regnerus' study has been criticized by advocates of the "moms-and-dads-are-interchangeable" theory. But in his thorough response, he concludes that, even accounting for his critics' concerns, the data "still reveal numerous differences between adult children who report maternal same-sex behavior (and residence with her partner) and those with still-married (heterosexual) biological parents." Mark D. Regnerus, *Parental Same-Sex Relationships, Family Instability, and Subsequent Life Outcomes for Adult Children: Answering Critics of the New Family Structures Study with Additional Analysis*, 41 Soc. Sci. Res. 1367, 1377 (2012), App. 732; *see also* Allen, *supra* note 35. Researchers have noted that many of the studies purporting to show no difference in parenting suffer from deep methodological flaws. *See, e.g.*, Loren D. Marks, *Same-Sex Parenting and Children's Outcomes: A Closer Examination of the American Psychological Association's Brief on Lesbian and Gay Parenting*, 41 Soc. Sci. Res. 735, 748 (2012), App. 862 (noting significant flaws in 59 studies conducted on same-sex parenting that involved small, convenience samples and that the generalized claim of no difference was "not empirically warranted"); *see also Lofton*, 358 F.3d at 325 (noting critiques of these studies, including "significant flaws in the[se] studies' methodologies and conclusions, such as the use of small, self-selected samples; reliance on self-report instruments; politically driven hypotheses; and the use of unrepresentative study populations consisting of disproportionately affluent, educated parents.")

[38] Lynn D. Wardle, *The Fall of Marital Stability and the Rise of Juvenile Delinquency*, 10 J. L. & Fam. Studs. 83 (2007), App. 733–59 (comprehensive review of literature and social science).

times more likely to end up young, unwed mothers than are children whose parents married and stayed married."[39]

In addition, when parents, and particularly fathers, do not take responsibility for raising their children, the State is often forced to assist through costly social welfare programs and other means. A recent study estimates that divorce and unwed childbearing "costs U.S. taxpayers at *least $112 billion each and every year*, or more than $1 trillion each decade."[40] This cost is not related to whether single parents or same-sex couples can be wonderful and loving parents; they clearly can. These studies simply show that both the biological connection and the gender diversity inherent in the married, mother-father parenting model powerfully enhance child welfare, even as they protect the State's fisc. Such considerations likewise provide compelling support for Idaho's marriage model.

The success of Idaho's marriage laws and policies. To achieve this and other benefits to children, Idaho has chosen to embrace and, where possible, fortify the social institution of marriage in its traditional child-centric form. Thus, recognizing the close relationship between the law and social institutions governing family life, Idaho has sought in its marriage laws to promote the gendered parenting model that has long been part of the social institution of marriage. That model privileges marriage over all other relationships thereby signaling to *all* would-be parents that the State wants them to do their best to ensure that any children they conceive are raised by their biological mother and father within a stable marital

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[39] Richard G. Wilkins, *Adult Sexual Desire and the Best Interests of the Child*, 18 St. Thomas L. Rev. 543, 594 (2005) (internal quotation marks omitted). *Accord, e.g.*, Cynthia C. Harper and Sara S McLanahan, *Father Absence and Youth Incarceration*, 14 J. Res. Adolescence 369, 384–86 (2004) (finding that compared with all other family forms, "[y]outh who never had a father in the household had the highest incarceration odds").

[40] Benjamin Scafidi, Institute for American Values, *The Taxpayer Costs of Divorce and Unwed Childbearing: First-Ever Estimates for the Nation and All Fifty States* 5 (2008), App. 794.

union. Official State encouragement, and the social understandings that flow from it, increase the overall likelihood that children will be raised in the parenting environment that Idaho and her citizens find optimal.

In Idaho, this is not mere theory or conjecture. Whatever the effectiveness of traditional marriage laws in other states, Idaho's marriage laws and policies are achieving excellent results. As Professor Price's affidavit demonstrates, Idaho has the third lowest percentage of births to unmarried mothers of all the states—25.7% compared to the national average of 41%. Affidavit of Joseph P. Price ("Price Aff.") ¶4, App. 106. Idaho also has the second highest fraction of husband-wife households—55.3% compared to the national average of 48.4%—and also the second highest fraction of husband-wife households with children under 18—24.0% compared to the national average of 20.2%. *Id.* ¶5. Moreover, 68.4% of children in Idaho ages six and younger live with both their father and mother who have been married since before the child was born, the second highest among all states. *Id.* ¶6. This number rises to 70.3% if adopted children are included, also the second highest among all states. These compare to national averages on these two measures of 56.8% and 58.1%. *Id.* [41] But far more important is the benefit to children themselves: As Professor Price concludes, "compared to children born in all the states, a child born in Idaho has some of the best chances of knowing and being reared by his or her own married mother and father." *Id.* ¶7.

Such real-world benefits to children are exactly what Idaho's marriage policies are intended to produce, and what Plaintiffs' arguments both ignore and imperil.

[41] Idaho drops slightly in this ranking if all children ages 0–17 are included, with the fraction of children in this age group living with both their father and mother who have been married since before their birth being 58.4%, but Idaho still remains the ninth highest in the country. Price Aff. ¶6.

How a redefinition would undermine Idaho's Interests. Compelling Idaho to redefine marriage to include same-sex couples—forcing it to replace its gendered marriage definition with a genderless one—would necessarily undermine the State's interest in promoting biological and gender-differentiated parenting in multiple distinct ways. And most of these, by the way, have nothing to do with whether same-sex parenting is on average comparable in quality to man-woman parenting.

First, as many commentators have observed, because procreation is an inherently gendered affair, redefining marriage in genderless terms would break the critical conceptual link between marriage and procreation.[42] As a matter of biological fact, a same-sex couple cannot provide a child with the advantages either of two biological parents or of gender complementarity in parenting: By definition, either the child's biological father or mother (or both) will be absent. In teaching that same-sex unions are on a par with traditional man-woman marriages, and thus that biological ties are of little or no importance to parenting, the redefinition requested by Plaintiffs would tend to encourage more parents to raise their biological children without the other biological parent.

Given the manifest ills of fatherless parenting, the State has a compelling interest in sending a powerful message to fathers that marriage to the mothers of their children is important to the welfare of those children and to society itself. By the same token, the State has a powerful interest in encouraging women, whenever possible, to marry the fathers of their children. Redefining marriage to include same-sex couples would undermine that message. It would

[42] *See, e.g.*, Girgis, *supra* note 18, at 7, App. 283 (stating that if marriage is redefined, the law will teach that marriage is "essentially an emotional union" that has no inherent connection to procreation and family life); Witherspoon Institute, *Marriage And The Public Good*, *supra* note 30, at 18, App. 507 ("Same-sex marriage would further undercut the idea that procreation is intrinsically connected to marriage.").

suggest that fathers and mothers are interchangeable, that the absence of one or the other is inconsequential, and therefore that there is no particular need for a single parent to marry the father or mother of his or her child, or to marry someone else who will (ideally through adoption) provide the gender complementarity the child needs.[43]

Second, replacing the child-centric view of marriage with a more adult-centric view would undermine the existing social norm that often leads parents in acceptable but not ideal marriages to make self-sacrifices and *remain* married to the parents of their children. Over time, this too would likely lead to more children being raised—and for longer periods—without both of their biological parents.

Third, by shifting the understanding of marriage to a more adult-centric view, a redefinition would also undermine the current social norm (weakened though it may be) that those who wish to have children—or to engage in conduct that could lead to children—*should* get married. If marriage is about accommodating the needs and desires of adults rather than meeting the needs of children (and society), then it is no longer an obligation—something one is supposed to do if one wants to have children. Rather, it is simply an option, to be chosen if, but only if, it is what one wants or what one thinks will make one happy.[44]

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[43] This is one reason that a large group of prominent scholars from all relevant academic fields has expressed "deep[ ] concerns about the institutional consequences of same-sex marriage for marriage itself." Witherspoon Institute, *Marriage And The Public Good*, *supra* note 30, at 18, App. 507. Among other things, they show that "[s]ame-sex marriage . . . would undermine the idea that children need both a mother and a father, further weakening the societal norm that men should take responsibility for the children they beget." *Id.* at 18–19, App. 507–08; Glenn, *supra* note 31, at 26 (expressing concern about "politically motivated denial of the value of fathers for the socialization, development, and well being of children").

[44] *See, e.g.*, Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. Marriage & Fam. 848, 848, 850, 853, 858 (2004), App. 835, 837, 840, 845 (explaining that "weakening of the social norms that define people's behavior in . . . marriage" shifts the focus of marriage from serving vital societal needs (including the needs of children) to facilitating the personal fulfillment of individuals and could even culminate, in the fading away of marriage, to

Fourth, if the traditional male-female aspect of marriage were thrown out as irrational, it would likely become more difficult to resist other innovations that would lead to additional children being raised without a father or mother. As one of the same-sex marriage advocates quoted in Justice Alito's *Windsor* opinion put it, "conferring the legitimacy of marriage on homosexual relations will introduce an implicit revolt against the institution into its very heart . . . . For starters, if homosexual marriage is OK, why not group marriage[?]" Ellen Willis, *Can Marriage Be Saved?* A Forum, The Nation 16 (2004), cited in *Windsor*, 133 S. Ct. at 2715 n.6 (Alito, J., dissenting).[45] To the extent they involve people of both sexes, such arrangements are especially likely to produce children who will not be raised by one or both of their biological parents, much less by a man-woman couple. The State cannot simply ignore the risks to children arising from such institutional developments which advocates of same-sex marriage *themselves* predict will happen if that change were adopted.

Mutually exclusive conceptions of marriage. In sum, given the strong connection in Idaho law and culture between marriage and children, redefining marriage in genderless terms would seriously undermine, if not destroy, the State's message that biological mother-father parenting is best for children. How can the State insist that fathers (or mothers) are essential to

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the point that it becomes "just one of many kinds of interpersonal romantic relationships"); Glenn, *supra* note 31, at 25–26 (explaining that the historical purposes of marriage—"regulation of sexual activity and the provision for offspring that may result from it"—have already been weakened by the "blurring of the distinction between marriage as an institution and mere "'close relationships,'" and warning that "acceptance of the arguments made by some advocates of same-sex marriage would bring this trend to its logical conclusion, namely, the definition of marriage as being for the benefit of those who enter into it rather than as an institution for the benefit of society, the community, or any social entity larger than the couple").

[45] *Accord, e.g.*, Judith Stacey, *In the Name of the Family: Rethinking Family Values in the Postmodern Age* 122–23, 126–27 (1996); *id.* at 127 ("If we begin to value the meaning and quality of intimate bonds over their customary forms, there are few limits to the kinds of marriage and kinship patterns people might wish to devise. . . . [P]erhaps some might dare to question the dyadic [i.e., two-person] limitations of Western marriage and seek some of the benefits of extended family life through small-group marriages . . . .").

their children's well-being if it is forced to redefine marriage to make fathers (or mothers) optional? Or how can the State insist that fathers and mothers are not interchangeable when its own marriage law effectively makes them interchangeable?

That is not to say that the State lacks compassion for the children of single parents or couples in same-sex relationships. State officials and community leaders remain concerned with their welfare, just as they are concerned with the welfare of every child. A panoply of public and private welfare programs, from subsidized healthcare to childhood education, reflects that concern. But the demand that marriage be redefined to include same-sex couples forces a difficult choice between mutually exclusive conceptions of marriage—one focused on adult-chosen relationships or one that is child-centric, binding a mother, a father, and their child in a legal institution.[46] Each conception carries unavoidable and unintended costs. Yet in the considered judgment of the State and its people, the costs and risks—especially to children generally—of redefining marriage in genderless terms vastly outweigh the costs of preserving the traditional definition.

Such difficult and often painful decisions are at the heart of the State's authority over domestic-relations matters. Idaho's citizens and legislators weighed the competing interests—including the compelling interest in the welfare of all the State's children—and chose the policy they believe to be sound. That choice is entitled to this Court's respect and deference.

[46] A society actually has a third option: no normative marriage institution at all. Many of the most influential advocates of genderless marriage correctly and gladly see that as leading quite naturally to no normative marriage institution at all. For a clear example of high-level advocacy for such, see Katherine Acey et al., *Beyond Same-Sex Marriage: A new strategic vision for all our families & relationships* (July 26, 2006), App. 866–92.

c. Preserving Idaho's marriage definition furthers the State's vital interest in accommodating religious freedom and reducing the potential for civic strife.

Yet another vital public welfare interest arises from the fact that husband-wife marriage is deeply interwoven into the fabric of Idaho life, including its diverse faith communities. Accordingly, preserving the traditional definition of marriage is essential to preserving social harmony in the State, while redefining marriage by judicial fiat would invite social and religious strife, centered on the instrumentalities of State and local government. *Cf. Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 741 (1983) (referring to "the States' compelling interest in the maintenance of domestic peace").

Religious and cultural support for marriage. The social consensus surrounding marriage reflects, in part, powerful religious symbolism and traditions through which Idaho's diverse faith communities foster and nourish marriage as the ideal institution for family life. That nearly ubiquitous religious support is an essential pillar in the social infrastructure that sustains Idaho's marriage rates—as well as the consensus that man-woman marriage is the best venue for bearing and rearing children. Of course, the State endorses no religious beliefs about marriage. Yet its interests are plainly advanced by the religious and other cultural institutions that support its pro-marriage culture.

Broad religious support for marriage, however, exists only because the current legal definition corresponds to the understanding of the vast majority of faith communities.

In that regard, the religious context surrounding same-sex marriage is vastly different from the religious context that surrounded interracial marriage. Historically, objections to interracial marriage were always principally about racism, not about religion or the marriage institution.

By contrast, religious support for defining marriage as between one man and one woman is both widespread and deeply rooted in the religious texts of all three major Abrahamic faiths—Christianity, Judaism, and Islam—plus one of the other two largest world religions—Buddhism.[47] The Abrahamic faiths in particular have rich religious narratives extolling the husband-wife, child-centric meaning of marriage. Hundreds of thousands of Idahoans who accept these traditions understand marriage and sexuality as gifts from God, designed not principally for the gratification of adults (i.e., adult-centric), but to provide an optimal setting for bearing and raising children (i.e., child-centric).[48]

These beliefs about marriage are not going away. They are held by major worldwide religious bodies, with billions of believers, that are unlikely to change their doctrines based on the views of the U.S. public, much less the U.S. courts. These beliefs are tied not only to theology but also to religious and family practices, deeply and sincerely held personal beliefs, and entire ways of life. They are no less integral to the dignity and identities of hundreds of thousands of Idaho citizens than Plaintiffs' sexual orientation is to them.

Given those realities, judicial imposition of a genderless definition of marriage would fracture the centuries-old consensus about the meaning of marriage, spawning real tensions between civil and religious understandings of that institution, and all to the detriment of both marriage and the State's interests in maintaining social peace.

Avoiding religion-centered conflicts. Redefining marriage in genderless terms would create the potential for religion-related strife—and infringements of religious freedom—in a

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[47] *See* Pew Research Religion & Pub. Life Project, *Religious Groups' Official Positions on Same-Sex Marriage*, Dec. 7, 2012, http://www.pewforum.org/2012/12/07/religious-groups-official-positions-on-same-sex-marriage/.

[48] *See e.g.*, Sex, Marriage and Family in World Religions xxii-xxvii (Don S. Browning, M. Christian Green & John Witte, Jr. eds., 2009).

wide variety of government-related situations that have already arisen around the country. Scholars across the ideological spectrum agree on the threat.[49] Indeed, as a group of pro-same-sex-marriage law professors recently put it to the Illinois legislature, the kind of redefinition Plaintiffs seek here "could create a whole new set of problems for the religious liberty of those religious believers who cannot conscientiously participate in implementing the new regime."[50] To take just a few examples:

- Governments would likely be pressured—and perhaps agree—to force religious social service agencies to cease providing adoption and foster care services unless they agree to provide those services in a manner contrary to their doctrines and beliefs.[51]

- Governments would likely be pressured—and perhaps agree—to revoke the tax-exempt status of churches or other non-profit religious organizations that refuse on religious grounds to recognize same-sex marriages or to provide benefits to same-sex couples on the same terms as husband-wife couples.[52]

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[49] *See generally Same-Sex Marriage and Religious Liberty: Emerging Conflicts* (Douglas Laycock et al. eds., 2008) ("Same-Sex Marriage and Religious Liberty") (diverse scholars discussing issue); *see* Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, *in* Same-Sex Marriage and Religious Liberty 124–25 (Professor Chai Feldblum, LGBT scholar and current commissioner of the federal EEOC, noting that there is often a "conflict . . . between laws intended to protect the liberty" of LGBT people "and the religious beliefs of some individuals whose conduct is regulated by such laws," and that sometimes "those who advocate for LGBT equality have downplayed the impact of such laws").

[50] Letter from Douglas Laycock, Michael Perry, and Mark D. Stern to Representative Michael Madigan (Mar. 11, 2013).

[51] *See, e.g.*, Michelle Boorstein, *Citing Same-Sex Marriage Bill, Washington Archdiocese Ends Foster-Care Program*, Washington Post, Feb. 17, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/02/16/AR2010021604899.html; Emily Esfahani Smith, *Washington, Gay Marriage and the Catholic Church*, Wall Street Journal, Jan. 9, 2010, http://online.wsj.com/article/SB10001424052748703478704574612451567822852.html; Manya A. Brachearm, *Rockford Catholic Charities Ending Foster Care*, Chicago Tribune, May 26, 2011, http://www.chicagotribune.com/news/local/breaking/chibrknews-rockford-catholic-charities-ending-foster-care-adoptions-20110526,0,4532788.story?track=rss; Daniel Avila, *Same-Sex Adoption in Massachusetts, the Catholic Church, and the Good of the Children: The Story Behind the Controversy and the Case for Conscientious Refusals* 27 Children's Legal Rights J. 1, 11 (2007); John Garvey, Op-Ed, *State Putting Church Out of Adoption Business,* Boston Globe, March 14, 2006, at A15.

[52] *Cf. Bob Jones University v. United States*, 461 U.S. 574 (1983); *Religious Establishment Bigots Sound Alarm Against Loving Same-Sex Marriages*, The Daily Kos, Jan. 12, 2012, http://www.dailykos.com/story/2012/01/12/1054208/-Religious-establishment-bigots-sound-

- Governments would likely be pressured—and perhaps agree—to investigate, prosecute and punish people in wedding-related businesses for refusing on religious conscience grounds to assist with same-sex weddings.[53]

- Governments would likely be pressured—and perhaps agree—to punish school teachers for refusing on religious conscience grounds to endorse same-sex marriage or for expressing contrary views.[54]

- Government licensing agencies would likely be pressured—and perhaps agree—to investigate and punish counselors for refusing on religious conscience grounds to counsel same-sex married couples on the same terms as heterosexual couples.[55]

- Religion-based conflicts between public schools and parents would likely increase as children are taught about sexuality and marriage in ways that contravene parents' and students' deeply held religious beliefs.[56]

- Governments would likely be pressured—and might agree—to punish religious colleges and similar institutions for adhering to their views on marriage in such things as married student housing, hiring, and curriculum.[57]

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alarm-against-loving-same-sex-marriages ("These religious bigots want to receive taxpayer support for their efforts, but want to keep discriminatory practices in place. . . . Their right to be bigots isn't in question. What's in question is whether American taxpayers should subsidize that bigotry. And the answer, quite obviously, should be a resounding NO.").

[53] *See Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (upholding fine for refusing on religious grounds to photograph same-sex commitment ceremony).

[54] *See, e.g.*, Todd Starnes, *Christian Teacher Under Investigation for Opposing Homosexuality*, Fox News Radio, Oct. 19, 2011, http://radio.foxnews.com/toddstarnes/ top-stories/christian-teacher-under-investigation-for-opposing-homosexuality.html (teacher investigated for posting message on private Facebook page opposing homosexuality based on her Christian faith; statewide gay rights group demanded her removal and governor criticized her publicly).

[55] *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012).

[56] *Compare Teacher, School Sued Over Gay Fairy Tale*, NPR, April 27, 2006, http://www.npr.org/templates/story/story.php?storyId=5366521 (legalization of SSM in Massachusetts basis for reading book depicting marriage of two princes), *with* Todd Starnes, *Atty Says School Threatened, Punished Boy Who Opposed Gay Adoption*, Fox News Radio, Jan. 24, 2012, http://radio.foxnews.com/toddstarnes/top-stories/atty-says-school-threatened-punished-boy-who-opposed-gay-adoption.html (student berated by school district superintendent after writing op-ed piece in school newspaper opposing gay adoptions; boy called to superintendent's office, subjected to hours of meetings, and accused of violating the school's anti-bullying policy; superintendent threatened suspension, demanded that student admit to "regret" over column, and called student "ignorant").

[57] *See, e.g.*, *Levin v. Yeshiva Univ.*, 754 N.E.2d 1099 (N.Y. 2001); *see generally* D. Smith, *Accreditation Committee Decides to Keep Religious Exemption*, 33 Monitor on Psychology 16 (Jan. 2002).

Preventing these kinds of social tensions and conflicts—and the infringements of religious freedom they could create—is an important and compelling State interest, legitimately grounded in the State's concern for public welfare. *See Bill Johnson's Restaurants*, 461 U.S. at 741. As Justice Breyer remarked in *Zelman v. Simmons-Harris*, one of the concerns underlying the federal Establishment Clause is "protecting the Nation's social fabric from religious conflict." 536 U.S. 639, 717 (2002) (Breyer, J., dissenting); *accord Van Orden v. Perry*, 545 U.S. 677, 698–99 (2005) (Breyer, J., concurring). If that is a legitimate *federal* interest, based as it is on the federal First Amendment, then surely the State has a compelling interest in doing what it can to protect the State's own social fabric from religious conflict.

That is not to say the State can invoke concerns about religious freedom or religion-related social strife as a basis for denying rights otherwise guaranteed by the Constitution. Yet for reasons already explained, the right to same-sex marriage claimed here is anything but well-established. Instead, the existence of a constitutional right to same-sex marriage hinges on whether Idaho has sufficiently good reasons for defining marriage in gendered terms. The State's interests in protecting religious freedom and minimizing religion-related civic conflicts are thus highly relevant to the constitutional inquiry.

The value of democratic decision-making. Avoiding such conflicts, moreover, is another reason the State has a profound interest in having disagreements over the nature and purpose of marriage resolved through democratic institutions. The risk of deep social division is at its apex when courts preempt democratic discourse and force major social changes on an unwilling populace.

By contrast, democratic channels allow for dialogue, persuasion, incremental steps, creative compromises, second and third chances and, sometimes, reaffirmations of established

ways. While it cannot guarantee everyone's preferred outcome, this "active liberty," as Justice Breyer has called it—the right to participate as equal citizens in democratic decision-making about how best to live out our common destiny[58]—ensures a legitimacy in lawmaking that judicial mandates cannot match. The State has the highest interest in preserving the right of the People and their democratic institutions to resolve controversial issues in a way that secures the greatest possible consensus and harmony.

Same-sex marriage is a classic example. To say that people hold divergent views about marriage is an understatement. As previously explained, some believe marriage is focused principally on the emotional fulfillment of adults, and that moms and dads are interchangeable. Others believe marriage is principally about children, and that they benefit from being raised by both a mom and a dad. Democratic processes are ill-served when the judiciary steps into such a contentious debate and labels one side as "irrational," as Plaintiffs urge this court to do. Such action would improperly dismiss as intolerant the personal and deeply-held beliefs of at least half the country. That is not the place or function of the judiciary. Such debates are properly reserved for the political branches or for the People speaking at the ballot box.

Idaho's marriage policy, moreover, does not dictate the private choices of its citizens. The Supreme Court has long acknowledged a "basic difference between direct state *interference* with a protected activity and state *encouragement* of an alternative activity consonant with legislative policy." *Maher v. Roe*, 432 U.S. 464, 475 (1977) (emphasis added). By defining marriage as being between one man and one woman, Idaho does not interfere with adults' ability

[58] "[T]he Constitution [is] centrally focused upon active liberty, upon the right of individuals to participate in democratic self-government." Stephen G. Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 21 (2005), App. 1029. Justice Breyer urges "that courts should take greater account of the Constitution's democratic nature when they interpret constitutional and statutory texts." *Id.* at 5, App. 1027. Judicial restraint—i.e, "judicial modesty in constitutional decision-making"—is essential. *Id.* at 37, App. 1030; *see also id.* at 17, App. 1028.

to commit to an exclusive, loving relationship with others of the same sex, or to bring children into that relationship. Instead, the laws at issue here simply *encourage* a familial structure that has served society for thousands of years as the ideal setting for raising children. Nothing in the federal Constitution prevents Idaho's citizens from making that choice.

5. Federal constitutional law does not require Idaho to recognize same-sex marriages performed in other states.

As explained above, Idaho's Marriage Laws satisfy the requirements of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and Idaho has a constitutionally valid policy to not recognize same-sex marriages regardless of where they are performed. No other provision of the federal Constitution requires the State to recognize same-sex marriages contrary to its public policy. "[T]he Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." *Nevada v. Hall*, 440 U.S. 410, 422 (1979). "Full Faith and Credit . . . does not . . . enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it." *Id.* at 423–24 (quoting *Pac. Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 504–05 (1939)).[59]

Further, section 2 of the federal Defense of Marriage Act (DOMA)—which has not been challenged by Plaintiffs in this case and which was not addressed in *Windsor*—squarely

[59] *See also Franchise Tax Bd. of California v. Hyatt*, 538 U.S. 488, 494 (2003) ("[T]he Full Faith and Credit Clause does not compel a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.") (quoting *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988)) (internal quotations omitted); *In re May's Estate*, 114 N.E.2d 4, 8 (N.Y. App. 1953) ("The general rule that 'a marriage valid where solemnized is valid everywhere' does not apply. To that rule, there is a provisio or exception, recognized, it would seem, by all the States, as follows: 'unless contrary to the prohibitions of natural law or the express prohibitions of the statute.'") (citations omitted).

forecloses Plaintiffs' claims to recognition of their marriages in Idaho.[60] *Windsor*, 133 S. Ct. at 2682–83 (noting that section 2 of DOMA, 28 U.S.C. § 1738C, was not at issue and allows States to refuse to recognize same-sex marriages performed in other States).

Accordingly, Idaho is not required to recognize same-sex marriages performed in other States.[61]

* * * * *

Nearly 130 years ago, in *Murphy v. Ramsey*, the Supreme Court held that "no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth . . . than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman . . . ." 114 U.S. 15, 45 (1885) (emphasis added). That was true then, and it remains true today: For all the reasons discussed above, the State has important and *compelling* interests in retaining its gendered definition of marriage. A fortiori, it has the required constitutional basis for doing so.

CONCLUSION

For the foregoing reasons, this Court should hold Idaho's Marriage Laws constitutional and enter summary judgment in favor of the Defendants.

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[60] Section 2 of DOMA provides:

> No state, territory, or possession of the United States, or Indian Tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

28 U.S.C. § 1738C.

[61] Forcing a state to recognize same-sex marriages performed elsewhere "would be the most astonishingly undemocratic, counter-majoritarian political development in American history." Patrick J. Borchers, Baker v. General Motors: *Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 Creighton L. Rev. 147, 150 (1998).

DATED this 18th day of February, 2014.

By /s/ *Thomas C. Perry*
THOMAS C. PERRY
Counsel to the Governor

ADDENDUM

Pertinent Legal Authorities

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Idaho Const. art. III, § 28

A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state.

Idaho Code § 32-201

(1) Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by the issuance of a license and a solemnization as authorized and provided by law. Marriage created by a mutual assumption of marital rights, duties or obligations shall not be recognized as a lawful marriage.

(2) The provisions of subsection (1) of this section requiring the issuance of a license and a solemnization shall not invalidate any marriage contract in effect prior to January 1, 1996, created by consenting parties through a mutual assumption of marital rights, duties or obligations.

Idaho Code § 32-209

All marriages contracted without this state, which would be valid by the laws of the state or country in which the same were contracted, are valid in this state, unless they violate the public policy of this state. Marriages that violate the public policy of this state include, but are not limited to, same-sex marriages, and marriages entered into under the laws of another state or country with the intent to evade the prohibitions of the marriage laws of this state.

The Definition of Marriage: Ballot Measures

Alabama: 2006; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 81%/19%

Alaska: 1998; to amend constitution to enshrine man-woman marriage; legislature initiated; passed 68%/31%

Arizona: 2006; to amend constitution to enshrine man-woman marriage and prohibit civil unions; voter initiated; failed 48%/52%

Arizona: 2008; to amend constitution to enshrine man-woman marriage; legislature initiated; passed 56%/44%

Arkansas: 2004; to amend constitution to enshrine man-woman marriage and prohibit civil unions; voter initiated; passed 75%/25%

California: 2000; to enact super-legislation to enshrine man-woman marriage; voter initiated; passed 61%/39%

California: 2008; to amend constitution to restore man-woman marriage; voter initiated; passed 52%/48%

Colorado: 2006; to amend constitution to enshrine man-woman marriage; voter initiated; passed 55%/45%

Florida: 2008; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 62%/38%

Georgia: 2004; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 76%/24%

***Hawaii:** 1998; to amend constitution to give legislature sole power to define marriage; legislature initiated; passed 69%/31%

Idaho: 2006; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 63%/37%

Kansas: 2005; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 70%/30%

Kentucky: 2004; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 75%/25%

Louisiana: 2004; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 78%/22%

Maine: 2009; to preserve man-woman marriage; voter initiated following legislature vote to approve genderless marriage; passed 53%/47%

Maine: 2012; to approve genderless marriage via referendum; voter initiated; passed 53%/47%

Maryland: 2012; to approve genderless marriage legislation; voter initiated following legislature vote to approve genderless marriage; passed 52%/48%

Michigan: 2004; to amend constitution to enshrine man-woman marriage and prohibit civil unions; voter initiated; passed 59%/41%

***Minnesota:** 2012; to amend constitution to enshrine man-woman marriage; legislature initiated; failed 47%/53%

Mississippi: 2004; to amend constitution to enshrine man-woman marriage; legislature initiated; passed 86%/14%

Missouri: 2004; to amend constitution to enshrine man-woman marriage; legislature initiated; passed 71%/29%

Montana: 2004; to amend constitution to enshrine man-woman marriage; voter initiated; passed 67%/33%

Nebraska: 2000; to amend constitution to enshrine man-woman marriage and prohibit civil unions; voter initiated; passed 70%/30%

Nevada: 2000; to amend constitution to enshrine man-woman marriage; voter initiated; passed 70%/30%

Nevada: 2002; to amend constitution to enshrine man-woman marriage; voter initiated; passed 67%/33%

North Carolina: 2012; to amend constitution to enshrine man-woman marriage; legislature initiated; passed 61%/39%

North Dakota: 2004; to amend constitution to enshrine man-woman marriage and prohibit civil unions; voter initiated; passed 73%/27%

Ohio: 2004; to amend constitution to enshrine man-woman marriage and prohibit civil unions; voter initiated; passed 62%/38%

Oklahoma: 2004; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 76%/24%

Oregon: 2004; to amend constitution to enshrine man-woman marriage; voter initiated; passed 57%/43%

South Carolina: 2006; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 78%/22%

South Dakota: 2006; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 52%/48%

Tennessee: 2006; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 81%/19%

Texas: 2005; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 76%/24%

Utah: 2004; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 66%/34%

Virginia: 2006; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 57%/43%

Washington: 2012; to approve genderless marriage legislation; voter initiated following legislature vote to approve genderless marriage; passed 54%/46%

Wisconsin: 2006; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 59%/41%

*Note: In Hawaii and Minnesota, a blank vote counts in essence as a “no” vote. For purposes of this addendum, in those two states, blank votes were counted as if they were “no” votes.

The Definition of Marriage: Statutory and State Constitutional Provisions

Alabama: Ala. Const. amend. 774 (man-woman)

Alaska: Alaska Const. art. I, § 25 (man-woman)

Arizona: Ariz. Const. art. XXX (man-woman)

Arkansas: Ark. Const. amend. LXXXII, §1 (man-woman)

California: Cal. Const. art. I, § 7.5 (man-woman) struck down as unconstitutional by *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (purportedly binding as appeals were vacated or did not address merits) (genderless)

Colorado: Colo. Const. art. II, § 31 (man-woman)

Connecticut: *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); Conn. Gen. Stat. § 46b-20 (genderless)

Delaware: Del. Code tit. 13, § 101 (genderless)

District of Columbia: D.C. Code § 46-401 (genderless)

Florida: Fla. Const. art. I, § 27 (man-woman)

Georgia: Ga. Const. art. I, § 4 ¶ 1 (man-woman)

Hawaii: Haw. Rev. Stat. § 572-1 (genderless)

Idaho: Idaho Const. art. III, § 28 (man-woman)

Illinois: 750 Ill. Comp. Stat. 5/201 (genderless)

Indiana: Ind. Code Ann. § 31-11-1-1 (man-woman)

Iowa: *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (genderless)

Kansas: Kan. Const. art. XV, § 16 (man-woman)

Kentucky: Ky. Const. § 233A (man-woman)

Louisiana: La. Const. art. XII, § 15 (man-woman)

Maine: Me. Rev. Stat. tit. 19-A, § 650, 701 (genderless)

Maryland: Md. Code, Fam. Law § 2-201 (genderless)

Massachusetts: *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (genderless)

Michigan: Mich. Const. art. I, § 25 (man-woman)

Minnesota: Minn. Stat. §§ 517.01 to .03; 2013 Minn. Laws 74 (genderless)

Mississippi: Miss. Const. art. XIV, § 263A (man-woman)

Missouri: Mo. Const. art. I, § 33 (man-woman)

Montana: Mont. Const. art. XIII, § 7 (man-woman)

Nebraska: Neb. Const. art. I, § 29 (man-woman)

Nevada: Nev. Const. art. I, § 21 (man-woman)

New Hampshire: N.H. Rev. Stat. § 457:1-a (genderless)

New Jersey: *Garden State Equality v. Dow*, 79 A.3d 1036 (N.J. 2013) (genderless)

New Mexico: *Griego v. Oliver*, 316 P.3d 865 (N.M. 2013) (genderless)

New York: N.Y. Dom. Rel. Law § 10-a (genderless)

North Carolina: N.C. Const. art. XIV, § 6 (man-woman)

North Dakota: N.D. Const. art. XI, § 28 (man-woman)

Ohio: Ohio Const. art. XV, § 11 (man-woman)

Oklahoma: Okla. Const. art. II, § 35 (man-woman), declared unconstitutional by *Bishop v. United States ex rel. Holder*, ___ F. Supp. 2d ___, 2014 WL 116013 (D. Okla. Jan. 14, 2014), *appeals docketed*, Nos. 14-5003, 14-5006 (10th Cir.)

Oregon: Or. Const. art. XV, § 5a (man-woman)

Pennsylvania: 23 Pa. Cons. Stat. § 1704 (man-woman)

Rhode Island: R.I. Gen. Laws § 15-1-1 *et seq.* (genderless)

South Carolina: S.C. Const. art. XVII, § 15 (man-woman)

South Dakota: S.D. Const. art. XXI, § 9 (man-woman)

Tennessee: Tenn. Const. art. XI, § 18 (man-woman)

Texas: Tex. Const. art. I, § 32 (man-woman)

Utah: Utah Const. art. I, § 29 (man-woman), declared unconstitutional by *Kitchen v. Herbert*, ___ F. Supp. 2d ___, 2013 WL 6697874 (D. Utah Dec. 20. 2013), *appeal docketed*, No. 13-4178 (10th Cir. Dec. 20, 2013)

Vermont: Vt. Stat. tit. 15, § 8 (genderless)

Virginia: Va. Const. art. I, § 15-A (man-woman), declared unconstitutional by *Bostic v. Rainey*, ___ F. Supp. 2d ___, 2014 WL 561978 (E.D. Va. Feb. 13, 2014)

Washington: Wash. Rev. Code § 26.04.020 *et. seq.* (genderless)

West Virginia: W. Va. Code § 48-2-104(c) (man-woman)

Wisconsin: Wis. Const. art. XIII, § 13 (man-woman)

Wyoming: Wyo. Stat. § 20-1-101 (man-woman)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of February, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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