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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

SUSAN LATTA and TRACI EHLERS, *et al.*,

Plaintiffs,

v.

C.L. "BUTCH" OTTER, as Governor of the State of Idaho, in his official capacity, *et al.*,

Defendants,

and

STATE OF IDAHO,

Defendant-Intervenor.

Case No. 1:13-cv-00482-CWD

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO THE MOTIONS TO DISMISS OF DEFENDANTS CHRISTOPHER RICH AND STATE OF IDAHO

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INTRODUCTION

Plaintiffs Susan Latta and Traci Ehlers, Lori Watsen and Sharene Watsen, Andrea Altmayer and Shelia Robertson, and Amber Beierle and Rachael Robertson ("Plaintiffs") respectfully submit this Memorandum in Support of their Motion for Summary Judgment and in Opposition to the Motions to Dismiss of Defendant Christopher Rich (Dkt. 30) and the State of Idaho (Dkt. 41).

Plaintiffs are four couples who live in Idaho. They have formed families here, contributed to their communities, and established close ties with their fellow Idaho citizens. All of the couples have been together for years and have committed to spend their lives together. Notwithstanding their homes and connections in Idaho, the state excludes them from legal recognition as families and the critical legal protections that the state makes available to opposite-sex couples who marry.

Two of the Plaintiff couples seek to marry in Idaho. Two of the Plaintiff couples already have legally married in other states—as many other Idaho residents have done. The federal government recognizes that the married Plaintiffs' existing marriages are valid and respects those marriages for purposes of most federal benefits. But in Idaho, where these couples live and have made their homes, the law refuses to recognize their marriages and regards them for all purposes of state law as though they were strangers to each other.

Idaho's refusal to permit these couples to marry or to recognize their existing marriages causes Plaintiffs serious harms, denying them the stability, security, and protections that other families may take for granted. In addition, Idaho's treatment of Plaintiffs as strangers rather than families demeans their deepest relationships and stigmatizes their children by communicating that their families are second class. *See United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013).

These harms violate the most basic principles of due process and equal protection, which require that the law treat all persons equally and, in particular, that every person has a protected right to marry and establish a home and family. *See Zablocki v. Redhail*, 434 U.S. 374, 384 (1978). Idaho's marriage ban infringes upon the fundamental right to marry and discriminates on the suspect bases of sex and sexual orientation. Idaho's laws cannot survive the heightened scrutiny—or "careful consideration" —that the Supreme Court and the Ninth Circuit have made plain the courts must apply to such discriminations. *Windsor*, 133 S. Ct. at 2693; *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 482 (9th Cir. 2014) ("*SmithKline*"). Indeed, as further discussed below, Idaho's discriminatory marriage laws cannot withstand *any* level of constitutional scrutiny because Idaho's exclusion of same-sex couples from marriage is utterly irrational and fails to further any legitimate governmental interest.

One of the strengths of our federal system is its recognition that when power is divided between state and federal governments, a third power may be protected—the autonomy of the individual to make the most personal choices about the course of her life and the family bonds she will form. "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). The states, including Idaho, generally have authority, rather than the federal government, to regulate domestic relations within their borders. However, the states' power over that area of life must be exercised subject to the requirements of the Fourteenth Amendment, which requires the states to protect the most sacrosanct personal freedoms of all persons equally and with due process of law. As a matter of law, Idaho's exclusion of same-sex couples from marriage violates the Fourteenth Amendment in numerous ways, and Plaintiffs are entitled to summary judgment on their constitutional claims.

BACKGROUND

I. THE EVOLUTION OF MARRIAGE LAWS IN IDAHO.

A. Idaho Has A Strong Tradition Favoring Marriage.

From its earliest history as a state, Idaho law defined marriage as "a personal relation arising out of a civil contract, to which the consent of the parties capable of making it is necessary," requiring either a solemnization ceremony or, until 1996, when Idaho abolished common law marriage, "a mutual assumption of marital rights, duties or obligations." Idaho Rev. Stat. § 2420; Idaho Code Ann. § 32-201 (1995).[1] That straightforward definition of marriage as requiring only the consent of both parties and either solemnization or, before 1996, a mutual assumption of marital obligations, is consistent with Idaho's longstanding public policy of favoring marriage and upholding the validity of a marriage whenever possible. *Huff v. Huff*, 118 P. 1080, 1082 (Idaho 1911). Since early in the state's history, courts have held that any proof of a marriage raised a strong presumption of its legality, and the burden is on the party challenging the marriage to show that it is illegal or void. *Mauldin v. Sunshine Mining Co*., 97 P.2d 608, 611 (Idaho 1939). That strong presumption continues today. *See, e.g., Matter of Yee's Estate*, 559 P.2d 763, 764 (Idaho 1977) (noting strong policy favoring marriage); *State v. Soura*, 796 P.2d 109, 114 (Idaho 1990) (recognizing that Idaho's laws favor "creating and maintaining stable and harmonious marriages"). As explained below, Idaho's laws barring same-sex couples from marriage constitute a stark departure from this longstanding policy.

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[1] Idaho recognized common law marriages until 1996, when the Legislature amended the marriage statutes to require solemnization. *See Matter of Estate of Wagner*, 893 P.2d 211, 214 (Idaho 1995); *see also Metropolitan Life Ins. Co. v. Johnson*, 645 P.2d 356, 360-61 (Idaho 1982) (describing Idaho's history of recognizing common law marriages even after most other states ceased to do so).

Similarly, apart from its recent enactment of measures to deny recognition to the marriages of same-sex couples who legally married in another state, Idaho has always recognized legal marriages from other jurisdictions, even if a marriage could not have been validly contracted under Idaho's own marriage laws. *See*, *e.g.*, former Idaho Code Ann. § 32-209 (1996) (providing that "marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, are valid in this state"); *see also State v. Martinez*, 250 P. 239, 242 (Idaho 1926) (holding that "the validity of a ceremonial marriage [from another jurisdiction] will be presumed" in the absence of strong evidence to the contrary). During the era in which Idaho and many other states barred interracial marriages, *see* former Idaho Code Ann. § 32-206 (repealed 1959), Idaho recognized interracial marriages from other states, including those entered into by Idaho residents who traveled to other states to avoid Idaho's prohibition of interracial marriage. *See* James R. Browning, *Anti-Miscegenation Laws in the U.S.*, 1 Duke B. J. 26, 27, 35 (1951) (describing Idaho's practice of recognizing valid interracial marriages from other states). As explained further below, while Idaho continues to apply its longstanding rule of recognizing valid out-of-state marriages, it has carved out an exception to that rule for the marriages of same-sex couples.

B. Past Discriminatory Exclusions And Gender-Based Rules Have Been Removed.

The history of Idaho's marriage laws reflects the resilience and flexibility of marriage as a legal and social institution. While Idaho's basic model of marriage as a bilateral relationship based on consent and assumption of mutual duties has endured, Idaho's marriage laws have changed in other important and far-reaching ways to eliminate inequality and keep pace with changing social realities. For decades, Idaho maintained discriminatory exclusions prohibiting marriage between "white persons" and people of color. *See* Idaho Code Ann. § 32-206 (1948)

(specifying "mongolians, Negroes, or mulattoes"). The legislature finally repealed Idaho's ban on marriage between different races in 1959, eight years before the United States Supreme Court struck down Virginia's anti-miscegenation statute in *Loving v. Virginia*, 388 U.S. 1 (1967). *See* 1959 Idaho Sess. Laws, ch. 44, § 1, 89 (codified as amended at Idaho Code Ann. § 32-206).

Similarly, for many years, Idaho law imposed differing duties and roles on husbands and wives. *See, e.g., Wilson v. Wilson*, 57 P. 708, 710 (Idaho 1899) (noting that the "husband has the management and control of the community [marital] property, with the absolute power of disposition (other than testamentary) as he has of his separate estate"); *Loomis v. Gray*, 90 P.2d 529, 536 (Idaho 1939) (holding that a married woman could not enter into binding contracts with respect to her own separate property), *overruled by Williams v. Paxton*, 559 P.2d 1123, 1132 (Idaho 1976). Today, however, as a result of legal and societal changes recognizing women's entitlement to equality in all aspects of life, men and women now stand on an equal footing in their marriages in the eyes of both federal and Idaho law. *See, e.g., Califano v. Goldfarb*, 430 U.S. 199, 202 (1977) (striking down a gender-based distinction in the Social Security Act); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 (1975) (same); *cf. Reed v. Reed*, 404 U.S. 71, 74 (1971) (invalidating Idaho statute requiring courts to give preference to men when appointing administrators of estates). Under Idaho's current law, the legal rights and responsibilities of marriage are the same for both spouses, without regard to gender. *See, e.g., Murphey v. Murphey*, 653 P.2d 441, 443-44 (Idaho 1982) (holding that a statute allowing alimony awards only to women is unconstitutional and extending the benefits of alimony to needy husbands); *Suter v. Suter*, 546 P.2d 1169, 1175 (Idaho 1976) (invalidating a statute that resulted in "unequal treatment for a husband and wife as regards their individual earnings after a separation").

Idaho's marriage laws underwent another significant change in 1971, when the legislature added "irreconcilable differences" as a ground for the dissolution of a marriage, adopting the modern view that an unworkable marriage should not be sustained merely because neither spouse was legally at fault. Idaho Code Ann. § 32-616; *see also Ripatti v. Ripatti*, 494 P.2d 1025, 1027 (Idaho 1972) (recognizing legislature's adoption of no-fault divorce).

As these changes show, civil marriage has never been static or frozen in time, and it has evolved as societal attitudes and conditions have changed. The consistent trend of these changes has been toward a more egalitarian and equitable institution, and one that reflects changing social realities.

C. The Multiple Interests Served By Marriage In Idaho.

The legal institution of marriage under Idaho law is a contractual relationship embodying a couple's desire to commit themselves publicly to one another, and to undertake legal duties to care for and protect each other and any children they may have, as they move through life together as a family. This legal union brings with it many rights, duties, and benefits under Idaho law that protect the couple and that serve important state interests, too. For instance, each spouse has a mutual obligation of support and an equal interest in all property acquired during the marriage. Idaho Code Ann. § 32-901; Idaho Code Ann. § 32-906. Spouses may file a joint tax return rather than file individual returns separately. Idaho Code Ann. § 60-3031. Upon the dissolution of a marriage, each spouse is entitled to a court-ordered equitable distribution of property, and upon the death of one spouse, the other spouse may receive a homestead allowance or an elective share of the estate. Idaho Code Ann. § 32-712; Idaho Code Ann. §§ 15-2-102, -301, -402. Numerous benefits also accrue to married couples under federal law, forming a safety net for those couples and their households. *See Windsor*, 133 S. Ct. at 2683 (noting that

the General Accounting Office reported in 1997 that there are more than 1,000 references in federal law to marriage.)

Idaho's laws also afford the ability to secure legal recognition of bonds between parents and children, including the presumption of parentage for children born into a marriage and an equal right to child custody. Idaho Code Ann. § 16-2002(12); Idaho Code Ann. §§ 32-1006 – 1007. Further, Idaho makes spouses and parents accountable for economic support through, for example, obligations of spousal and child support. Idaho Code Ann. §§ 32-705 – 706.

II. IDAHO'S PROHIBITION ON MARRIAGE BY SAME-SEX COUPLES.

Despite Idaho's public policy favoring marriage, and contrary to Idaho's historical trend toward eliminating inequality in marriage and keeping pace with legal and social changes, Idaho has chosen to prohibit same-sex couples from enjoying the same status and rights that marriage confers on opposite-sex couples. This prohibition was enacted through amendments to Idaho Code § 32-201 and Idaho Code § 32-209 in 1996 and the addition of Article III, § 28 to the Idaho Constitution in 2006. In addition to barring same-sex couples from marriage, these measures also bar any other type of official recognition or protection for same-sex relationships.

The chronology and context in which these changes occurred makes plain that these unprecedented enactments were intended to single out and exclude gay and lesbian couples from lawful marriage or any legal status similar to marriage.

A. Idaho's Statutory Prohibitions.

In 1993, the Hawaii Supreme Court issued a landmark decision holding that Hawaii's denial of marriage to same-sex couples was subject to strict scrutiny under Hawaii's Equal Protection Clause and would be struck down absent a showing that it was narrowly tailored to serve a compelling state interest. *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993) (superseded by

constitutional amendment, Haw. Const. art. I, § 23 (1998)). The next year, a private interest group in Idaho gathered enough signatures to put an initiative, called Proposition 1, on the November 1994 ballot to prohibit state and local governments from enacting laws that would protect Idaho's gay and lesbian citizens from discrimination. Declaration of Shannon P. Minter in Support of Plaintiffs' Request for Judicial Notice ("Minter Decl."), Ex. H at 1.[2] The initiative also included several additional provisions singling out gay and lesbian Idahoans for adverse treatment, including that "same-sex marriages and domestic partnerships shall not be legally recognized"; that elementary and secondary school educators shall not discuss "homosexuality as acceptable behavior"; that "no state funds shall be expended in a manner that has the effect of accepting or approving homosexuality"; that access to materials in libraries that "address homosexuality" shall be limited to adults; and that "private sexual practices may be considered non-job factors in public employment." *See id.*

Three legislators asked the Idaho Attorney General to issue a legal opinion on the constitutionality of Proposition 1. *See* Minter Decl., Ex. G at 1. The Attorney General concluded that Idaho law already precluded marriage by same-sex couples, rendering that provision redundant, and that the remainder of the initiative was unconstitutional. *Id.* at 1-2. The Attorney General recognized that the initiative targeted gay and lesbian citizens for unequal treatment, remarking "that even if this initiative marking a politically unpopular group of Idahoans for abridgment of their core constitutional rights succeeds at the ballot, it will never be allowed to go into effect." *Id.* On November 8, 1994, Proposition 1 was narrowly defeated at

[2] Plaintiffs' request for judicial notice of various documents, including excerpts of the legislative history regarding Idaho's marriage bans, is filed concurrently with this memorandum.

the polls, losing 49.6% to 50.4%, avoiding the need to test the Attorney General's prediction. *See* http://www.sos.idaho.gov/elect/rsltgn94.htm.

The failure of Proposition 1 did not mark the end of attempts to amend Idaho's laws to prevent gay and lesbian couples from sharing in the full rights of citizenship. In 1995 and 1996, respectively, the legislature enacted statutory amendments that expressly restricted marriage to opposite-sex couples and declared that Idaho would not recognize the marriage of a same-sex couple even if the marriage had been lawfully entered into in another jurisdiction. Specifically, the legislature amended Idaho Code Ann. § 32-201, effective January 1, 1996, to define marriage as a contractual and consensual relationship "between a man and a woman." 1995 Idaho Sess. Laws, ch. 104, § 3, 334-35. For the first time in its history, Idaho also created an express, categorical exception to its longstanding tradition of liberally recognizing lawful marriages from other jurisdictions by amending Idaho Code Ann. § 32-209. 1996 Idaho Sess. Laws ch. 331, § 1 1126. While maintaining the rule that Idaho generally recognizes out-of-state marriages that were valid where contracted, the statute now carves out an exception for marriages that "violate the public policy of this state," which are defined to include "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." *Id*.

B. Idaho's Constitutional Prohibitions.

Change continued rapidly across the nation over the next few years. In 1999, the Vermont Supreme Court ruled that same-sex couples must be treated equally to opposite-sex married couples as a matter of state constitutional law. *Baker v. State*, 722 A.2d 864, 886 (Vt. 1999). Four years later, the Massachusetts Supreme Judicial Court concluded that prohibiting

same-sex couples from marrying violated the Commonwealth's state constitution. *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 961 (Mass. 2003).

In 2005, eager to join several other states that had recently enacted state constitutional bans on marriage for same-sex couples, sixteen Idaho state senators co-sponsored a resolution in the legislature to place a constitutional amendment before the Idaho electorate. That resolution—known as Senate Joint Resolution 101—provided that "[o]nly a union of one man and one woman shall be valid or recognized in this state." S. Journal, 58th Leg., 1st Sess., at 436 (Idaho 2005), http://legislature.idaho.gov/sessioninfo/2005/journals/sfinal.pdf. In addition, the resolution included a second clause that explicitly barred the state or any political subdivision from "creat[ing] or recogniz[ing] a legal status similar to that of marriage." *Id*. The resolution passed out of committee and received a majority of the vote on the Senate floor; however, it did not meet the required two-thirds majority to pass. *Id.* at 58.

Undeterred, the next year supporters introduced a new resolution, House Joint Resolution 2, which sought to place on the ballot a proposed constitutional amendment to "provide that a marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state." H. Journal, 58th Leg., 2d Sess., at 30-31 (Idaho 2006), http://legislature.idaho.gov/sessioninfo/2006/journals/hfinal.pdf. The declared Statement of Purpose was to "protect marriage" and to block any attempt to confer legal status or "the legal benefits of marriage to civil unions, domestic partnerships, or any other relationship that attempts to approximate marriage." H.R.J. Res. 2, 58th Leg., 2d Sess., http://legislature.idaho.gov/legislation/2006/HJR002.html. House Majority Leader Lawrence Denney urged that it be passed, in part, because it would promote "temperance and morality." Minter Decl., Ex. C at 1.

While the resolution was pending, Majority Leader Denney solicited a legal opinion regarding the constitutionality of the proposed amendment from the Idaho Attorney General. The Attorney General opined that, "[w]ithout a marriage amendment, a challenge could be brought [in state court] that prohibiting same-sex marriage under Idaho Code §§ 32-201 and 32-209 violates the due process and equal protection clauses of the Idaho Constitution." Minter Decl., Ex. E at 6-9. The Attorney General also indicated that the amendment's inclusion of language prohibiting recognition not only of marriage, but of any type of domestic partnership or other legally recognized relationship between same-sex couples, might put the measure at "greater risk of a successful legal challenge." *Id*. at 25.

House Joint Resolution 2 passed through the legislature quickly. It was introduced in late January of 2006, passed by two committees, adopted in late February by a legislative super-majority, and placed on the ballot of the November 7, 2006 election. H. Journal, 58th Leg., 2d Sess. at 62, 140 (Idaho 2006), http://legislature.idaho.gov/sessioninfo/2006/journals/hfinal.pdf; S. Journal, 58th Leg., 2nd Sess. at 94, 102-03 (Idaho 2006), http://legislature.idaho.gov/sessioninfo/2006/journals/sfinal.pdf. The resolution passed in the general election, and the Idaho Constitution was amended to read that "[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.

III. THE PLAINTIFFS IN THIS ACTION.

Plaintiffs are four Idaho same-sex couples who either applied for marriage licenses and were denied by Defendant Christopher Rich, County Recorder of Ada County, or who lawfully married in other states and have been denied recognition of their otherwise valid marriages in Idaho.

Susan Latta and Traci Ehlers. Susan Latta ("Sue") and Traci Ehlers ("Traci") married in California in 2008. Declaration of Traci Ehlers ("Ehlers Dec.") ¶ 10; Declaration of Susan Latta ("Latta Dec.") ¶ 12. Sue has two grown children and two grandchildren; Sue's children regard Traci as their stepmother and as the grandmother of Sue's two grandchildren. Latta Dec. ¶¶ 7, 13. Traci and Sue have been harmed in various ways by Idaho's failure to recognize their marriage. Latta Dec. ¶¶ 14-17; Ehlers Dec. ¶¶ 11-18. For example, Idaho law considers Traci to be a legal stranger to her grandchildren. Ehlers Dec. ¶ 13. Further, when Sue and Traci file their federal taxes this year as a married couple, they must also file separate income tax returns in Idaho, and are required by the state to falsely claim that they are two unmarried individuals.[3] Latta Dec. ¶ 14, Ehlers Dec. ¶ 15.

Additionally, the property that Sue and Traci have acquired together since their marriage in 2008 has not become community property under Idaho law. Latta Dec. ¶ 15, Ehlers Dec. ¶ 16. Sue and Traci recently filed a quitclaim deed transferring the title to their home from joint property to marital community property with the right of survivorship. *Id.* Although the deed was accepted for recording, Sue and Traci have no certainty—and substantial reason to doubt—that it will be enforceable absent an order from this Court compelling Idaho to recognize their marriage. *Id.*

Lori Watsen and Sharene Watsen. Lori Watsen ("Lori") and Sharene Watsen ("Sharene") were married in New York in October 2011. Declaration of Lori Watsen ("Lori

[3] Idaho requires legally married same-sex couples to prepare and submit five tax returns. That includes the federal return they file as a married couple, two "dummy" federal returns as if they were single and then a state return for each spouse completed as though each were single. *See* Idaho State Tax Comm'n, Same-Sex Couples and Idaho Income Tax Filing, http://tax.idaho.gov/i-1154.cfm (last visited Feb. 17, 2014)

Watsen Dec.") ¶ 14; Declaration of Sharene Watsen ("Sharene Watsen Dec.") ¶ 12. In 2013, Sharene gave birth to their child, a boy. Sharene Watsen Dec. ¶ 14; Lori Watsen Dec. ¶ 21.

During the summer of 2013, Lori petitioned to adopt their son through a second-parent adoption. Sharene Watsen Dec. ¶ 17; Lori Watsen Dec. ¶ 27. The court summarily denied Lori's petition on the ground that Idaho does not recognize Lori and Sharene's marriage. Sharene Watsen Dec. ¶ 17; Lori Watsen Dec. ¶ 27 & Ex. C. As a result, every six months Sharene and Lori must create a new Medical Power of Attorney so that Lori can have legal authority to consent to medical treatment for their son. Sharene Watsen Dec. ¶ 20; Lori Watsen Dec. ¶ 30. Lori and Sharene are demeaned and harmed because Idaho's refusal to recognize their marriage causes them concern that their son may grow up believing that there is something wrong with his family because Idaho does not recognize his parent's marriage. *Id.*

Sharene and Lori intend to file a joint federal tax return this year. Sharene Watsen Dec. ¶ 22; Lori Watsen Dec. ¶ 32. Idaho, however, requires each of them to file state income tax returns separately and to falsely state on those documents that each is not married. *Id.; see also* note 2, *supra*.

Because Idaho does not recognize their marriage, Idaho law regards the property Lori and Sharene have acquired since their marriage in 2011 as separate, not community, property. Sharene Watsen Dec. ¶ 24; Lori Watsen Dec. ¶ 34. Both Lori and Sharene have filed quitclaim deeds in an attempt to transfer the title to their separate real property to marital community property. *Id.* Although the deeds were accepted for recording, Lori and Sharene have no certainty—and substantial reason to doubt—that the deeds will be enforceable absent an order from this Court compelling Idaho to recognize their marriage. *Id.*

Andrea Altmayer and Shelia Robertson. Andrea Altmayer ("Andrea") and Shelia Robertson ("Shelia") have been a couple for more than sixteen years and wish to marry in Idaho. Declaration of Shelia Robertson ("Shelia Robertson Dec.") ¶¶ 8, 15; Declaration of Andrea Altmeyer ("Altmayer Dec.") ¶ 6. In 2009, Andrea gave birth to their child, a boy. Altmayer Dec. ¶ 7.

Andrea and Shelia have been harmed by Idaho's marriage ban in many significant ways. Shelia Robertson Dec. ¶¶ 11-12, 15-18; Altmayer Dec. ¶¶ 8-12. Shelia is not recognized as their son's parent. Sheila Robertson Dec. ¶¶ 11-12, 18; Altmayer Dec. ¶¶ 8-9, 11. This has sweeping ramifications. *Id.* For example, Shelia cannot consent to medical treatment for him. Sheila Robertson Dec. ¶ 12; Altmayer Dec. ¶ 9. Additionally, neither Andrea nor their son can obtain health insurance coverage through Shelia's employer. Shelia Robertson Dec. ¶ 18; Altmayer Dec. ¶ 11. Andrea and Shelia are demeaned and harmed because Idaho's refusal to recognize their marriage causes them concern that their son may grow up believing that there is something wrong with his family because Idaho does not recognize his parent's marriage. Shelia Robertson Dec. ¶¶ 11-12, 15-18; Altmayer Dec. ¶¶ 8-9, 11.

Shelia and Andrea applied for and were denied a marriage license in Ada County, Idaho. Shelia Robertson Dec. ¶ 17; Altmayer Dec. ¶ 12. Other than the fact that Shelia and Andrea are both women, they meet all the legal requirements for marriage in Idaho. *Id.*

Amber Beierle and Rachael Robertson. Amber Beierle ("Amber") and Rachael Robertson ("Rachael") want to spend the rest of their lives together and to marry in Idaho. Declaration of Rachael Robertson ("Rachael Robertson Dec.") ¶ 9, 13; Declaration of Amber Beierle ("Beierle Dec.") ¶ 9, 12. Amber and Rachael bought a house together in December 2012. Rachael Robertson Dec. ¶ 12; Beierle Dec. ¶ 14. They attempted to get a mortgage

through the Veteran's Administration because of Rachael's status as a veteran, but the agency indicated that it would not allow Amber to be on the mortgage with Rachael. *Id.* Additionally, if Rachael and Amber were allowed to marry, Amber could provide health insurance coverage for Rachael. Rachael Robertson Dec. ¶ 14; Beierle Dec. ¶ 15. Moreover, they are harmed by Idaho's refusal to permit them to marry because they would like their jointly acquired property to be regarded as community property. *Id.*

Rachael and Amber applied for and were denied a marriage license in Ada County, Idaho. Rachael Robertson Dec. ¶ 15; Beierle Dec. ¶ 16. Other than the fact that Rachael and Amber are both women, they meet all the legal requirements for marriage in Idaho. *Id.*

ARGUMENT

I. LEGAL STANDARDS

A motion to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) "tests the legal sufficiency" of the asserted claims. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). When evaluating such a motion, the court must accept all material allegations in the complaint as true and construe them in the light most favorable to the non-moving party. *Id.*; *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). Plaintiffs are the non-moving party with respect to the motions to dismiss of Defendants Rich and the State of Idaho.

Summary judgment is appropriate where "there is no genuine issue as to any material fact exists and [] the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *see also* Fed. R. Civ. P. 56(c). Here, there are no disputes regarding material facts in connection with Plaintiffs' motion for summary judgment.

II. *BAKER V. NELSON* DOES NOT CONTROL THIS CASE.

Contrary to Defendants' arguments, the Supreme Court's summary dismissal of the appeal in *Baker v. Nelson*, 409 U.S. 810 (1972), for want of a substantial federal question more than forty years ago does not control this case. A summary dismissal is only dispositive as to the "precise issues" presented in a case, and *Baker* did not address the "precise issues" presented here. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Moreover, doctrinal developments have deprived *Baker* of precedential effect. *See Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (holding that courts need not "adhere to the view that if the Court has branded a question as unsubstantial, it remains so . . . when doctrinal developments indicate otherwise") (internal quotations omitted). Just last year, during oral argument in a case concerning California's exclusion of same-sex couples from marriage, the attorney defending California's Proposition 8 contended that *Baker* was controlling. Justice Ginsburg disagreed, stating: "*Baker v. Nelson* was 1971. The Supreme Court hadn't even decided that gender-based classifications get any kind of heightened scrutiny. . . . I don't think we can extract much in *Baker v. Nelson*." Transcript of Oral Argument at 12, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144). *Baker* was not mentioned by any other Justice during the argument, and none of the opinions in *Hollingsworth* or in *Windsor* mentioned *Baker*. *See Hollingsworth*, 133 S.Ct. 2652; *Windsor*, 133 S. Ct. at 2675. That is not surprising because, as explained below, *Baker* does not foreclose claims such as Plaintiffs' constitutional challenges to Idaho's marriage bans.

A. *Baker* Did Not Address The Precise Issues Presented By This Case.

The precedential reach of a summary dismissal by the Supreme Court is extremely limited: "'A summary disposition affirms only the judgment of the court below, and no more may be read into [such disposition] than was essential to sustain that judgment.'" *Montana v. Crow Tribe of Indians*, 523 U.S. 696, 714 n.14 (1998) (quoting *Anderson v. Celebrezze*, 460 U.S.

780, 785 n. 5 (1983)). The judgment affirmed in *Baker* addressed whether same-sex couples were denied equal protection and due process by Minnesota's marriage statute—a measure that did not indicate on its face whether same-sex couples could marry and that had not been enacted for the express purpose of excluding same-sex couples from marriage.[4] *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971). In contrast, the Idaho marriage bans that Plaintiffs here challenge were enacted for the express purpose of excluding same-sex couples from marriage and go so far as to enshrine that exclusion in Idaho's constitution, in addition to a statute. *Baker* did not address the constitutionality of such intentionally discriminatory measures.

Nor did *Baker* address the validity of measures—like Idaho's laws—that bar same-sex couples not only from marriage, but also from any official protection for their relationships. *Baker* cannot be read as deciding the validity of such a measure, which unlike the mere silence of the marriage laws at issue in *Baker*, was enacted for the express purpose of preventing any recognition or protection of same-sex couples and their families.

Further, at the time *Baker* was decided, no jurisdiction in the world permitted same-sex couples to marry. *Baker* presented no issue whatsoever regarding the recognition of marriages entered into in another state, unlike this case, in which Plaintiffs Sue Latta and Traci Ehlers, who married in California, and Plaintiffs Lori and Sharene Watsen, who married in New York, seek a ruling that Idaho must recognize their marriages.

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[4] It was not until 1977 that Minnesota expressly limited marriages to unions "between a man and a woman." Minn. Stat. Ann. § 517.01 (1977) (amended by Laws 1977, ch. 441, § 1). Today, Minnesota permits same-sex couples to marry. *See* Minn. Stat. Ann. § 517.01 (amended by Laws 1997, ch. 203, art. 10, § 1) (defining marriage as "a civil contract between two persons").

B. Significant Developments In The Supreme Court's Application Of The Equal Protection And Due Process Clauses Have Deprived *Baker* Of Precedential Effect.

Baker was decided more than forty years ago, before the Supreme Court held that heightened equal protection scrutiny applies to sex-based classifications. *See Craig v. Boren*, 429 U.S. 190, 197 (1976). At the time *Baker* was decided, the Supreme Court had not yet held that laws enacted for the express purpose of disadvantaging a particular group violate the requirement of equal protection. *See United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973). And the Court had not yet applied that principle to laws that target gay people. *Romer v. Evans*, 517 U.S. 620, 635 (1996); *see also Windsor*, 133 S. Ct. at 2693.

With respect to due process, the Court in 1971 had not yet held that same-sex couples have the same protected liberty interests in their relationships as others. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). Nor had the Supreme Court affirmed that "the right to marry is of fundamental importance for all individuals," *Zablocki*, 434 U.S. at 384, or held that incarcerated persons who are unable to engage in procreative intimacy nonetheless have a protected right to marry. *Turner v. Safley*, 482 U.S. 78, 94-97 (1987). In light of these profound developments, every federal court to consider post-*Windsor* whether *Baker* controls a challenge to a state law barring same-sex couples from marriage has concluded that the answer is no. *See, e.g.*, *Bostic v. Rainey*, No. 2:13-cv-395, 2014 WL 561978 at *10 (E.D. Va. Feb. 13, 2014); *Bourke v. Beshear*, No. 3:13-cv-750 2014 WL 556729 at *1 (W.D. Ky.Feb. 12. 2014); *Bishop v. United States*, No. 04-cv-848, 2014 WL 116013, at *15-17 (N.D. Okla. Jan. 14, 2014); *Kitchen v. Herbert*, No. 2:13-cv-217, 2013 WL 6697874, *7-9 (D. Utah Dec. 20, 2013); *Obergefell v. Wymyslo*, No. 1:13-cv-501, 2013 WL 6726688, at *1 (S.D. Ohio Dec. 23, 2013) (holding, without discussing *Baker*, that "*under the Constitution of the United States, Ohio must recognize on Ohio death certificates valid same-sex marriages from other states.*") (emphasis in original).

III. IDAHO'S MARRIAGE BAN DENIES SAME-SEX COUPLES EQUAL PROTECTION OF THE LAWS.

The Fourteenth Amendment's Equal Protection Clause ensures that the law "neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). By excluding same-sex couples from marriage and precluding recognition of the out-of-state marriages of same-sex couples, Idaho's marriage ban discriminates against those couples on the bases of their gender and sexual orientation. Supreme Court and Ninth Circuit precedent require that courts reviewing a law that discriminates based on sex or sexual orientation may not simply defer to the state's judgment, but must apply heightened scrutiny, carefully considering the law's effects and the state's reasons for enacting it. Such discriminatory laws may be upheld only if the state can offer an "exceedingly persuasive" justification for the differential treatment. *United States v. Virginia*, 518 U.S. 515, 531 (1996); *SmithKline*, 740 F.3d at 483; *see also Windsor*, 133 S. Ct. at 2675. The Idaho marriage ban not only fails this exacting test, but also cannot even satisfy the minimal rational basis test, because there is no rational connection between the various purported governmental objectives Defendants have proffered and the exclusion of same-sex couples from the protections and obligations of civil marriage.

A. Idaho's Marriage Ban Is Subject To Heightened Scrutiny Because It Discriminates On The Basis Of Sexual Orientation.

In a recent decision, the Ninth Circuit held that the Supreme Court's decision in *United States v. Windsor* "requires that heightened scrutiny be applied to equal protection claims involving sexual orientation." *SmithKline* 740 F.3d at 481. As explained below, there is no merit to the contention of Defendant-Intervenor State of Idaho that *SmithKline* is inapplicable here. In any event, laws such as Idaho's marriage bans that discriminate based on sexual

orientation are subject to heightened scrutiny based on factors that the Supreme Court has traditionally identified as warranting heightened scrutiny.

1. *SmithKline* Requires Application Of Heightened Scrutiny.

In *SmithKline*, the Ninth Circuit carefully examined the Supreme Court's decision in *Windsor* and concluded that it requires application of heightened scrutiny to laws that discriminate based on sexual orientation: "*Windsor* requires that when state action discriminates on the basis of sexual orientation, [courts] must examine its actual purposes and carefully consider the resulting inequality to ensure that our most fundamental institutions neither send nor reinforce messages of stigma or second-class status." *SmithKline*, 740 F.3d at 483. In plain terms, the court held that "earlier [Ninth Circuit] cases applying rational basis review to classifications based on sexual orientation cannot be reconciled with *Windsor*." *Id.* Rather, because "we are required by *Windsor* to apply heightened scrutiny to classifications based on sexual orientation for purposes of equal protection," "there can no longer be any question that gays and lesbians are no longer a 'group or class of individuals normally subject to "rational basis" review.'" *Id.* (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143 (1994)). *SmithKline* therefore establishes that, in the Ninth Circuit, laws that impose disadvantages based on an individual's sexual orientation are subject to heightened scrutiny.

In its memorandum in support of its motion to dismiss, Defendant-Intervenor State of Idaho attempts to distinguish *SmithKline* by arguing that Idaho's marriage ban does not discriminate on the basis of sexual orientation because a gay man is free to marry a woman and a lesbian is free to marry a man. (Dkt. 41-1 at 3-4.) That argument ignores that sexual orientation is defined by whether a person is attracted to and desires to have an intimate relationship with a person of the same sex or a person of the opposite sex. A law that prohibits same-sex couples

from marrying prevents a gay man or a lesbian from marrying a person of that individual's choice. Similarly, a law that withholds recognition of the existing marriage of a same-sex couple denies recognition based on a person's marital relationship with a person of the same sex. As numerous courts have agreed, such laws discriminate on the basis of sexual orientation.[5]

Indeed, *Windsor* makes plain the erroneousness of Defendants' position that a law restricting marriage or marriage recognition to opposite-sex couples does not discriminate based on sexual orientation. The federal Defense of Marriage Act ("DOMA") is such a law, and in *Windsor*, the Supreme Court noted that "the House [of Representatives] concluded that DOMA expresses 'both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo–Christian) morality.'" *Windsor*, 133 S. Ct. at 2694 (citation omitted).

In *Windsor*, the Supreme Court ruled that Section 3 of DOMA, which prohibited the United States from recognizing the marriages of same-sex couples for any purpose under federal law, violated the Fifth Amendment's guarantees of due process and equal protection. *See Windsor,* 133 S. Ct. at 2695-96. The Court held that Section 3 required "careful consideration" for equal protection and due process purposes because it represented a "[d]iscrimination[] of an unusual character"—namely, an unusual departure from the federal government's usual practice of respecting any marriage lawfully entered into under state law. *Id*. at 2692 (second alteration supplied). Applying "careful consideration," the Supreme Court in *Windsor* closely scrutinized

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[5] *See, e.g., Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012) (analyzing federal DOMA as discriminating against gay and lesbian people); *Massachusetts v. United States Dep't of Health & Human Servs*., 682 F.3d 1, 11 (1st Cir. 2012) (same)*; Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 997 (N.D. Cal. 2010); *In re Balas*, 449 B.R. 567 (Bankr. C.D. Cal. 2011); *In re Marriage Cases*, 183 P.3d 384, 442-43 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health,* 957 A.2d 407, 431-32 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa 2009).

both the purposes for which DOMA was enacted and its harmful effects on married same-sex couples and their children. The Court concluded that DOMA's "principal effect is to identify a subset of state-sanctioned marriages and make them unequal" and that its "principal purpose is to impose inequality." *Id.* at 2694. The Court observed that "[u]nder DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways . . . from the mundane to the profound." *Id.* The Court further observed:

> The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, *see Lawrence*, 539 U.S. 558, 123 S.Ct. 2472, and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

Id. at 2694. The Court held that DOMA Section 3 could not withstand scrutiny under due process and equal protection because "no legitimate purpose overcomes the purpose and effect to disparage and to injure" married same-sex couples. *Id.* at 2696. *SmithKline* requires that courts within the Ninth Circuit apply at least the same degree of scrutiny to laws that discriminate based on sexual orientation.

2. Even Apart From *SmithKline*, Heightened Scrutiny Is Warranted Based On The Traditional Factors Applied By The Supreme Court To Identify Suspect Classifications.

The Supreme Court's application of careful scrutiny in *Windsor* was consistent with the framework the Court has developed over many years for determining which classifications carry a high risk of reflecting prejudice or an improper purpose to harm a particular group, and, therefore, should be scrutinized more closely for equal protection purposes. The most important factors in this analysis are: (1) whether a classified group has suffered a history of invidious discrimination, and (2) whether the classification has any bearing on a person's ability to

perform in or contribute to society. *See Windsor v. United States*, 699 F.3d 169, 181 (2nd Cir. 2012). Occasionally, courts consider two additional factors to supplement their analyses: (3) whether the characteristic is immutable or an integral part of one's identity, and (4) whether the group is a minority or lacks sufficient political power to protect itself through the democratic process. *See, e.g., Frontiero v. Richardson*, 411 U.S. 677, 686 (1973); *Mathews v. Lucas*, 427 U.S. 495, 505 (1976); *Windsor*, 699 F.3d at 181. These last two factors are not essential to the analysis; the Supreme Court has never denied heightened scrutiny review where the group in question has experienced a long history of discrimination based on deep-seated prejudice and where the group's defining characteristic has no bearing on the ability of persons to contribute to society. Sexual orientation readily satisfies all of these factors, as many courts have acknowledged. *See, e.g., Windsor*, 699 F.3d at 185; *In re Marriage Cases*, 183 P.3d at 445; *Kerrigan*, 957 A.2d at 461; *Varnum*, 763 N.W.2d at 896 (Iowa 2009).

B. Idaho's Marriage Ban Is Also Subject To Heightened Scrutiny Because It Expressly Discriminates On The Basis of Gender Classifications And Because It Perpetuates Improper Gender-Based Stereotypes.

Idaho's marriage ban also warrants heightened equal protection scrutiny because it classifies on the basis of gender. Each Plaintiff would be permitted to marry her partner (or, in the case of the married Plaintiffs, would be recognized as a spouse) if their partners were male. Solely because the partner of each Plaintiff is a woman, however, they are denied these rights. *See Kitchen*, 2013 WL 6697874, at *20 ("Amendment 3 involves sex-based classifications because it prohibits a man from marrying another man, but does not prohibit that man from marrying a woman."); *Perry*, 704 F.Supp.2d at 996; *In re Levenson*, 560 F.3d 1145, 1147 (9th Cir. 2009) (EDR Plan administrative decision). The Equal Protection Clause prohibits such "differential treatment or denial of opportunity" based on a person's gender in the absence of an

"exceedingly persuasive" justification. *Virginia*, 518 U.S. at 515, 532-33 (internal quotation marks omitted). Defendants cannot muster even a minimally plausible—let alone, an "exceedingly persuasive"—justification for employing these gender-based distinctions to deny recognition to the lawful marriages of same-sex couples.

Defendant Rich argues that the marriage ban does not discriminate based on gender because it applies equally to prohibit both men from marrying men and women from marrying women. (Rich Mem. at 9.) In *Loving*, however, the Supreme Court rejected the argument that Virginia's law prohibiting interracial marriage should stand because it imposed its restrictions "equally" on members of different races. 388 U.S. at 8 (1967); *see also Powers v. Ohio*, 499 U.S. 410 (1991) (reiterating *Loving*'s holding "that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree," and holding that race-based peremptory challenges are invalid even though they affect all races).[6] That same reasoning applies to gender-based classifications. *See J.E.B.*, 511 U.S. at 140-141 (citing *Powers*, extending its reasoning to sex-based peremptory challenges, and holding that such challenges are unconstitutional even though they affect both male and female jurors). Under *Loving*, *Powers*, and *J.E.B.*, it is plain that the sex-based classifications in Idaho's marriage statutes are not immune from heightened scrutiny simply because they affect men and women the same way. Rather, the relevant inquiry under the Equal Protection Clause is whether the law treats *an individual* differently because of his or her gender. *Id.* "The neutral phrasing of the Equal Protection Clause, extending its guarantee to 'any person,' reveals its concern with rights of individuals, not groups (though group disabilities are sometimes the mechanism by which the

[6] *See also Perez v. Sharp*, 198 P.2d 17, 20 (Cal. 1948) ("The decisive question . . . is not whether different races, each considered as a group, are equally treated. The right to marry is the right of individuals, not of racial groups.").

State violates the individual right in question)." *J.E.B.*, 511 U.S. at 152 (Kennedy, J., concurring in the judgment); *id.* at 152-153 (observing that the federal Equal Protection Clause is primarily "concern[ed] with rights of individuals, not groups").

Idaho's marriage ban also discriminates based on gender because it seeks to enforce impermissible gender stereotypes and expectations regarding the supposedly proper roles of men and women. The Supreme Court "ha[s] made abundantly clear . . . that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause." *J.E.B.*, 511 U.S. at 140. In particular, in a long line of cases, the Supreme Court has held that the government may not enforce gender-specific rules based on expectations about roles that women and men should perform within the family, whether as caregivers, breadwinners, heads of households, or parents.[7]

Like the laws in those cases, Idaho's marriage ban overtly classifies based on gender and reflects deeply entrenched expectations about gender—namely, that a woman's most intimate relationship and marriage should be with a man, and that a man's most intimate relationship and marriage should be with a woman. While that expectation holds true for many people, it does not hold true for Plaintiffs and other same-sex couples, who yearn to be married to the person of their choice. By enforcing "assumptions about the proper roles of men and women," Idaho's

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[7] *See, e.g.*, *Reed v. Reed*, 404 U.S. 71 (invalidating Idaho law that gave men preference over women in administering estates); *see also Califano v. Westcott*, 443 U.S. 76, 89 (1979) (finding unconstitutional federal statute providing for support in event of father's unemployment, but not mother's unemployment; describing measure as based on stereotypes that father is principal provider "while the mother is the 'center of home and family life'"); *Orr v. Orr*, 440 U.S. 268, 283 (1979) (invalidating measure imposing alimony obligations on husbands, but not on wives, because it "carries with it the baggage of sexual stereotypes"); *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975) (finding unconstitutional state support statute assigning different age of majority to girls than to boys and stating, "[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas").

marriage ban deprives individuals of their essential liberty to depart from gender-based expectations. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982). Because Idaho's marriage ban discriminates based on gender, it cannot be upheld unless that discrimination is supported by an "exceedingly persuasive justification," which Defendants cannot provide, as explained in the following section.

C. Idaho's Marriage Ban Violates Equal Protection Under Any Standard Of Review.

Although binding precedent requires the Court to apply heightened scrutiny, Idaho's marriage ban would violate equal protection under any standard of review. Even ordinary rational basis review is not "toothless." *Mathews v. de Castro,* 429 U.S. 181, 185 (1976) (quoting *Mathews v. Lucas*, 427 U.S. 495, 510 (1976)). Rather, even under that most lenient form of equal protection review, there must be a rational relationship "between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632-33. When a law is "so far removed from [its] particular justifications that [courts] find it impossible to credit them," the law violates the basic equal protection requirement that a law possess "a rational relationship to a legitimate governmental purpose." *Id.* at 635; *see also Diaz v. Brewer*, 656 F.3d 1008, 1014-15 (9th Cir. 2011) (affirming preliminary injunction barring enforcement of state law stripping employee benefits from same-sex domestic partners of state workers because "the record established that the statute was not rationally related to furthering [the state's asserted] interests"). "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, [courts] ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633. None of Defendants' asserted justifications for Idaho's marriage ban satisfies even these basic standards, let alone the careful scrutiny that Supreme Court and Ninth Circuit precedent requires.

In cases concerning the rights of gay and lesbian persons, the Supreme Court has rejected the purported governmental interests proffered by Defendants in support of Idaho's marriage bans. Appeals to history and tradition cannot justify the harms that Idaho's marriage bans inflict on Plaintiffs, because tradition is not a legitimate reason to deny equal treatment to same-sex couples and relationships. *See Lawrence*, 539 U.S. at 577-78. Likewise, moral disapproval of same-sex couples and relationships is never a legitimate governmental interest that could justify discriminatory legislation. *Windsor*, 133 S. Ct. at 2695; *Lawrence*, 539 U.S. at 571; *Romer*, 517 U.S. at 634-35. Nor can the marriage bans be defended based on the unfounded arguments that excluding same-sex couples and their children from marriage and the legal protections that accompany marriage will somehow promote procreation by opposite-sex couples, or that married opposite-sex couples supposedly make better parents than married same-sex couples. Those arguments have no basis in reality, and there simply is no rational connection between forbidding same-sex couples to marry and any asserted governmental interest in encouraging procreation and parenting of biological children by married opposite-sex couples. Preventing same-sex couples from marrying (and refusing to recognize the existing marriages of same-sex couples) does nothing to advance these goals, but serves only to penalize and inflict gratuitous injury on same-sex couples and the children they are already raising. *See, e.g., Windsor*, 133 S. Ct. at 2696; *Kitchen*, 2013 WL 6697874, at *26.

Every justification now asserted by Defendants in support of Idaho's marriage ban was also presented to the Supreme Court in support of DOMA in *Windsor*. *See* Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 267026, at *28-*49. The Supreme Court found none of those purported governmental interests sufficient to save

DOMA from invalidity. *See Windsor*, 133 S. Ct at 2696; *see also SmithKline*, 740 F.3d at 481-82. As one district court very recently observed, each of the procreation-related justifications on which Defendants rely "has failed rational basis review in every court to consider them post-*Windsor*, and most courts pre-*Windsor*." *Bourke*, 2014 556729, at *8 (citing *Bishop*, 2014 WL 116013, at *28-*33; *Kitchen*, 2013 WL 6697874, at *25-*27; *Obergefell*, 2013 WL 6726688, at *20. This Court should conclude the same, as explained below.

1. There Is No Rational Connection Between Idaho's Marriage Bans For Same-Sex Couples And Defendants' Asserted Interest In Furthering Stability Of Opposite-Sex Couples' Marriages Due To Their "Procreative Capacity."

Defendants argue that Idaho's marriage bans are justified by Idaho's interest in fostering stability in opposite-sex relationships since only those relationships have "biological procreative capacity." *See* Rich Mem. at 11. Defendants go on to assert that Idaho is justified in targeting its "limited resources"[8] on relationships that produce "virtually all children," and that the state rationally could extend marriage only to opposite-sex couples in order to "foster[] stable environments for childrearing by biological parents." *Id.* at 15. What Defendants do not

[8] Defendants never articulate what they mean by the State's "limited resources" to foster marriage. Whatever Defendants may have intended, it is clear that an interest in conserving resources cannot justify Idaho's marriage ban. Marriage licenses are not a scarce resource; issuance of marriage licenses to same-sex couples does not reduce the number available to other couples. And even if Defendants could demonstrate that allowing same-sex couples to marry would negatively affect state expenditures or resources in other ways—something they have not even attempted to do—that still would not justify conserving resources by singling out a disfavored subset of citizens for unequal treatment. Even under rational basis review, the government must articulate more than a desire to save resources; it must justify why it chose a particular group to bear the burden of cost savings. *Plyler v. Doe*, 457 U.S. 202, 227, 229 (1982) (cost-cutting could not justify denying free public education to children of undocumented immigrants); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969) ("[a state] must do more than show that denying welfare benefits to new residents saves money"), *overruled in part on other grounds*, *Edelmann v. Jordan*, 415 U.S. 651 (1974). *See also Diaz*, 656 F.3d at 1013 ("[W]hen a state chooses to provide [health care] benefits [to couples], it may not do so in an arbitrary or discriminatory manner that adversely affects particular groups that may be unpopular.").

explain, however, is how *excluding* committed same-sex couples from civil marriage furthers the stability of opposite-sex relationships, increases the likelihood that children will be raised by their married biological parents, or enhances the wellbeing of children who are raised in such marriages.

As numerous courts around the country have held—including *every* federal court to consider the question since *Windsor*—Defendants' failure to demonstrate that excluding same-sex couples from marriage rationally advances these asserted procreation-related governmental objectives means that Idaho's marriage ban cannot survive any level of scrutiny. *See Bostic*, 2014 WL 561978, at *18 ("Of course the welfare of our children is a legitimate state interest. However, limiting marriage to opposite-sex couples fails to further this interest."); *see also Bishop*, 2014 WL 116013, at *29 (same); *Kitchen*, 2013 WL 6697874, at *25 (same) *Obergefell*, 2013 WL 6726688, at *20 (same); *Bourke*, 2014 WL 556729, at *8 (same).

The lack of a rational connection between Idaho's marriage ban and the asserted interest in creating a stable relationship for biological procreation is further demonstrated by the fact that Idaho does not require a couple to be willing or able to procreate in order to marry. "Permitting same-sex couples to receive a marriage license does not harm, erode, or somehow water-down the 'procreative' origins of the marriage institution, any more than marriages of couples who cannot 'naturally procreate' or do not ever wish to 'naturally procreate.'" *Bishop*, 2014 WL 116013, at *29; *see also Bostic*, 2014 WL 561978, at *19 ("The 'for-the-children' rationale also fails because it would threaten the legitimacy of marriages involving post-menopausal women, infertile individuals, and individuals who choose to refrain from procreating."). The Constitution protects all individuals' right to marry, including those who do not wish to have children or are unable to do so because of age, infertility, or incarceration. *See Turner*, 482 U.S. at 95-96;

Lawrence, 539 U.S. at 604-05 (Scalia, J., dissenting) (stating the "the encouragement of procreation" cannot "possibly" be a justification for barring same-sex couples from marriage "since the sterile and the elderly are allowed to marry)."

In any event, Idaho's marriage ban does not classify based on "procreative ability" as Defendants contend. Rich Mem. at 16 & n.7. Rather, it classifies based on the gender and sexual orientation of the partners, regardless of their procreative abilities. Because Idaho does not condition the right to marry on procreative ability, the state cannot selectively rely on procreation only when it comes to same-sex couples while declining to impose such a requirement on opposite-sex couples. Even "[a]ssuming a state can rationally exclude citizens from marital benefits due to those citizens' inability to 'naturally procreate,' the state's exclusion of only same-sex couples in this case is so grossly underinclusive that it is irrational and arbitrary." *Bishop*, 2014 WL 116013, at *30.

2. There Is No Rational Connection Between Idaho's Marriage Ban For Same-Sex Couples And Defendants' Asserted Interest In Promoting "Optimal Childrearing."

Defendants assert that Idaho's marriage ban also is justified by a state interest in optimal parenting, claiming that "[c]hildren generally thrive best in intact family structures where their biological parents are married." Rich Mem. at 13. As an initial matter, it bears emphasis that Idaho does not insist upon "optimal childrearing" skills or environment as a condition for opposite-sex couples to marry or to have their marriages recognized. Defendants' purported rationale for excluding same-sex couples from marriage based on such criteria is, once again, "so grossly under inclusive that it is irrational and arbitrary." *Bishop*, 2014 WL 116013, at *30. Moreover, the exclusion of same-sex couples from marriage has no effect on who can be a parent, nor does it affect opposite-sex couples' incentives to raise their biological children within

a marital relationship in any reasonably conceivable way. There is no rational connection between the marriage ban and this asserted interest. *See, e.g.*, *Bishop*, 2014 WL 116013, at *31 ("[T]he Court cannot discern, a single way that excluding same-sex couples from marriage will 'promote' this 'ideal' child-rearing environment."); *Kitchen*, 2013 WL 6697874, at *25 ("[T]he State fails to demonstrate any rational link between its prohibition of same-sex marriage and its goal of having more children raised in the family structure the State wishes to promote."); *Obergefell*, 2013 WL 6726688, at *20 ("Even if it were rational for legislators to speculate that children raised by heterosexual couples are better off than children raised by gay or lesbian couples, *which it is not*, there is simply no rational connection between the Ohio marriage recognition bans and the asserted goal, as Ohio's marriage recognition bans do not prevent gay couples from having children." (emphasis in original)).

Furthermore, the scientific consensus of every national health care organization charged with the welfare of children and adolescents—including the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, the American Psychiatric Association, the American Psychological Association, the American Psychoanalytic Association, the American Sociological Association, the National Association of Social Workers, the American Medical Association, and the Child Welfare League of America—based on a significant and well-respected body of current research, is that children and adolescents raised by same-sex parents, with all things being equal, are as well-adjusted as children raised by opposite-sex parents. *See* Brief of American Psychological Association, et al. as *Amici Curiae* on the Merits in Support of Affirmance, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307).

Numerous courts have recognized this overwhelming scientific consensus. *See, e.g.*, *Bostic*, 2014 WL 2:13cv395, at *30 ("Gay and lesbian couples are as capable as other couples of

raising well-adjusted children."); *Golinski v. U.S. Office of Personnel Mgmt.*, 824 F.Supp.2d 968, 991 (N.D. Cal. 2012) ("More than thirty years of scholarship resulting in over fifty peer-reviewed empirical reports have overwhelmingly demonstrated that children raised by same-sex parents are as likely to be emotionally healthy, and educationally and socially successful as those raised by opposite-sex parents") (citations omitted); *Obergefell*, 2013 WL 6726688, at *20 n.20 (same) ; *see also* Expert Declaration of Dr. Michael E. Lamb ("Lamb Decl."), filed concurrently herewith, at ¶ 13 ("Children and adolescents raised by same-sex parents are as likely to be well-adjusted as children raised by different-sex parents, including biological parents.").[9]

The hodgepodge of articles cited by Defendants in support of their "optimal parenting" rationale either support Plaintiffs' position or are wholly unrelated to same-sex couples and their children. Defendants cite a study by Kristin A. Moore to support their claim that it is the "presence of two biological parents that seems to support children's development." Rich Mem. at 13-14. But as Moore's study notes on the very first page, the study was conducted before same-sex parents (or adoptive parents) were identified in large national surveys and therefore, "no conclusions can be drawn from this research about the well-being of children raised by same-sex or adoptive parents." *See* Dkt. 30-7 at 2; Lamb Decl. at ¶ 44 n. 8. Defendants also cite a study by Benjamin Scafide, Rich Mem. at 15, but that paper simply compares children born and raised by single parents to those born and raised by married parents. Lamb Decl. at ¶ 40 n. 9.[10] Defendants cite Elizabeth Wildsmith's finding that "'[r]educing nonmarital childbearing and

[9] Dr. Lamb is a preeminent scholar with forty years of experience in children's development and adjustment. Lamb Decl. at ¶¶ 1-10 and Ex. A.

[10] Defendants' citations to articles by Amato and Wilson are similarly unavailing since "studies comparing two parent families to step-parent families have not examined children being

promoting marriage among unmarried parents remain important goals of federal and state policies and programs designed to improve the well-being of children and reduce their reliance on public assistance.'" *Id.* at 14-15. Defendants fail to explain how or why this article, which simply evaluated data about women who have children outside of marriage, supports the view that same-sex couples should be excluded from marriage. Lamb Decl. at ¶ 45 n. 10. Indeed, these articles show that society, individuals, and children all benefit when marriage is available, expressly supporting Plaintiffs' arguments in this case.

Defendants are undoubtedly correct that marriage provides enormous benefits for children. What Defendants ignore is that same-sex couples are also raising children, and those children are no less deserving of the protections associated with having parents who are married. As other courts have concluded, children of same-sex couples "are also worthy of the State's protection," and state marriage bans "harm[] [those children] for the same reasons that the Supreme Court found that DOMA harmed the children of same-sex couples." *Kitchen*, 2013 WL 6697874, at *26. Indeed, "[t]he only effect the bans have on children's well-being is harming the children of same-sex couples who are denied the protection and stability of having parents who are legally married." *Obergefell*, 2013 WL 6726688, at *20. Far from protecting children, Idaho's marriage ban "needlessly stigmatiz[es] and humiliate[es] children who are being raised by . . . loving [same-sex] couples." *Bostic*, 2014 No. 2:13cv395, at *30.

Defendants utterly ignore that children of same-sex couples are harmed by Idaho's laws. Instead, they argue that it is rational for the state to penalize those couples and their children by excluding them from marriage because those families represent "a miniscule number of households affected." Rich Mem. at 13; *see also id.* at 12 (claiming that Idaho must "target its

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raised by same-sex couples who jointly planned to bring children into their families either by birth or adoption, and jointly raise the children." Lamb Decl. at ¶ 43.

limited resources" on opposite-sex relationships that "produce virtually all children"); *id.* at 12 (stating that only a "minute fraction" of same-sex couples in Idaho have minor children); see also *id.* at 16-17 (same). Defendants' suggestion that the number of same-sex couples in Idaho justifies the state in imposing inequality, stigma, and tangible harm on those couples and their children is not only deeply offensive, it is repugnant to our constitutional tradition.

Defendants' argument is similar to arguing that a religious congregation can be denied its freedom to worship because it has only a few members, or that a newspaper can be censored because of its small circulation—or that any other group constituting only a tiny percentage of the population can rationally be excluded from marriage and its protections. It is axiomatic that "[a] citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." *Lucas v. Forty-Fourth Gen. Assembly of State of Colo.*, 377 U.S. 713, 736-37 (1964). As the Supreme Court noted in *Lucas*:

> It is too clear for argument that constitutional law is not a matter of majority vote. Indeed, the entire philosophy of the Fourteenth Amendment teaches that it is personal rights which are to be protected against the will of the majority…. The plaintiffs have a right to expect that the cause will be determined in relation to the standards of equal protection. Utilization of other or different standards denies them full measure of justice.

Lucas, 377 U.S. at 737 n. 30 (quoting *Lisco v. Love*, 219 F.Supp. 922, 944 (D. Colo. 1963)).

Moreover, when laws draw distinctions based on "some unpopular trait or affiliation," as Idaho's marriage laws do here, they "create or reflect [a] special likelihood of bias on the part of the ruling majority." *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 593 (1979). Because those characteristics "are so seldom relevant to the achievement of any legitimate state interest[,] laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others." *City of Cleburne v.*

Cleburne Living Ctr., 473 U.S. 432, 440 (1985). "Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that *each person* is to be judged individually and is entitled to equal justice under the law." *Plyler*, 457 U.S. at 216 n.14 (emphasis added).

3. No Legitimate Interest Overcomes The Primary Purpose And Practical Effect Of Idaho's Marriage Ban To Disadvantage And Stigmatize Same-Sex Couples And Their Children.

For the reasons stated above, Idaho's marriage bans cannot survive even rational basis review because there is no rational connection between excluding same-sex couples from marriage and the advancement of the governmental objectives asserted by Defendants. But Idaho's marriage bans also fail constitutional scrutiny for additional reasons. *Windsor* and *SmithKline* require Defendants to establish much more than a rational connection to a hypothetical justification. Because the marriage ban targets same-sex couples and their children for unequal treatment, the Court must carefully consider the actual purpose and effect of the Idaho ban, and must strike down the exclusion unless Defendants can show that it advances a governmental interest sufficiently strong that it "overcomes the [law's] purpose and effect to disparage and to injure" same-sex couples. *Windsor*, 133 S. Ct. at 2696; *see also SmithKline*, 740 F.3d at 481-82. Here, the record demonstrates that the Idaho marriage bans were enacted in order to impose legal disadvantages on same-sex couples. Under *Windsor* and *SmithKline*, this purpose to impose inequality on same-sex couples violates equal protection even if Defendants can proffer some legitimate hypothetical justification for the law, which they cannot.[11]

[11] It is important to recognize that the improper purpose or "animus" that led the Supreme Court to strike down Section 3 of DOMA in *Windsor* does not mean that those in Congress who enacted the statute harbored malice or subjective ill will toward gay people. Instead, it was sufficient that the primary effect of the law and its reason for enactment were to deny equal

Perhaps the most fundamental requirement of equal protection is that all laws must be enacted to further a legitimate governmental purpose, not to disadvantage a particular group. *See Windsor*, 133 S. Ct. at 2693, 2696; *Romer*, 517 U.S. at 633; *Moreno*, 413 U.S. at 534-35. When the actual purpose and effect of a law is to disadvantage same-sex couples, courts may not blindly accept the state's proffered rationales for the law, but must carefully scrutinize the "design, purpose, and effect" of the law to determine whether any "legitimate purpose overcomes the purpose and effect to disparage and to injure" the class harmed by the law. *Id.* at 2689, 2696. "When the primary purpose and effect of a law is to harm an identifiable group, the fact that the law may also incidentally serve some other neutral governmental interest cannot save it from unconstitutionality." *Obergefell*, 2013 WL 6726688, at *21. "If the principal purpose or effect of a law is to impose inequality, a court need not even consider whether the class of citizens that the law effects requires heightened scrutiny or a rational basis approach. Such laws are 'not within our constitutional tradition,' *Romer*, 517 U.S. at 633, and violate the Equal Protection Clause regardless of the class of citizens that bears the disabilities imposed by the law." *Kitchen*, 2013 WL 6697874, at *22.

Just as the "principal purpose" and "necessary effect" of DOMA were to "impose inequality" on same-sex couples and their children, *Windsor*, 133 S. Ct. at 2694, 2695, so too the purpose and effect of the Idaho marriage bans are to prevent same-sex couples from marrying

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treatment to same-sex couples. Such purposeful imposition of unequal treatment does not necessarily involve malice, but may reflect "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable" by the government in enacting legislation. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985). As Justice Kennedy has observed, such attitudes "may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Bd. of Trs. of Univ. of Alabama v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). For the same reasons, the fact that Idaho's marriage bans were enacted for the improper purpose of treating same-sex couples unequally does not mean that those who supported or voted for the bans were motivated by malice or ill will.

and to deny recognition to the marriages of same-sex couples from other states. The marriage bans were enacted as part of a national wave of statutes and state constitutional amendments aimed at preventing same-sex couples from marrying. *Cf. Windsor*, 133 S. Ct. at 2693 (examining historical context of DOMA); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) (explaining "historical background of the decision" is relevant when determining legislative intent). For instance, House Speaker Simpson made clear his view that House Bill 658, which amended Idaho Code Ann. § 32-209, should be enacted because Hawaii might recognize same-sex marriages, thereby "forcing Idaho to make a choice to either pass this bill reinforcing the current policy or recognize same sex marriage by default." *See* Minter Decl., Ex. A at 2; *see also id.* at 4 (statement from Representative William Sali that legislation was drafted due to actions of Hawaii). Similarly, the legislature enacted Section 28 of the Idaho Constitution in the wake of the Massachusetts Supreme Judicial Court's ruling—the first in the nation—requiring a state to permit same-sex couples to marry. Minter Decl., Ex. B at 4 (Statement by Senator Gerry Sweet, a sponsor of the bill, that while four judges decided this issue in Massachusetts, a vote of the people should decide the issue in Idaho); *id.* at 2 (reference by Senator Curt McKenzie, another sponsor of the bill, to the Massachusetts decision).[12] Like the federal DOMA, Idaho's marriage ban has much more than an "incidental effect" on "the

[12] Notably, the Idaho legislature attempted to pass similar constitutional amendments in 2004 and 2005, as well, the years immediately following the Massachusetts ruling. Regarding the proposed amendment in 2004, Representative Henry Kulczyk, a sponsor of the bill, explained during a public hearing that it was necessary "in view of the overturning of the Massachusetts law regarding marriage." Minter Decl., Ex. F at 1. He then quoted President George W. Bush's statement that "[m]arriage is a sacred institution between a man and a woman. If activist judges insist on re-defining marriage by court order, the only alternative will be the constitutional process. We must do what is legally necessary to defend the sanctity of marriage." *Id.*

equal dignity of same-sex" relationships—rather, denying them equal treatment and respect is the "essence" of these laws. *Windsor*, 133 S. Ct. at 2693.

The legislative debates similarly reflect that Idaho's marriage ban, like DOMA, was intended to express moral disapproval of same-sex couples—in the guise of supposedly fostering "temperance and morality"—and not, as Defendants claim now, to promote responsible procreation. Minter Decl., Ex. C at 1 (quoting House Majority Leader Lawrence Denney). Just as DOMA had an impermissible purpose of "promot[ing] an 'interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws'" and just as DOMA's title—"Defense of Marriage Act"—was deemed by the Supreme Court to be evidence of impermissible intent, *Windsor*, 133 S. Ct. at 2693, Idaho's marriage ban was similarly enacted "to *protect marriage* as being only between a man and a woman." Minter Decl., Ex. D at 1 (emphasis added); *see also id.*, Ex. E at 1 (noting Majority Leader Denney's statement that the amendment is needed "to ensure the State of Idaho's policy provides for and protects the traditional institution of marriage.").[13]

Moreover, as discussed above, the Idaho constitutional amendment included a provision mandating that "[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. Far from simply promoting marriage for opposite-sex couples, Idaho thus took the extreme and drastic step of prohibiting every form of legal recognition for same-sex couples and their families. Such a total exclusion of same-sex couples and their families from legal status and protection is an

[13] With respect to the similar constitutional amendment attempted in 2004, House Majority Leader Denney also said "this is a moral issue" and that "we can and we must legislate moral laws." Minter Decl., Ex. F at 4.

impermissible form of "[c]lass legislation" that is "obnoxious to the prohibitions of the Fourteenth Amendment." *Romer*, 517 U.S. at 635 (internal quotation marks omitted).

In addition to the legislative evidence showing the impermissible purposes of these laws, the "practical effect" of Idaho's marriage ban is "to impose a disadvantage, a separate status, and so a stigma upon" same-sex couples in the eyes of state officials and other Idaho residents. *Windsor*, 133 S. Ct at 2693. Like DOMA, Idaho's marriage ban "demeans the couple, whose moral and sexual choices the Constitution protects." *Id.* at 2694 (citing *Lawrence*, 539 U.S. 558). It also "humiliates" the "children now being raised by same-sex couples . . . [making] it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Id.* "This government-sponsored message [i]s in itself a harm of great constitutional significance." *SmithKline*, 740 F.3d at 482.

In sum, the legislative record and the circumstances surrounding the marriage bans' enactments—as well as the bans' plain language and stated intent to prevent same-sex couples from gaining access to marriage or any other type of family protections—demonstrate that its purpose and effect are to impose inequality on same-sex couples and their families. As shown above, Idaho's marriage bans are not rationally related to any legitimate purpose. But even if there were a rational connection between the marriage bans and some hypothetical governmental interest, such an interest would be insufficient to "overcome[] the purpose and effect to disparage and to injure" same-sex couples and their families, *Windsor*, 133 S. Ct at 2696, and to "send [and] reinforce messages of stigma or second-class status." *SmithKline*, 740 F.3d at 483; s*ee also Obergefell*, 2013 WL 6726688, at *21 ("Even if it were possible to hypothesize regarding a rational connection between Ohio's marriage recognition bans and some legitimate governmental

interest, no hypothetical justification can overcome the clear primary purpose and practical effect of the marriage bans ... to disparage and demean the dignity of same-sex couples in the eyes of the State and the wider community.") (ellipsis in original).

IV. IDAHO'S EXCLUSION OF SAME-SEX COUPLES FROM MARRIAGE VIOLATES DUE PROCESS.

The Due Process Clause "guarantees more than fair process"; it "also includes a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (internal quotation marks and citations omitted). Idaho's marriage ban violates due process by depriving Plaintiffs and other same-sex couples of the fundamental right to marry the one unique person with whom each has chosen to build a life, a home, and a family.

A. The Constitutional Right To Marry Is Rooted In And Protects Each Person's Fundamental Interests In Privacy, Autonomy, And Freedom Of Association; Same-Sex Relationships Share "Equal Dignity" With Respect To These Interests.

The right to marry is among the most cherished freedoms protected by the Federal Constitution. "The right to marry and to enjoy marriage are unquestionably liberty interests protected by the Due Process Clause." *Ching v. Mayorkas*, 725 F.3d 1149, 1157 (9th Cir. 2013). In decisions stretching back more than ninety years, the Supreme Court has defined marriage as a fundamental right of liberty, *see Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), of privacy, *see Griswold v. Connecticut*, 381 U.S. 479, 486 (1965), and of association, *see M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996).[14] For many people, marriage is "the most important relation in life."

[14] The Supreme Court has repeatedly held that the right to marry is fundamental. *Turner*, 482 U.S. at 95 ("the decision to marry is a fundamental right."); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-640 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due

Zablocki, 434 U.S. 384 (internal quotation omitted). It "is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Griswold*, 381 U.S. at 486.

The unmarried Plaintiffs yearn to participate in this deeply valued and cherished institution. These Plaintiffs have each demonstrated their commitment to one another, built stable families together, and contributed to their communities. They seek to be treated as equal, respected, and participating members of society who—like others—are able to marry the person of their choice. In *Lawrence*, the Supreme Court held that lesbian and gay people have the same protected liberty and privacy interests in their intimate relationships as heterosexual people. *See Lawrence*, 539 U.S. at 578. The Court explained that decisions about marriage and relationships "'involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy,'" and that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Id*. at 574. In *Windsor*, the Court powerfully reaffirmed the "equal dignity" of same-sex couples' relationships in the context of federal recognition of the marriages of same-sex couples, noting that the right to intimacy recognized in *Lawrence* "can form 'but one element in a personal bond that is more enduring.'" *Windsor*, 133 S. Ct. at 2693, 2692 (quoting *Lawrence*, 539 U.S. at 567).

Excluding Plaintiffs and other same-sex couples from marriage undermines the core constitutional values and principles that underlie the fundamental right to marry. The freedom to marry is protected by the Constitution because the intimate relationships a person forms, and the decision whether to formalize such relationships through marriage, implicate deeply held personal beliefs and core values. Permitting the government, rather than individuals, to make

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Process Clause . . . ."); *see generally Washington v. Glucksberg*, 521 U.S. 702, 727 n.19 (1997) (collecting cases).

such personal decisions would impose an intolerable burden on individual dignity and self-determination. *Loving*, 388 U.S. at 12 ("Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State."); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984) ("[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse. . . ."). As the California Supreme Court recognized when it became the first state supreme court to strike down a ban on marriage by interracial couples in 1946, people are not "interchangeable." *Perez v. Lippold* (*Perez v. Sharp*), 198 P.2d 17, 25 (Cal. 1948).

Like the laws struck down in *Perez* and *Loving*, Idaho's marriage ban violates Plaintiffs' dignity and autonomy by denying persons in same-sex relationships the freedom—enjoyed by other Idaho residents—to marry the person with whom they have forged enduring bonds of love and commitment and who, to each of them, is irreplaceable. Particularly in light of *Windsor*, it is clear that same-sex couples are like other couples with respect to "the inner attributes of marriage that form the core justifications for why the Constitution protects this fundamental human right." *Kitchen*, 2013 WL 6697874, at *13; *see also Bostic*, 2014 WL WL 561978, at *13 ("Gay and lesbian individuals share the same capacity as heterosexual individuals to form, preserve and celebrate loving, intimate and lasting relationships. Such relationships are created through the exercise of sacred, personal choices—choices, like the choices made by every other citizen, that must be free from unwarranted government interference.").

In addition, full citizenship—on which our democracy rests—is impossible when fundamental rights such as the right to marry are denied to one group of people. The freedom to marry safeguards "the decentralized structure of our democratic society," ensuring that there is a realm of private family life into which the government may not impermissibly intrude. *Lehr v.*

Robertson, 463 U.S. 248, 257 (1983). As an institution in which individuals exercise freedom of choice without undue interference from the State, marriage "nurtures and develops the individual initiative that distinguishes a free people." *De Burgh v. De Burgh*, 250 P.2d 598, 601 (Cal. 1952); *cf. Bowers v. Hardwick*, 478 U.S. 186, 211 (1986) (Blackmun, J., dissenting) ("It is precisely because the issue raised by this case touches the heart of what makes individuals what they are that we should be especially sensitive to the rights of those whose choices upset the majority."), *overruled by Lawrence*, 539 U.S. 558.

B. Plaintiffs Seek To Exercise The Same Fundamental Right To Marry That All Other Individuals Enjoy, Not Recognition Of A New Right To "Same-Sex Marriage."

In contending that the marriage bans do not infringe on Plaintiffs' fundamental right to marry, Defendants erroneously suggest that the right in question is a right to "same-sex marriage." (Rich Mem. at 7-8.) Plaintiffs, however, do not seek a new right. Rather, as equal citizens of this state, they seek to have the same "freedom of personal choice in matters of marriage and family life," *Cleveland Bd. Of Educ.*, 414 U.S. at 639, that is protected for others. Defendants offer no *substantive* reason why Plaintiffs are unfit to exercise this fundamental right or should be excluded from it. Instead, Defendants argue formalistically that because the right to marry has not been understood to include same-sex couples in the past, it must be understood to exclude them now. Rich Mem. at 8 (arguing that past decisions about marriage have involved opposite-sex couples and that Plaintiffs must therefore be seeking a new right to "same-sex marriage"). But Plaintiffs' fundamental liberty interests cannot be sidestepped in this manner.

The notion that fundamental rights are protected for some groups and not others is anathema to our Constitution. "Fundamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights." *In*

re Marriage Cases, 183 P.3d at 430 (internal quotation marks and alterations omitted). Plaintiffs seek to make a legally binding commitment to one another and their children and to join their lives in a way that must be respected by the government and third parties. To suggest that the right to form a legally protected family is inherently restricted to opposite-sex couples (and that permitting same-sex couples to marry therefore requires the recognition of a "new" right), tautologically begs the very question to be answered in this case. Massachusetts Justice Greaney explained the flaw in this position in his concurring opinion in *Goodridge*: "To define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of those to whom it never has been accessible, is conclusory and bypasses the core question . . . ." 798 N.E.2d at 972-73 (Greaney, J., concurring); *see also id.* at 973 n.5.

The Supreme Court has rejected any notion that the scope of a fundamental right can be limited based on historical patterns of discrimination. In *Loving*, the Supreme Court struck down Virginia's laws barring interracial couples from marriage, even though race-based restrictions on marriage were deeply entrenched in our nation's history and traditions. *See Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 847-48 (1992) ("[I]nterracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving*. . . ."); *Lawrence*, 539 U.S. at 577-78 ("[N]either history nor tradition could save a law prohibiting miscegenation from constitutional attack.") (quotation omitted). *Loving* did not recognize a new right to "interracial marriage," but rather affirmed that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." 388 U.S. at 12. The same principle, and the same reasoning, apply

here. Indeed, it is no more appropriate to speak of a right to "same-sex marriage" than to talk about a right to "women's vote" or to "interracial education."

Decisions after *Loving* have confirmed that marriage is of "fundamental importance for all individuals," *Zablocki,* 434 U.S. at 384, and have expressly declined to limit the right based on other types of historically sanctioned discrimination. For much of our nation's past, states routinely barred prisoners from marrying. *See* Virgiria L. Hardwick, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U. L. Rev. 275, 278 (1985) (noting that such restrictions were "almost universally upheld"). But in *Turner,* the Court held that incarcerated persons have the same right to marry as others. 482 U.S. at 95-96. The Court did not limit the right to marry based on the long history of excluding prisoners from marriage. Instead, the Court examined the attributes of marriage that cause it to be protected as a fundamental right and concluded that prisoners could form marital relationships that embody those attributes. The Court held that even incarcerated prisoners with no right to conjugal visits have a fundamental right to marry because "[m]any important attributes of marriage remain . . . after taking into account the limitations imposed by prison life . . . [including] expressions of emotional support and public commitment," the "exercise of religious faith," and the "expression of personal dedication," which "are an important and significant aspect of the marital relationship." *Id.,* 482 U.S. at 95-96. The same is true here: Plaintiffs are no less capable of participating in, and benefitting from, the constitutionally protected attributes of marriage than others.[15]

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[15] Defendants' approach conflicts with how the Supreme Court has analyzed other fundamental rights as well. For example, for centuries, men who fathered children out of wedlock were subject to social and legal stigma. Nonetheless, in *Stanley v. Illinois*, the Supreme

Similarly, for most of our nation's history, the right to marry did not include a right to divorce and remarry. But in the modern era, the Supreme Court has held that states may not burden an individual's right to remarry. *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) (holding that state law requiring indigent persons to pay court fees to petition for divorce unduly burdened their fundamental right to re-marry). In the same vein, modern contraceptives have been available only since the early decades of the twentieth century. Yet the Supreme Court did not hesitate to hold that barring married couples' access to contraceptives violated their fundamental right to marital privacy in *Griswold*. 381 U.S. at 485-86.

The position urged by Defendants—that Plaintiffs seek not the same right to marry as others, but a new right to "same-sex marriage"—repeats the analytical error of *Bowers*. In *Bowers*, the Court erroneously framed the issue in that case as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." 478 U.S. at 190. As the Supreme Court explained when it reversed *Bowers* in *Lawrence*, that statement "disclose[d] the Court's own failure to appreciate the extent of the liberty at stake." 539 U.S. at 567. Similarly here, Plaintiffs do not seek a new right specific only to gay and lesbian persons, but the same right to marry enjoyed by all other citizens of this state. As a federal district court recently explained, Plaintiffs seek "the same right that is currently enjoyed by heterosexual individuals: the right to make a public commitment to form an exclusive relationship and create a family with a partner with whom the person shares an intimate and sustaining emotional bond." *Kitchen*, 2013 WL 6697874, at *16; *see also Bostic*, 2014 WL 561978, at *12 ("Plaintiffs ask for nothing more than to exercise a right that is enjoyed by the vast majority of Virginia's adult citizens.").

Court readily held that the established fundamental right to parent included the right of an unmarried father to maintain a custodial relationship with his child. 405 U.S. 645, 653 (1972).

In sum, Plaintiffs stand on the same footing as other couples with respect to the interests in liberty, autonomy, and privacy that the fundamental right to marry seeks to protect. They ask nothing more and nothing less than to have those interests respected by the State of Idaho to the same degree, and in the same way, as it does for other couples: through a legally recognized civil marriage. The Due Process Clause guarantees them that opportunity.[16]

V. IDAHO'S REFUSAL TO RECOGNIZE THE MARRIAGES OF SAME-SEX COUPLES VALIDLY CELEBRATED IN OTHER JURISDICTIONS IS UNCONSTITUTIONAL.

Like its refusal to issue marriage licenses to same-sex couples, Idaho's categorical refusal to respect the marriages of same-sex couples who married in other states deprives those couples of their fundamental right to marry and unconstitutionally discriminates on the basis of gender and sexual orientation.[17] Additionally, however, Idaho's refusal to recognize same-sex couples' valid out-of-state marriages violates due process and equal protection for reasons that are distinct from and independent of the state's refusal to permit same-sex couples to marry within the state. As the Supreme Court recognized in *Windsor*, the marriages of same-sex couples entered into in other states share "equal dignity" with other couples' marriages, and those marriages are entitled to the same protections that the Constitution ensures for all other marriages. 133 S. Ct. at 2693.

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[16] Idaho's discrimination against same-sex couples with respect to their exercise of the fundamental right to marry also triggers strict scrutiny under the Equal Protection Clause. *See Zablocki*, 434 U.S. at 388; *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966).

[17] Defendant Rich asserts that Plaintiffs Susan Latta and Traci Ehlers and Lori and Sharene Watsen do not have a claim against him because they are already married, and he has no enforcement responsibility with respect to Idaho's ban on recognition of out-of-state marriages of same-sex couples. Rich Mem. at 17 n. 9. Whatever Rich's role may be, there is a justiciable controversy between Plaintiffs and Defendants State of Idaho and Governor Otter with respect to this claim, and both Defendants Rich and the State of Idaho address the merits of this claim in their motions to dismiss. Plaintiffs are entitled to summary judgment on this claim for the reasons stated herein.

Idaho's wholesale refusal to respect the marriages of same-sex couples who married in other states deprives those couples of due process and equal protection for the same reasons that the Supreme Court concluded in *Windsor* that the federal government's refusal to respect such valid marriages infringed those constitutional guarantees. Like Section 3 of DOMA, Idaho's anti-recognition laws unjustifiably intrude upon married same-sex couples' constitutionally protected liberty interest in their existing marriages and constitute "a deprivation of the liberty of the person protected by" due process. *Id*. at 2695. Similarly, the anti-recognition laws deprive married same-sex couples of equal protection by discriminating against the class of legally married same-sex couples, not to achieve any important or even legitimate government interest, but simply to express disapproval of that class and subject that class to unequal treatment. *See id.* at 2695-96. As with DOMA, the challenged Idaho anti-recognition laws' "principal effect is to identify a subset of state-sanctioned marriages and make them unequal." *Id.* at 2694. Idaho's refusal to respect the otherwise valid marriages of same-sex couples cannot withstand constitutional scrutiny because "no legitimate purpose overcomes the purpose and effect to disparage and to injure" married same-sex couples. *Id.* at 2696.

A. Idaho's Anti-Recognition Laws Are An Unusual Deviation From Its Longstanding Tradition And Practice Of Recognizing Valid Marriages From Other States.

Idaho's anti-recognition laws—Idaho Const. art. III, § 28 and Idaho Code Ann. § 32-209—both enacted within the past two decades, represent a stark departure from the state's longstanding practice of recognizing valid marriages from other states even if such marriages could not have been entered into within Idaho. The anti-recognition laws' departure from Idaho's historical treatment of out-of-state marriages imposes severe harms on married same-sex couples, leaving those couples and their families in an untenable limbo and effectively stripping

them of an existing marital status for all state law purposes. Like Section 3 of DOMA, Idaho's blanket refusal to recognize legally married same-sex couples' relationships violates "basic due process and equal protection principles." 133 S. Ct. at 2693, 2694.

From territorial days until 1996, Idaho law provided that "marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, are valid in this state." Idaho Code Ann. § 32-209 (1983); *see also* 1867 Territory of Idaho Sess. Laws 71, §5; Idaho Rev. Stat. § 2428; *Morrison v. Sunshine Mining Co.*, 127 P.2d 766, 769 (Idaho 1942) ("Having assumed and entered into the marital relation with appellant in Montana, the status thus established followed Morrison to Idaho and could not be shed like a garment on entering this state."). This rule—known as the "place of celebration rule"—is recognized in every state and is a defining element of our federal system and American family law. *See, e.g. Obergefell,* 2013 WL 6726688, at *5 ("[T]he concept that a marriage that has legal force where it was celebrated also has legal force throughout the country has been a longstanding general rule in every state.").

The place of celebration rule recognizes that individuals order their lives based on their marital status and "need to know reliably and certainly, and at once, whether they are married or not." Luther L. McDougal III et al., *American Conflicts Law* 713 (5th ed. 2001). This rule of marriage recognition also "confirms the parties' expectations, it provides stability in an area where stability (because of children and property) is very important, and it avoids the potentially hideous problems that would arise if the legality of a marriage varied from state to state." William M. Richman & William L. Reynolds, *Understanding Conflict of Laws* 398 (3d ed. 2002). This firmly rooted doctrine comports with the reasonable expectations of married couples that, in our highly mobile society, they may travel throughout the country secure in the

knowledge that their marriage will be respected in every state and that the simple act of crossing a state line will not divest them of their marital status. *See Obergefell*, 2013 WL 6726688, at *7 ("Couples moving from state to state have an expectation that their marriage and, more concretely, the property interests involved with it—including bank accounts, inheritance rights, property, and other rights and benefits associated with marriage—will follow them.").

In 1996, the legislature amended Idaho Code § 32-209 to create a statutory exception to the place of celebration rule for the marriages of same-sex couples. *See* 1996 Idaho Sess. Laws 1126 (codified as Idaho Code Ann. § 32-209). The amendment provided that out-of-state marriages that violate Idaho public policy will not be recognized. *Id.* The only marriages identified in the statute as violations of public policy, however, are marriages of same-sex couples and marriages entered into in other states "with the intent to evade" Idaho's marriage laws. The amendment did not establish any other category of out-of-state marriages that are denied recognition under the newly created public policy exception. Idaho's 1996 statutory amendment was followed by a 2006 state constitutional amendment that also prohibits state recognition of same-sex couples' marriages. *See* Idaho Const. art. III, § 28.

Although decisions of courts in other states historically have referred to a common-law "public policy" exception to the place of celebration rule, Plaintiffs have located no published Idaho decision that invalidated an out-of-state marriage on the ground that the marriage violated Idaho public policy—even, as noted above, during the era in which Idaho barred certain interracial marriages. Even in states where the public policy exception has been applied, reliance by courts on that doctrine to deny recognition to out-of-state marriages has been extremely rare. Indeed, "until the recent hysteria associated with same sex marriage, the public policy exception was fast becoming obsolete." Joseph William Singer, *Same Sex Marriage, Full Faith and*

Credit, and the Evasion of Obligation, 1 Stan. J. C.R. & C.L. 1, 40 (2005). A categorical prohibition on recognition of an entire class of marriages that were validly entered in another state, in any context, "is very nearly unheard of in the United States." Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 Tex. L. Rev. 921, 962 (1998).

Against this background, Idaho's ban on recognizing the valid marriages of same-sex couples who marry in other states represents a stark departure from the general rule followed throughout the country and from Idaho's own past and current treatment of out-of-state marriages in general. For the reasons explained below, Idaho's refusal to recognize the marriages of an entire category of persons who validly married in other states, solely to exclude a disfavored group from the ordinary legal protections and responsibilities they would otherwise enjoy, and despite the severe, harmful impact of that refusal, cannot withstand constitutional scrutiny.

B. Idaho's Anti-Recognition Laws Deprive Married Same-Sex Couples Of Due Process And Equal Protection By Unjustifiably Infringing On Their Protected Liberty Interest In Their Marriages.

Like the plaintiff in *Windsor*, Plaintiffs Susan Latta and Traci Ehlers and Lori and Sharene Watsen are already legally married. Just as Edith Windsor had married in Canada and was denied recognition of that marriage by the federal government, these Plaintiffs married in California and New York and are now being denied recognition of their marriages by the State of Idaho. *Windsor* held that the federal government's refusal to recognize the legal marriages of same-sex couples violated due process because it burdened "many aspects of married and family life, from the mundane to the profound," 133 S. Ct. at 2694, and because its "avowed purpose and practical effect" were to treat those couples unequally, rather than to further a legitimate purpose. *Id*. at 2693. Idaho's anti-recognition laws deprive married same-sex couples of due

process for the same reasons. Indeed, "Justice Kennedy's analysis [in *Windsor*] would seem to command that a [state] law refusing to recognize valid out-of-state same-sex marriages has only one effect: to impose inequality." *Bourke*, 2014 WL 556729, at *13.

Windsor's holding means that the marriages of same-sex couples share "equal dignity" with other couples' marriages, and that legally married same-sex couples possess the same constitutionally protected liberty interests in their marriages as all other married couples. *Windsor*, 133 S. Ct. at 2693; *see also Obergefell*, 2013 WL 6726688, at *5 ("[H]ere, the constitutional due process right at issue is not the right to marry, but, instead, the right not to be deprived of one's already-existing legal marriage and its attendant benefits and protections."). Those liberty interests are protected against unjustified infringement by any level of government. *See Bourke*, 2014 WL 556729, at *11.

Windsor's recognition that same-sex couples' marriages, like all marriages, are constitutionally protected is consistent with cases stretching back for decades in which the Supreme Court has held that spousal relationships, like parent-child relationships, are among those intimate family bonds whose "preservation" must be afforded "a substantial measure of sanctuary from unjustified interference by the State." *United States Jaycees*, 468 U.S. at 618 (1984); *see also Loving*, 388 U.S. at 12 (reversing married interracial couple's convictions for violations of anti-miscegenation statutes); *Griswold*, 381 U.S. at 485-86 (holding that marriage is "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees"); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (recognizing "marital privacy" as a fundamental liberty interest).

Under this longstanding doctrine, laws that significantly burden protected liberties such as existing marital and family relationships are subject to heightened scrutiny. *See, e.g.*

Griswold, 381 U.S. at 485-86 (applying heightened constitutional scrutiny in striking down law barring use of contraceptives by married couples); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (holding that where law burdened a protected family relationship, the court must "examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."); *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (holding that state action burdening a protected parent-child relationship requires "close consideration"); *Windsor*, 133 S. Ct. at 2692 (holding that federal statute burdening marital relationships requires "careful consideration") (internal citations omitted).

As the Supreme Court recognized in *Windsor*, there is no basis to distinguish between same-sex and opposite-sex married couples with respect to the liberty interest they possess in their existing lawful marriages. *See id*. at 2693 (affirming "the equal dignity of same-sex marriages"). Marriage is a status of "immense import." *Id*. at 2681. Having secured that status, Plaintiffs have the same protected liberty interest in their marital relationships as did the plaintiffs in *Windsor, Loving, Griswold*, and other cases involving attempts by the government to burden protected family relationships.

Idaho's anti-recognition laws also facially discriminate against the class of legally married same-sex couples—the same class at issue in *Windsor*—in violation of equal protection. *See id*. at 2695 ("The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by [a] State."). That classification, in addition to discriminating unconstitutionally based on gender and sexual orientation, violates equal protection principles in an even more fundamental way—by singling out a disfavored group for disadvantageous treatment, not to further any legitimate goal, but to impose inequality.

As *Windsor* recognized, such a law violates the most basic test of due process and equal protection.

1. Idaho's Anti-Recognition Laws Inflict Severe Harms On Married Same-Sex Couples And Their Children And Disrupt Their Marital And Family Relationships.

In a manner virtually unprecedented in this country's history (outside the context of anti-miscegenation laws), Idaho's anti-recognition laws, and similar laws that other states have enacted in recent years with respect to married same-sex couples, cause serious harms to families. Idaho's anti-recognition laws disregard the longstanding, deeply rooted, and otherwise near-universal rule that a marriage that is validly entered into by a couple living in one state will be recognized when the couple travels or relocates to another state. By excluding legally married same-sex couples from this uniform rule, Idaho has created an untenable and chaotic situation. The married Plaintiffs remain legally married in the states where they wed, are regarded as legally married in the many other states and countries that recognize the marriages of same-sex couples, and are recognized as legally married for purposes of most federal protections and responsibilities. But as long as they reside in Idaho, these Plaintiffs' legal marriages, and those of other legally married same-sex couples, are deemed void and unenforceable under Idaho law. The instability and harms inflicted on these Plaintiffs and other married couples caught in this extraordinary situation are severe, continuing, and cumulative. "[N]ullification of a valid marriage when both partners wish to remain legally married constitutes the most extreme form of state interference imaginable in the marital relationship." Lois A. Weithorn, *Can a Subsequent Change in Law Void a Marriage that Was Valid at Its Inception? Considering the Legal Effect of Proposition 8 on California's Existing Same-Sex Marriages*, 60 Hastings L.J. 1063, 1125 (2009). Indeed, the Supreme Court has described the notion that one state might regard a couple as

married while another state simultaneously views them as unmarried as one of "the most perplexing and distressing complication[s] in the domestic relations of . . . citizens." *Williams v. North Carolina*, 317 U.S. 287, 299 (1942) (internal citations omitted).

By treating legally married same-sex couples as legal strangers to one another, Idaho disrupts their protected family relationships and, in effect, forces them, unlike other married couples, to "shed [their marital status] like a garment on entering this state." *Morrison*, 127 P.2d at 769. Marriage provides the only means under Idaho law whereby two adults can establish a family unit that must be legally respected by the state and by others. Through hundreds of statutes, regulations, and common law rules, Idaho's laws provide married couples with comprehensive protections and responsibilities that enable them to make a legally binding commitment to one another and to any children they may have, and to be treated as a legal family. These state-law protections range "from the mundane to the profound," *Windsor*, 133 S. Ct. at 2694, but many are designed to assist families in their times of greatest need and to protect them when misfortune strikes unexpectedly. Idaho's anti-recognition laws deprive same-sex couples of the certainty, stability, permanence, and predictability that marriage is designed to provide, protections that other couples who married outside Idaho automatically enjoy.[18]

"When a state effectively terminates the marriage of a same-sex couple married in

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[18] Additionally, the federal government has not yet determined whether certain federal benefits and protections will accrue to married same-sex couples who live in states that do not recognize their marriages. For example, the Social Security Administration has announced that it will recognize the marriages of same-sex couples who reside in a state that recognizes their marriages. Program Operations Manual System, GN 00210.100, available at https://secure.ssa.gov/apps10/ poms.nsf/lnx/0200210100. But the Administration currently is holding spousal benefits claims filed by married same-sex couples living in states that do not respect their marriages and has not announced whether those benefits will be available to such couples. Program Operations Manual System, GN 00210.005, available at https://secure.ssa.gov/apps10/poms.nsf/lnx/0200210005.

another jurisdiction, it intrudes into the realm of private marital, family, and intimate relations specifically protected by the Supreme Court." *Obergefell,* 2013 WL 6726688, at *7. Idaho's anti-recognition laws "tell[] those couples, and all the world, that their otherwise valid marriages are unworthy of . . . recognition." *Windsor,* 133 S. Ct. at 2694; *see also Obergefell*, 2013 WL 6726688, at *7 ("Ohio's official statutory and constitutional establishment of same-sex couples married in other jurisdictions as a disfavored and disadvantaged subset of people has a destabilizing and stigmatizing impact on them."). Idaho's anti-recognition laws also humiliate the children of married same-sex couples by instructing them that the State of Idaho regards their parents' marriages and their families as less worthy of recognition than other marriages and families—indeed, that their families are worthy of no recognition at all. *See Windsor,* 133 S. Ct. at 2694.

2. As With DOMA, Idaho's Anti-Recognition Laws' Principal Purpose And Effect Is To Treat Married Same-Sex Couples Unequally.

Idaho's anti-recognition laws have the same "avowed purpose and practical effect" as Section 3 of DOMA: to deny married same-sex couples all of the benefits and responsibilities that otherwise would flow from Idaho's recognition of the valid marriages of couples who marry in other states. *Id.* at 2693. That purpose is apparent on the face of the laws themselves, which expressly deny recognition to marriages between same-sex couples that are legally entered into in other states. Like DOMA, Idaho's anti-recognition laws were enacted "to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages." *Id.* at 2693–94. Their "principal effect is to identify a subset of state-sanctioned marriages and make them unequal," and their "principal purpose is to impose inequality." *Id.* at 2694. For these reasons, the anti-recognition provisions violate the same basic principles of due process and equal protection that led the Supreme Court to strike down Section 3 of DOMA.

C. Section 2 Of DOMA Provides No Justification For Idaho's Discriminatory Marriage Recognition Laws.

Defendants seek refuge in DOMA's Section 2, suggesting that it authorizes Idaho and other states to exclude the marriages of same-sex couples from recognition. *See* Rich Mem. at 18. Section 2 cannot justify Idaho's refusal to respect Plaintiffs' marriages, for several reasons. As an initial matter, the analysis applied by the Supreme Court in *Windsor* to hold that Section 3 of DOMA violates basic due process and equal protection principles applies equally to Section 2.[19] Like Section 3, Section 2 targets the class of legally married same-sex couples for disfavored treatment. In *Windsor*, the Court emphasized that state laws concerning marriage remain subject to constitutional guarantees and that "discriminations of an unusual character" warrant careful consideration. 133 S. Ct. at 2692 (internal citations omitted). The Court discussed the unusual character of Section 3, but Section 2 is just as unusual and unprecedented. Never before has Congress passed a statute purporting to authorize the states to ignore a whole class of marriages. Moreover, in explaining why Section 3 was invalid, the Court in *Windsor* found that DOMA had the improper purpose and effect of treating lawfully married same-sex couples unequally—which is equally true of Section 2. In finding animus, the Court cited statements made in the House Report that apply equally to Section 2 as to Section 3. *See id.* at 2693. The Court also noted that the title of the statute itself evinced an improper purpose to discriminate, which applies equally to Section 2. *See id.* In light of the Court's analysis, there simply is no basis on which to conclude that section 2 of DOMA was not equally infected with the improper purpose that the Court found fatal to section 3.

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[19] Section 2 of DOMA was not at issue in *Windsor*. The Supreme Court's decision invalidating Section 3 neither upheld Section 2 nor provided any reason to think that the Supreme Court would uphold it against a properly presented constitutional challenge.

In any event, this Court need not reach the issue of Section 2's validity here, because regardless of what Section 2 purports to authorize, this Court must decide whether *Idaho's* anti-recognition laws satisfy the Fourteenth Amendment's commands of due process and equal protection of the laws. No statute passed by Congress can exempt Idaho from those fundamental requirements—among the most important provisions of our federal system since the Civil War. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618, 641 (1969) ("Congress may not authorize the States to violate the Equal Protection Clause"); *Saenz v. Roe*, 526 U.S. 489, 508 (1999) ("Although we give deference to congressional decisions and classifications, neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment.") (internal citations omitted). Defendants' reference to Section 2 of DOMA here is as baseless as the argument that Congress could have changed the result in *Loving v. Virginia* by enacting a statute providing that the state could refuse to recognize interracial marriages.

In sum, Section 2 of DOMA does not affect the Court's analysis in this case. Congress has no power under the Full Faith and Credit Clause or otherwise to enact a statute enabling the states to avoid the requirements of the Fourteenth Amendment.

D. Idaho's Refusal To Recognize Same-Sex Couples' Valid Marriages Undermines Important Goals Of Federalism.

Defendants erroneously suggest that *Windsor* stands for the proposition that a state's authority over marriage is absolute. (Rich Mem. at 5.) In fact, the *Windsor* court unequivocally affirmed that state regulations of marriage "must respect the constitutional rights of persons." 133 S. Ct. at 2691. That obligation applies not only to restrictions on marriage under state law, but also to state laws addressing the recognition of marriages from other states. As *Windsor* held, when a same-sex couple enters into a valid marriage under the laws of a state, the spouses acquire a status of "immense import." *Id.* at 2692. Once married, those couples have the same

protected interest in their marital privacy, dignity, and autonomy as other married couples. *Id.* at 2693. As explained above, a state may not, consistent with the requirement of due process, infringe upon that protected interest by denying recognition to their marriages unless it has a constitutionally sufficient reason to do so. Similarly, where a state has adopted a general rule of respecting valid marriages from other states, it cannot exclude a particular group from that rule without violating the requirement of equal protection merely because it wishes to treat them unequally.

Idaho's refusal to recognize an entire category of persons who legally married in other states, and similar refusals by other states in recent years, constitute a virtually unprecedented affront to the basic principles of federalism that have long underlain the marriage recognition practices of the states. Even during the era in which many states barred interracial marriages, very few states refused to recognize such marriages when validly entered in other states. Today, as described above, except in the rarest of circumstances, couples who legally marry in one state can be assured that their marriage will be recognized in other states, regardless of where they choose to travel or live. That assurance—that states will respect the sovereignty of other states to determine their own marriage laws by respecting marriages that are validly entered into in any state—is a bedrock principle of our federalist system on which married couples have long relied. States respect marriages from other states except where there is a compelling reason not to because they expect that other states will respect their marriages. Interstate transportability of marriages has become—and has long been—a defining feature of American law and one that is essential to stability, order, and the basic functioning of our mobile society. For one state to treat another state's valid marriages as null and void without adequate justification is not only an affront to the rights of individuals, it is also an affront to the equal sovereignty of other states.

For these reasons, the *Windsor* Court's discussion of the states' traditional authority over marriage underscores why Idaho's anti-recognition laws constitute an extraordinary departure from basic principles of federalism, as well as of due process and equal protection.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion for summary judgment and deny the motions to dismiss filed by Defendants Christopher Rich and the State of Idaho.

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Respectfully submitted,

_____/s/_____

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