No. 14-____

IN THE

Supreme Court of the United States

C.L. "BUTCH" OTTER, *et al.*,
Petitioner

v.

SUSAN LATTA, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the decision below, a panel decision of the Ninth Circuit (per Reinhardt, J.) held that Idaho's man-woman definition of marriage violates the Fourteenth Amendment to the federal Constitution because that definition discriminates on the basis of sexual orientation and does not satisfy the heighted scrutiny that another recent Ninth Circuit decision (also written by Reinhardt, J.) held applicable to claims of sexual-orientation discrimination. This case thus presents the following questions, of which the second and third are subsidiary to the first:

1. Whether the Fourteenth Amendment requires a State to define or legally recognize marriages as between people of the same gender?

2. Whether State laws allegedly discriminating on the basis of sexual orientation—such as laws defining marriage as a union of a man and a woman—are subject to rational-basis review, as nine other circuits hold, or to some form of heightened scrutiny, as the Second and Ninth Circuits have held?

3. Whether Idaho's laws defining marriage as a union of a man and a woman satisfy rational-basis scrutiny, heightened scrutiny, or both?

PARTIES TO THE PROCEEDING

Petitioner is C. L. "Butch" Otter, as Governor of the State of Idaho, in his official capacity.

Respondents are Susan Latta, Traci Ehlers, Lori Watsen, Sharene Watsen, Shelia Robertson, Andrea Altmayer, Amber Beierle, and Rachael Robertson.

Respondents also include Christopher Rich, as Recorder of Ada County, Idaho, in his official capacity, and the State of Idaho. These respondents are expected to file their own petition for certiorari within the next few days.

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INTRODUCTION

The time has come for this Court to resolve a question of critical importance to the States, their citizens and especially their children: Whether the federal Constitution prohibits a State from maintaining the traditional understanding and definition of marriage as between a man and a woman. And this case—either alone or in combination with one of the cases arising out of the Sixth Circuit's decision in *DeBoer* v. *Snyder,* 772 F.3d 388 (6th Cir. 2014)—is an ideal vehicle for resolving that question as well as the subsidiary questions on which its resolution depends.

Three reasons are obvious. Unlike some of the cases currently before the Court, for example, this case involves *both* of the settings in which plaintiffs have challenged state man-woman marriage laws—i.e., the licensing of new marriages, and the recognition of existing marriages from other States. Because the arguments for invalidating state marriage laws vary somewhat between these two settings, it will be more efficient for the Court to resolve the underlying constitutional question in a case that involves both.

In addition, the Ninth Circuit here not only invalidated Idaho's man-woman definition, but it did so on a basis that is certain to spawn intense and contentious litigation in a variety of settings beyond marriage. Specifically, in an opinion authored by Judge Reinhardt, the court held that Idaho's traditional definition violates the Fourteenth Amendment because it discriminates on the basis of sexual orientation, which, according to prior and recent Ninth Circuit precedent, requires heightened scrutiny. See 11a-12a (relying

upon *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, *reh'g en banc* denied, 759 F.3d 990 (9th Cir. 2014) (Reinhardt, J.)). The latter holding deepens a mature circuit conflict that this Court will need to resolve regardless of how it rules on the specific question of man-woman marriage.

Furthermore, between the main panel opinion and the two concurrences, the panel here has made a concerted effort to articulate in their most plausible form all three of the principal constitutional arguments that have been advanced against man-woman marriage laws: (1) the sexual-orientation discrimination argument adopted by the panel; (2) the sex discrimination argument articulated in Judge Berzon's concurrence; and (3) the fundamental-rights argument articulated in Judge Reinhardt's concurrence. This case thus provides the Court with a handy compendium of all the main arguments that will need to be addressed in determining the constitutionality of state man-woman marriage laws.

Two other reasons for choosing this case over other available options are perhaps less self-evident. *First*, this is the only case now available to the Court in which the man-woman definition of marriage has been defended, in part, on grounds of avoiding religious strife and church-state entanglements. That is an issue this Court will likely want to consider as it resolves the core constitutional question presented here. And it was squarely presented to and addressed—adversely—by the Ninth Circuit. See 26a.

Second, and most important, this is the only case now available to the Court where any public officials

have mounted a truly vigorous policy defense of the man-woman understanding and definition of marriage—including an explanation of its salutary effects on the children of heterosexual couples, and why such a definition satisfies any level of constitutional scrutiny. Other States have shied away from defending that definition with full vigor, preferring instead to rely on narrower rational-basis-type defenses. Those defenses are both valuable and correct. However, it is important that at least one of the cases this Court considers on the merits be a case in which the traditional definition has been defended with the most robust defense available. This is that case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, 1a–82a, is reported at 771 F.3d 456. The opinion of the United States District Court for the District of Idaho, 83a–140a, is reported at 19 F. Supp. 3d 1054.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(3). The Ninth Circuit had appellate jurisdiction under 28 U.S.C. § 1291. The Court of Appeals filed its opinion and entered judgment on October 7, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTONAL AND STATUTORY PROVISIONS

The Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provide, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article III, § 28 of the Idaho Constitution provides:

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

Idaho Code § 32-201(1) provides in relevant part:

> Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of parties capable of making it is necessary.

Idaho Code § 32-209 provides in relevant part:

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

STATEMENT

Since its territorial days during the Lincoln Administration—and for the past century and a half—Idaho has defined civil marriage as a union between one man and one woman. *See* 1864 Idaho Terr. Sess. L. 613; 1889 Idaho Terr. Sess. L. 40; 1901 Civ. Code Ann. § 1990; Idaho Code § 32-202. Despite recent changes in other States, Idaho's legislature and citizens have firmly adhered to this understanding and definition of marriage, in large measure because they wish to foster a marriage culture that is focused, not primarily on the needs and interests of adults, but on the welfare of children.

A. Competing visions of marriage

As Justice Alito pointed out, those who favor redefining marriage to accommodate same-sex couples see the institution primarily from an adult-centered perspective, with marriage's principal purpose being to endorse, legitimize and facilitate love and commitment between adults. *United States* v. *Windsor,* 133 S. Ct. 2675, 2718 (2013) (Alito, J., dissenting) (describing competing visions). The adult-centric view holds that, because the love of a same-sex couple is just as good as that of a man-woman couple, the government's refusal to recognize that love as a marriage is unjust discrimination.

By contrast, those who wish to retain the man-woman marriage definition—including a large majority of Idahoans—believe the government has no legitimate interest in formally recognizing loving relationships, whether opposite-sex or same-sex.

Their view of marriage is biologically based and primarily child-centered. And it holds that the principal (though not exclusive) purpose of marriage is to unite a child to his or her biological mother and father whenever possible, and when not possible, to *a* mother *and* father. *Id.*

The difference in these views is not that one promotes equality, justice, and tolerance, while the other endorses inequality, injustice, and intolerance. Rather, it is a difference in understanding about what the marriage institution *is*—or ought to be. And the question in this case is whether the federal Constitution compels States and their people to endorse one vision over the other. Petitioner Governor Otter maintains that neither the Fourteenth Amendment nor *Windsor* compels Idaho to redefine marriage, and thus to abandon the child-centric vision of marriage that has ably served its people for so long.

B. Idaho's marriage laws

Idaho Code § 32-202, which was last amended in 1981, specifies the persons who may marry under Idaho law. It identifies those qualified to marry as "[a]ny unmarried male . . . and any unmarried female" of specified age, and "not otherwise disqualified." Based on this statute, the Idaho Attorney General issued a formal opinion in 1993 concluding that Idaho law did not permit persons of the same sex to marry. Idaho Att'y Gen. Op. No. 93-11, 1993 WL 482224, at *10 (Nov. 3, 1993) (citing § 32-202 for the principle that "[t]he State of Idaho does not legally recognize either

homosexual marriages or homosexual domestic partnerships. By statute, marriage is limited in Idaho to the union between a man and a woman").

In 1995, Idaho's legislature amended Idaho Code § 32-201 to eliminate recognition of common law marriages. *See* 1995 Idaho Sess. Laws ch. 104. The amendment also affirmed Idaho's longstanding definition of marriage. *See id.* § 3. Section 32-201 currently provides in relevant part: "Marriage is a personal relation arising out of a civil contract between a man and a woman."

The next year, Idaho's legislature amended Idaho Code § 32-209, which governs recognition of foreign or out-of-State marriages. *See* 1996 Idaho Sess. Laws ch. 331, § 1. That section provides that marriages contracted "without this State" are not valid in Idaho if they "violate the public policy of this State," including the policy barring "same-sex marriages."

Ten years later, in response to judicial decisions in other States ordering the elected branches to permit same-sex marriages, the Idaho legislature proposed Article III, section 28 (2006 Idaho Sess. Laws H.J.R. No. 2), and the Idaho electorate approved it as a state constitutional amendment with 63% of the vote. The constitutional amendment reaffirmed Idaho's traditional definition of marriage. Article III, section 28 provides: "A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state."

C. District court proceedings and decision

Plaintiffs below, respondents here, are four same-sex couples. Two desired to get married in Idaho but could not under Idaho law. The other two couples received marriage licenses in other States and wanted Idaho to recognize them. They argued that the Equal Protection and Due Process Clauses of the Fourteenth Amendment require Idaho to expand the definition of civil marriage to include same-sex couples. They challenged the validity of Article III, Section 28 of the Idaho Constitution and Idaho Code § 32-201 (which limit civil marriage to unions between one man and one woman), and Idaho Code § 32-209 (which prohibits recognition of out-of-State marriages that violate Idaho's public policy).

Respondents sued Idaho's Governor, C.L. "Butch" Otter, and the Ada County Recorder, Christopher Rich in their official capacities. The district court permitted the State of Idaho to intervene to defend its laws.

The district court resolved the case on motions. Recorder Rich and the State of Idaho filed a Rule 12(b)(6) motion to dismiss; Governor Otter and respondents filed cross-motions for summary judgment. The district court issued a Memorandum Decision and Order granting respondents' motion on May 13, 2014. 83a-140a.

The district court rejected the defendants' showing that *Baker v. Nelson,* 409 U.S. 810 (1972), barred plaintiffs' challenges. 97a-102a. The court acknowledged that *Baker* resolved the precise issues raised by respondents, 98a, and that prior to *Windsor*, courts were "reluctant" to depart from the precedent the

Court set in *Baker*. 100a. But the court determined that *Windsor* "dramatically changed" the States' authority over same-sex marriage, 99a, purportedly constituting a "doctrinal development" thus allowing the district court to conclude *Baker* is no longer controlling. 101a.

On the merits of the case, the district court concluded the right to same-sex marriage is a fundamental right protected by the Due Process Clause. 102a-110a. And based on the Ninth Circuit's decision in *SmithKline*, the court held that Idaho's laws discriminated on the basis of sexual orientation, a constitutionally suspect class, and therefore subjected the laws in question to heightened scrutiny. 114a-119a.

Based on a cursory analysis, the district court found Idaho's marriage laws could not withstand heightened scrutiny. 119a-139a. In so holding, the court barely acknowledged—much less engaged—extensive record evidence establishing what has come to be called the "institutional" defense of marriage. See 162a-175a (outlining evidence). That defense holds that marriage is a social institution that conveys to heterosexual couples important social norms—such as the value of biological connections between children and the adults who raise them—that in turn help heterosexuals be better parents and take a more responsible approach to procreation. Because those norms rest on the man-woman understanding and definition of marriage, removing that definition and replacing it with an "any two qualified persons" definition will inevitably weaken those child-centric norms. As a result, more children of heterosexual couples will likely

grow up without the active influence of one or both biological parents, and will therefore face an increased risk of crime, emotional and psychological difficulties, poor performance in school and other ills. See 168a (describing evidence on risks to children).

Given its determinations on the merits, the district court declared Idaho's marriage laws unconstitutional and permanently enjoined their enforcement. 140a.

On May 14, 2014, the district court denied Governor Otter's motion for a stay pending appeal. That same day, the court entered judgment in plaintiffs' favor consistent with its May 13 memorandum decision and order.

All defendants filed emergency motions with the Ninth Circuit seeking a stay of the district court's judgment pending appeal. The Ninth Circuit granted the emergency motions on May 20, 2014, and entered a stay pending appeal consistent with this Court's decision granting a stay in *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014).

D. Ninth circuit proceedings and decision

The Ninth Circuit affirmed the district court. The panel opinion held that Idaho's marriage laws violate the Fourteenth Amendment's Equal Protection Clause because they discriminate on the basis of sexual orientation—which the Ninth Circuit had recently held in *SmithKline* to be a constitutionally suspect class requiring heightened scrutiny. 11a-12a.

Although the opinion acknowledged a rational basis for what it described as Idaho's "procreative channeling" justification ("[t]his makes some sense"), 18a, it found that neither this nor other justifications could withstand heightened scrutiny. 13a-30a. But in rejecting the institutional defense of Idaho's man-woman marriage laws, the opinion attacked a straw man. For example, the opinion claimed that this defense was based on the idea that "allowing same-sex *marriages* will adversely affect opposite-sex marriage." 13a. But the opinion failed to acknowledge that the institutional defense is based not on the mere existence of same-sex "marriages," but instead on the necessary *redefinition* of marriage from an inherently gendered institution to a genderless institution—and the resulting destruction of social norms based on biological and other differences (and complementarity) between men and women. See 168a-172a. Finally, the panel held that possible clashes between its newly minted right to same-sex marriage and religious liberties was irrelevant to its decision. 26a.

The panel opinion's author, Judge Reinhardt, wrote a concurrence concluding that Idaho's marriage laws also violate the Due Process Clause because they deny same-sex couples a fundamental right to marry. 42a-47a. Judge Berzon also wrote a concurring opinion, concluding that Idaho's marriage laws discriminate on the basis of gender in violation of the Equal Protection Clause. 48a-82a.

Following issuance of its opinion, the Ninth Circuit, inconsistent with its practice, immediately issued the mandate. Governor Otter filed an emergency motion for stay of the mandate in the Ninth Circuit and this

Court, and Justice Kennedy granted a temporary stay. This Court later denied a permanent stay. *Otter v. Latta*, 135 S. Ct. 345 (2014), 141a. The Plaintiffs then filed a motion to dissolve the pre-existing Ninth Circuit stay, which Governor Otter opposed. The Ninth Circuit granted the Plaintiffs' request. 143a. Since October 15, 2014, Idaho has issued marriage licenses to same-sex couples.

Governor Otter filed a timely petition for rehearing en banc on October 21, 2014—more than two months ago. 152a-185a. Although the mandate has already been issued, the Ninth Circuit has not yet acted on the petition. Given the amount of time that has passed, we assume there are not enough votes to grant the petition, and that the delay is the result of a forthcoming dissent from its denial.

REASONS FOR GRANTING THE PETITION

This case warrants review for three independent reasons. First, the Ninth Circuit's decision not only conflicts with this Court's decision in *Baker,* it also conflicts directly with the Sixth Circuit's decision in *DeBoer,* and with an earlier decision of the Eighth Circuit. Second, the Ninth Circuit's decision to apply heightened scrutiny to Idaho's marriage laws—based on its holding that sexual orientation discrimination is subject to heightened scrutiny—conflicts directly with decisions in nine other circuits, even as it opens the floodgates to massive additional litigation over alleged sexual-orientation discrimination in a range of areas beyond marriage. Third, and most important, the Ninth Circuit's decision to invalidate Idaho's marriage

laws—and with them the remaining man-woman marriage laws of every other State within that Circuit—poses a serious risk of irreparable injury to countless children of heterosexual couples. This case, moreover, is an ideal vehicle in which to determine, once and for all, the validity of such laws.

I. The Ninth Circuit's decision conflicts with this Court's teachings about the States' authority to define and regulate marriage, and directly conflicts with the decisions of the Sixth and Eighth Circuits in *DeBoer* and *Bruning*.

Certiorari is warranted, first and foremost, because the Ninth Circuit's decision is at odds with this Court's precedent regarding the States' authority to limit marriage to the union of a man and a woman, as well as decisions of other courts of appeal directly on point. Indeed, the Ninth Circuit's ruling deprives Idaho citizens of the "fundamental right" to "act through a lawful electoral process." *Schuette* v. *BAMN*, 134 S. Ct. 1623, 1637 (2014) (plurality), and ignores that the federal Constitution says nothing about how States must define marriage.

1. The Ninth Circuit's decision conflicts with and misconstrues *Baker*, which is this Court's last definitive word on the States' authority to adhere to the man-woman definition of marriage. The *Baker* plaintiffs asserted that Minnesota's marriage laws, which were construed to permit only opposite-sex marriage, violated the Equal Protection and Due Process Clauses. *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971). The Minnesota Supreme Court disagreed, and this Court summarily dismissed the appeal "for want

of a substantial federal question." 409 U.S. at 810. That dismissal "prevent[s] lower courts from coming to opposite conclusions," *Mandel v. Bradley*, 432 U.S. 173, 176, (1977), unless and until this Court rules to the contrary.

The Ninth Circuit panel opinion concluded that this Court's decisions had rendered *Baker* obsolete, and in so doing cited *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); and *Windsor*. 11a. But none of these decisions overruled *Baker*. *Romer* invalidated a Colorado constitutional amendment that prohibited enactment or enforcement of any law or policy "designed to protect . . . homosexual persons or gays and lesbians." 517 U.S. at 624. The Court's opinion makes no mention of same-sex marriage or *Baker*. *Lawrence* struck down State laws criminalizing sodomy. It involved the government's authority to regulate private, consensual sexual conduct, not the issue whether a State's citizens have the authority to define marriage. 539 U.S. at 578 (this case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.").

And *Windsor,* which invalidated a portion of the federal Defense of Marriage Act (DOMA) that sought to preserve the man-woman definition as a matter of federal law even for citizens of States that had decided to allow same-sex marriage, did not mention *Baker.* It instead affirmed *Baker*'s core holding that States have the authority to define marriage. 133 S. Ct. at 2693. *Windsor* certainly did not hold that all States are required constitutionally to permit or recognize same-sex marriage. Nor did it establish that States have no

choice in deciding whether marriage should be limited to opposite-sex couples. Quite the contrary, the Court went out of its way to make clear that the flaw in DOMA was Congress' failure to give effect to New York's determination as to who is eligible to enter into the marriage relationship.

Windsor, like *Baker*, thus respects the authority of *all* the States to define marriage within their borders. *Baker* thus remained binding on the court of appeals; it was for this Court, not Ninth Circuit, to declare whether it should be revisited.

The Ninth Circuit's decision violated not only its duty to follow *Baker*, but also this Court's long-established principles recognizing State authority to regulate domestic relations. Since the nineteenth century, this Court has consistently recognized that the States, not federal courts, have the power to define marriage. *Pennoyer v. Neff*, 95 U.S. 714, 734–35 (1877) ("[t]he State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created"); *Haddock v. Haddock*, 201 U.S. 562, 575 (1906), *overruled on other grounds*, *Williams v. North Carolina*, 317 U.S. 287 (1942) ("[n]o one denies that the States, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce"). *Windsor* itself reaffirmed this precedent: "By history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States." 133 S. Ct. at 2689–90.

2. On the first question presented, the Ninth Circuit's decision also directly conflicts with the Sixth Circuit's recent decision in *DeBoer*, a case that has spawned several certiorari petitions currently pending before the Court. In *DeBoer*, the Sixth Circuit properly acknowledged the continuing effect of *Baker*. 772 F.3d at 399-402.

It further analyzed the plaintiffs' constitutional claims challenging traditional marriage laws, and rejected them. Writing for the majority, Judge Sutton noted at the outset that "[f]rom the founding of the Republic to 2003, every State defined marriage as a relationship between a man and a woman, meaning that the Fourteenth Amendment permits, though it does not require, States to define marriage in that way." *Id.* at 404. The opinion examined potential justifications for the traditional marriage definition and found at least two rational bases for it.

First, governments are "in the business of defining marriage, not to regulate love but to regulate sex, most especially the intended and unintended effects of male-female intercourse." 772 F.3d at 404. Encouraging male-female couples, who possess "unique procreative possibilities," to enter stable family units for the benefit of their biological children, is one rational basis for providing marriage benefits to a man and a woman. *Id.* at 404-05. The opinion's analysis of this rational explanation for opposite-sex marriage statutes succinctly concluded that, "[b]y creating a status (marriage) and by subsidizing it (e.g., with tax-filing privileges and deductions), the States created an incentive for two people who procreate together to stay together for purposes of rearing offspring"–a wholly

reasonable regulation reflecting not animus as to same-sex couples but an "awareness of the biological reality that couples of the same sex do not have children in the same way as couples of opposite sexes and that couples of the same sex do not run the risk of unintended offspring."

The Sixth Circuit also found a second rational basis: Because same-sex marriage is a new phenomenon, States may rationally choose to "wait and see before changing a norm that our society (like all others) has accepted for centuries." 772 F.3d at 406.

These rational reasons supporting the traditional definition of marriage led the court to uphold the marriage laws of four States against constitutional attack because, it concluded, there was no reason to subject the laws to any higher level of scrutiny. Such laws are not the result of improper animus; they merely codify "a long-existing, widely held social norm already reflected in State law." *Id.* at 408. Nor do traditional marriage laws deprive same-sex couples of a fundamental right. Same-sex marriage is not "deeply rooted in this Nation's history and tradition.'" *Id.* at 411 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)); *accord Windsor*, 133 S.Ct. at 2689 (same-sex marriage is a "new perspective, a new insight").

According to the Sixth Circuit, moreover, the Equal Protection Clause does not require heightened scrutiny. Indeed, as the Sixth Circuit pointed out, this Court has never held that heightened scrutiny applies to sexual orientation discrimination claims. See *id.* at 772 F.3d 413-15. That holding squarely and directly conflicts with the holding of the Ninth Circuit in this

case that claims of sexual orientation discrimination *are* subject to heightened scrutiny—which is the subject of the second question presented here.

3. On both questions, moreover, the Ninth Circuit's decision also squarely conflicts with *Citizens for Equal Protection v. Bruning*, 455 F.d 859, 864-69 (8th Cir. 2008), where the Eighth Circuit rejected an equal protection challenge to a Nebraska constitutional amendment that affirmed the traditional man-woman marriage definition. Like the Sixth Circuit in *DeBoer*, the Eighth Circuit rejected the notion that heightened scrutiny should apply to sexual orientation discrimination claims. *Id.* at 866-67. And like the Sixth Circuit, the Eighth Circuit found ample, rational justifications for the traditional marriage definition. *See id.* at 867-68.

4. To be sure, the Ninth Circuit is not the only federal appellate court to hold traditional marriage laws unconstitutional. Recently, the Fourth, Seventh, and Tenth Circuits have done so as well, on varied grounds. *See Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) (same-sex couples have fundamental right to marry under the Due Process Clause); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) (traditional marriage laws cannot meet the rational basis test); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) (same-sex couples have fundamental right to marry). All of these decisions have deprived voters in the affected States of their "fundamental right" to "act through a lawful electoral process," *Schuette*, *supra,* 134 S. Ct. at 1637 (plurality), on a question of enormous importance to themselves and their children. And the cacophony of reasoning in these opinions and their deep intrusion

into a core component of state sovereignty highlight the immediate need for this Court to settle the issue and instruct the federal and state courts on the applicable Fourteenth Amendment standards.

II. The Ninth Circuit's application of heightened scrutiny to Idaho's marriage laws is not required by *Windsor* and conflicts with the law of this Court and at least nine other circuits.

In addition to the specific conflict with the Sixth and Eighth Circuit's holdings as to state marriage laws, certiorari also is warranted because the Ninth Circuit improperly invoked heightened scrutiny—the subject of the second question presented. Specifically, the Ninth Circuit's conclusion that Idaho's laws discriminate on the basis of sexual orientation conflicts with this Court's precedents requiring proof of discriminatory purpose in disparate impact cases. And the Ninth Circuit's application of heightened scrutiny to sexual orientation discrimination claims is based on a misreading of *Windsor* that conflicts with the law in the vast majority of the courts of appeal, and that will have enormous practical consequences for state actors and courts alike.

1. Idaho's marriage laws do not classify on the basis of sexual orientation. On their face, the laws apply equally to heterosexuals and homosexuals – both may marry a person of the opposite sex, and neither may marry a person of the same sex. Without a doubt, the laws disparately affect gays and lesbians. But there is no evidence that these laws, which can be traced back to the Civil War era and were merely codified in recent decades, were designed to discriminate against them.

Nevertheless, the Ninth Circuit determined that Idaho's choice not to redefine marriage to include same-sex couples amounts to unlawful discrimination on the basis of sexual orientation. In so doing, the court violated the rule established by this Court that disparate impact alone does not establish unlawful discrimination; a discriminatory purpose must also be present. *See, e.g., Crawford v. Bd. of Ed. of Los Angeles,* 458 U.S. 527, 537-38 (1982) (even when a facially neutral law has a disproportionate impact on a suspect class, the Equal Protection Clause is not violated absent proof of a discriminatory purpose).

There is no evidence that animus toward gays and lesbians motivated Idaho when it adopted the traditional definition of marriage in the 1860s. Idaho's marriage laws are based (at a minimum) on legitimate and longstanding legislative choices, not irrational stereotypes or animus. The State has defined marriage as a union between a man and a woman based on irrefutable biological facts, including the possibility of both deliberate and accidental procreation. The State confers the benefits of civil marriage on opposite-sex couples because they alone are biologically able to procreate together and are thus responsible for virtually all children being raised in Idaho households, not because of their sexual orientation.

2. Besides it error in finding discrimination on the basis of sexual orientation, the Ninth Circuit compounded its error by holding that laws discriminating on that basis are subject to heightened scrutiny. In so holding, the Ninth Circuit court relied on its *SmithKline* decision, issued earlier in 2014. 14a. That decision determined that *Windsor* required the panel

there to reject established Ninth Circuit precedent, which applied rational basis review to sexual orientation discrimination claims, and instead apply some undefined form of heightened scrutiny to all such claims. 740 F.3d at 480-83.

The Ninth Circuit's application of heightened scrutiny is based on a misreading of *Windsor*. As the Sixth Circuit pointed out in *DeBoer,* nothing in *Windsor* says that gays and lesbians comprise a suspect class, or that sexual orientation discrimination claims are governed by heightened scrutiny. *See DeBoer*, 772 F.3d at 413-15. The Ninth Circuit's reading of *Windsor* is thus in square conflict with the Sixth Circuit's reading.

The Ninth Circuit's approach also conflicts with that employed by the large majority of the courts of appeal. At least nine circuits—including the Sixth—apply rational basis review to claims of sexual orientation discrimination. *See Cook v. Gates*, 528 F.3d 42, 61-62 (1st Cir. 2008); *Thomasson v. Perry,* 80 F.3d 915, 927-28 (4th Cir. 1996); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *DeBoer*, 772 F.3d at 413-15; *Bruning*, 455 F.3d at 866-67; *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113 (10th Cir. 2008); *Lofton v. Secretary of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989). Only the Second Circuit has joined the Ninth in subjecting claims of sexual orientation discrimination to heightened scrutiny. See *Windsor* v. *United States*, 699 F.3d 169 (2d Cir. 2012), *affirmed on other grounds, United States* v. *Windsor*, 133 S.Ct. 2675 (2013).

That approach has sweeping implications beyond the marriage context. It will subject States and all other government actors to additional potential liability on a range of subjects, including employment, educational opportunities, public benefits, and housing. And it will subject those government actors and the courts to massive additional litigation costs burdens.

This mature conflict alone warrants this Court's review. And it provides a compelling reason to use this case as a vehicle for resolving the overarching question of whether States have authority under the federal Constitution to retain the traditional man-woman definition of marriage—and the child-centric vision of marriage that lies at its heart.

III. The Ninth Circuit's holding that Idaho's marriage laws do not satisfy the relevant standard of review—based on the importance of those laws to the welfare of Idaho's children—is likewise erroneous and warrants this Court's review.

The Ninth Circuit was also wrong to hold that Idaho's marriage laws fail the relevant standard of review—be it rational basis or heightened scrutiny.

1. Idaho's marriage laws easily satisfy the rational basis standard, which applies here, and which this Court has articulated thus:

> [W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for

> the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.

City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441-42 (1985); see also *Nguyen v. INS*, 533 U.S. 53, 73 (2001) ("[t]o fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it").

Rational basis is a deferential standard. It "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). The rational basis standard is satisfied so long as there is a plausible justification for the classification; the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decision-maker; and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational. *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992). This Court further "has made clear that a legislature need not strike at all evils at the same time or in the same way, . . . and that a legislature may implement [its] program step by step, . . . adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981) (internal citation and quotations omitted).

Moreover, a State "has no obligation to produce evidence to sustain the rationality of a statutory classification" because "a legislative choice is not subject to courtroom fact-finding." *Heller v. Doe*, 509 U.S. 312, 320 (1993). It is thus "irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Beach Commc'ns*, 508 U.S. at 315. The test is simply whether the involved distinction or classification "is at least debatable." *Clover Leaf Creamery*, 449 U.S. at 464. Once plausible grounds are asserted, the "inquiry is at an end"–*i.e.*, rebuttal is not permitted. *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980).

Courts have repeatedly held that rational bases validly support marriage laws that limit marriage to the union of one man and one woman. *See*, *e.g.*, *DeBoer*, 772 F.3d at 404-08; *Bruning*, 455 F.3d at 867-68; *Andersen v. King County*, 138 P.3d 963, 982-83 (Wash. 2006); *Hernandez v. Robles*, 855 N.E.2d 1, 6-9 (N.Y. App. Div. 2006); *Morrison v. Sadler*, 821 N.E.2d 15, 22-31 (Ind. Ct. App. 2005). Under rational basis review, "[w]hen…the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and nonbeneficiaries is invidiously discriminatory." *Johnson v. Robison*, 415 U.S. 361, 383 (1974). Furthermore, "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Heller*, 509 U.S. at 320. Thus, under rational review, courts must "accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Id.* at 320-21. And "it is entirely ir-

relevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *FCC v. Beach Communications*, 508 U.S. 307, 315 (1993).

The rational bases the Sixth Circuit recently found as ample justification for the marriage laws of Michigan, Ohio, Kentucky, and Tennessee apply with equal force to Idaho's. Idaho's determination–again dating back over 150 years to the first territorial code – to target its finite resources on fostering long-lived opposite-sex relationships through marital status benefits is rational when those relationships produce almost all children and account for a sizable majority of family households in the State. For marriage purposes, the distinguishing characteristics of opposite-sex and same-sex couples are the procreative capacity of the former, not the participants' sexual orientation. The Idaho Legislature in 1995, as well as the Idaho electorate in 2006, thus had a rational basis to conclude that targeting the legislative benefits of marriage to opposite-sex couples would further the State's interest in encouraging stable families for child-rearing purposes. Idaho was not required to change over a century of practice by making civil marriage available to individuals who desire to access the governmental benefits of such status but who categorically lack the capacity to procreate with one another.

2. The Ninth Circuit was also wrong to reject another defense offered in support of Idaho's man-woman definition of marriage, namely, that even if heightened scrutiny applies, it is satisfied here. As Judge Sutton concluded, "[b]y creating a status (marriage) and by

subsidizing it (e.g., with tax-filing privileges and deductions), the States create[] an incentive for two people who procreate together to stay together for purposes of rearing offspring." 772 F.3d at 405. But in addition to financial incentives, as was amply demonstrated below, this combination of State-sanctioned status and benefits also reinforces certain child-centered norms or expectations that form part of the social institution of marriage. Those norms—such as the value of biological connections between children and the adults who raise them—independently encourage man-woman couples "to stay together for purposes of rearing offspring." See 162a-166a (summarizing norms and associated record evidence); *accord* Brief of *Amici Curiae* 76 Scholars of Marriage in No. 14-556 et al (filed December 15, 2014) ("Marriage Scholars Amicus"), at 3-9. Given the importance of those norms to the welfare of the children of such couples, the State has a compelling interest in reinforcing and maintaining them.

Some of those norms, moreover, arise from and/or depend upon the man-woman understanding that has long been viewed as central to the social institution of marriage. See *Windsor,* 133 S.Ct. at 2718. For example, because only man-woman couples (as a class) have the ability to provide dual biological connections to the children they raise together, the State's decision—implemented by the man-woman definition—to limit marital status and benefits to such couples reminds society of the value of those biological connections. It thereby gently encourages man-woman couples to rear their biological children together. 166a-172a; Marriage Scholars Amicus at 4-7. And it does so without denigrating other arrangements—such as adoption or

artificial insemination—that such couples might choose when, for whatever reason, they are unable to have biological children of their own.

Like other social norms traditionally associated with the man-woman definition of marriage, the biological connection norm will likely be diluted or destroyed if the man-woman definition (and associated social understanding) is abandoned in favor of a definition that allows marriage between "any two otherwise qualified persons"—which is what same-sex marriage requires. 166a-171a; Marriage Scholars Amicus at 9-11.

Just as those norms benefit the State and society, their dilution or destruction can be expected to harm the interests of the State and its citizens. For example, over time, as fewer heterosexual parents embrace the biological connection norm, more of their children will be raised without a mother or a father—usually a father. That in turn will mean more children of heterosexuals raised in poverty, doing poorly in school, experiencing psychological or emotional problems, and committing crimes—all at significant cost to the State. 167a-168a; Marriage Scholars Amicus at 11-18.

This analysis also explains why Idaho's decision to retain the man-woman definition of marriage should not be seen as demeaning gay and lesbian citizens or their children, and why it satisfies any form of heightened scrutiny. The definitional choice Idaho faced was a binary one: *either* preserve the man-woman definition and the benefits it provides to the children of heterosexuals (and the State), *or* replace it with an "any two qualified persons" definition and risk losing those

benefits. There is no middle ground. Idaho's choice to preserve the man-woman definition is thus narrowly tailored—indeed, it is perfectly tailored—to the State's interests in preserving those benefits and in avoiding the enormous societal risks accompanying a redefinition. See Marriage Scholars Amicus at 23-26.

Under a proper means-ends analysis, therefore, Idaho's choice passes muster under any constitutional standard. See *Grutter* v. *Bollinger,* 539 U.S. 982 (2003) (holding that affirmative action program satisfied strict scrutiny, and that the courts were required to defer to legislative facts found by decision-makers); see also 168a-175a (rebutting Ninth Circuit's tendentious attempts to respond to this defense). The Ninth Circuit's misapplication of this Court's precedents to a question of such surpassing importance amply warrants this Court's review.

IV. This case is an ideal vehicle for resolving the questions presented, and should be reviewed instead of or in tandem with the Sixth Circuit's decision.

Moreover, this is the only case now available for review by this Court in which any public officials have mounted a vigorous "institutional" defense of the man-woman definition of marriage, recognizing the choice articulated in Justice Alito's dissent, or have sought to defend that definition under heightened scrutiny. For that reason alone, assuming the Court grants one of

the petitions arising from the Sixth Circuit's decision, this case should be heard in tandem with that case.[1]

In addition, as previously explained, this is the only case now available to this Court in which any public officials have defended the man-woman definition in part on the grounds of reducing the potential for religious conflict and church-state entanglement. That issue has substantial potential importance to this Court's resolution of the principal question presented. See, *e.g., Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014) ("A test that would sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent."); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983) (referring to "the States' compelling interest in the maintenance of domestic peace"). And that too is a powerful reason to grant the present petition now, and to consider this case along with (or instead of) one of the pending Sixth Circuit cases.

Next, as previously explained, this is the only case presently available to the Court in which an appellate court has invalidated a State's marriage laws based on

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[1] If this petition is granted along with the forthcoming petition from the other defendants in this case, petitioner will make every effort to ensure that all petitioners submit joint briefing and argument on the merits. Those efforts will be facilitated by the Court's granting review on all three questions presented here, thereby making clear that the Court wishes to hear a comprehensive defense of the laws at issue.

a rationale that requires heightened scrutiny for alleged discrimination on the basis of sexual orientation. Given the importance of the Ninth Circuit's holding on that point beyond the context of marriage, that too is a powerful reason to grant the present petition now, and to consider this case along with or in lieu of the Sixth Circuit's decision.

Also, as previously noted, the two concurring opinions in this case articulate in their most plausible form the other two principal constitutional arguments that have been advanced against man-woman marriage laws: sex discrimination in violation of the Equal Protection Clause, and deprivation of a fundamental right in violation of the Due Process Clause. Those two opinions provide an additional reason to prefer this case to one in which only one or two of the main constitutional challenges have been forcefully articulated.

Finally, this case involves claims by same-sex couples seeking a marriage license in Idaho and same-sex couples seeking Idaho's recognition of a license issued in another State. If this Court ultimately vindicates Idaho's right to retain its marriage definition, the Court will also be in a position to reject the recognition claim under the Fourteenth Amendment or Full Faith and Credit Clause. Indeed, this Court has already recognized that "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." *Nevada v. Hall*, 440 U.S. 410, 422 (1979). To the contrary, "the very nature of the federal union of States . . . precludes resort to the full faith and credit clause as the means for compelling a State to substitute the statutes of other States for its own statutes dealing with a subject

matter concerning which it is competent to legislate." *Pac. Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501 (1939). Thus, if Idaho prevails here, this Court will have necessarily concluded that the State is "competent" to define marriage. And forcing Idaho—or any other state—to recognize another state's marriage license in violation of the first state's Constitution would improperly compel that state to "substitute" the marriage laws of another state for its own laws.

Accordingly, the Court's resolution of the questions presented here can mark the end of marriage litigation in all respects—if this Court resolves those questions in the context of this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Oct. 07, 2014]

No. 14-35420
D.C. No. 1:13-cv-00482-CWD

SUSAN LATTA; TRACI EHLERS; LORI WATSEN; SHARENE WATSEN; SHELIA ROBERTSON; ANDREA ALTMAYER; AMBER BEIERLE; RACHAEL ROBERTSON,

Plaintiffs-Appellees,

v.

C. L. OTTER, "BUTCH"; Governor of the State of Idaho, in his official capacity,

Defendant-Appellant,

And

CHRISTOPHER RICH, Recorder of Ada County, Idaho, in his official capacity,

Defendant,

STATE OF IDAHO,

Intervenor-Defendant.

No. 14-35421
D.C. No. 1:13-cv-00482-CWD

SUSAN LATTA; TRACI EHLERS; LORI WATSEN; SHARENE WATSEN; SHELIA ROBERTSON; ANDREA ALTMAYER; AMBER BEIERLE; RACHAEL ROBERTSON,
Plaintiffs-Appellees,

v.

C. L. OTTER, "BUTCH"; Governor of the State of Idaho, in his official capacity,
Defendant,

And

CHRISTOPHER RICH, Recorder of Ada County, Idaho, in his official capacity,
Defendant-Appellant,

STATE OF IDAHO,
Intervenor-Defendant-Appellant.

Appeal from the United States District Court
for the District of Idaho
Candy W. Dale, Magistrate Judge, Presiding

No. 12-17668
D.C. No. 2:12-cv-00578-RCJ-PAL

BEVERLY SEVCIK; MARY BARANOVICH; ANTIOCO CARRILLO; THEODORE SMALL; KAREN GOODY; KAREN VIBE; FLETCHER WHITWELL; GREG FLAMER; MIKYLA MILLER; KATRINA MILLER; ADELE TERRANOVA; TARA NEWBERRY; CAREN CAFFERATA-JENKINS; FARRELL CAFFERATA-JENKINS; MEGAN LANZ; SARA GEIGER,
Plaintiffs-Appellants,

v.

BRIAN SANDOVAL, in his official capacity as Governor of the State of Nevada; DIANA ALBA, in her official

capacity as the County Clerk and Commissioner of Civil Marriages for Clark County, Nevada; AMY HARVEY, in her official capacity as the County Clerk and Commissioner of Civil Marriages for Washoe County, Nevada; ALAN GLOVER, in his official capacity as the Clerk Recorder for Carson City, Nevada,

Defendants-Appellees,

And

COALITION FOR THE PROTECTION OF MARRIAGE,

Intervenor-Defendant-Appellee.

Appeal from the United States District Court for the District of Nevada
Robert Clive Jones, District Judge, Presiding

Argued and Submitted September 8, 2014[1]
San Francisco, California

OPINION

Before: REINHARDT, GOULD, and BERZON, Circuit Judges.

Opinion by Judge Reinhardt:

Both Idaho and Nevada have passed statutes and enacted constitutional amendments preventing same-sex couples from marrying and refusing to recognize same-sex marriages validly performed elsewhere.[2]

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[1] A disposition in *Jackson v. Abercrombie*, Nos. 12-16995 & 12-16998, is forthcoming separately.

[2] Idaho Const. Art. III, § 28 ("A marriage between a man and a woman is the only domestic legal union that shall be valid or

Plaintiffs, same-sex couples who live in Idaho and Nevada and wish either to marry there or to have marriages entered into elsewhere recognized in their home states, have sued for declaratory relief and to enjoin the enforcement of these laws. They argue that the laws are subject to heightened scrutiny because they deprive plaintiffs of the fundamental due process right to marriage, and because they deny them equal protection of the law by discriminating against them on the bases of their sexual orientation and their sex. In response, Governor Otter, Recorder Rich, and the State of Idaho, along with the Nevada intervenors, the Coalition for the Protection of Marriage ("the Coalition"), argue that their laws survive heightened scrutiny, primarily because the states have a compelling interest in sending a message of support for the institution of opposite-sex marriage. They argue that permitting same-sex marriage will seriously undermine this message, and contend that the institution of opposite-sex marriage is important because it encourages people who procreate to be

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recognized in this state."); Idaho Code §§ 32-201 ("Marriage is a personal relation arising out of a civil contract between a man and a woman . . . ."), 32-202 (identifying as qualified to marry "[a]ny unmarried male . . . and unmarried female" of a certain age and "not otherwise disqualified."); 32-209 ("All marriages contracted without this state, which would be valid by the laws of the state or country in which the same were contracted, are valid in this state, unless they violate the public policy of this state. Marriages that violate the public policy of this state include, but are not limited to, same-sex marriage, 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."); Nev. Const. Art. 1, § 21 ("Only a marriage between a male and female person shall be recognized and given effect in this state."); Nev. Rev. Stat. § 122.020(1) ("[A] male and female person . . . may be joined in marriage.").

responsible parents, and because opposite-sex parents are better for children than same-sex parents.

Without the benefit of our decision in *SmithKline Beecham Corp. v. Abbott Labs*., 740 F.3d 471 (9th Cir. 2014), *reh'g en banc denied*, 759 F.3d 990 (9th Cir. 2014), the Sevcik district court applied rational basis review and upheld Nevada's laws. *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012). After we decided *SmithKline*, the *Latta* district court concluded that heightened scrutiny applied to Idaho's laws because they discriminated based on sexual orientation, and invalidated them.[3] *Latta v. Otter*, No. 1:13-CV-00482-CWD, 2014 WL 1909999, at *14–18 (D. Idaho May 13, 2014). We hold that the Idaho and Nevada laws at issue violate the Equal Protection Clause of the Fourteenth Amendment because they deny lesbians and gays[4] who wish to marry persons of the same sex a right they afford to individuals who wish to marry persons of the opposite sex, and do not satisfy the heightened scrutiny standard we adopted in *SmithKline*.

I.

Before we reach the merits, we must address two preliminary matters: first, whether an Article III case or controversy still exists in *Sevcik*, since Nevada's

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[3] The *Latta* court also found a due process violation because, it concluded, the laws curtailed plaintiffs' fundamental right to marry. *Latta v. Otter*, No. 1:13-CV-00482-CWD, 2014 WL 1909999, at *9–13 (D. Idaho May 13, 2014).

[4] We have recognized that "[s]exual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them." *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1093 (9th Cir. 2000), *overruled on other grounds by* Thomas v. Gonzales, 409 F.3d 1177, 1187 (9th Cir. 2005), *vacated*, 547 U.S. 183 (2006).

government officials have ceased to defend their laws' constitutionality; and second, whether the Supreme Court's summary dismissal in *Baker v. Nelson*, 409 U.S. 810 (1972), is controlling precedent that precludes us from considering plaintiffs' claims.

A.

Governor Sandoval and Clerk-Recorder Glover initially defended Nevada's laws in the district court. However, they have since withdrawn their answering briefs from consideration by this Court, in light of our decision in *SmithKline*, 740 F.3d at 480-81 (holding heightened scrutiny applicable). Governor Sandoval now asserts that *United States v. Windsor*, 133 S. Ct. 2675 (2013), "signifies that discrimination against same-sex couples is unconstitutional," and that "[a]ny uncertainty regarding the interpretation of *Windsor* was . . . dispelled" by *SmithKline*. As a result, we have not considered those briefs, and the Governor and Clerk-Recorder were not heard at oral argument, pursuant to Fed. R. App. P. 31(c).

The Nevada Governor and Clerk Recorder remain parties, however, and continue to enforce the laws at issue on the basis of a judgment in their favor below. As a result, we are still presented with a live case or controversy in need of resolution. Despite the fact that Nevada "largely agree[s] with the opposing party on the merits of the controversy, there is sufficient adverseness and an adequate basis for jurisdiction in the fact the [state] intend[s] to enforce the challenged law against that party." *Windsor*, 133 S. Ct. at 2686–87 (citation and quotation marks omitted). Although the state defendants withdrew their briefs, we are required to ascertain and rule on the merits arguments in the case, rather than ruling automatically in favor of plaintiffs-appellants. *See*

Carvalho v. Equifax Info. Servs., LLC, 629 F.3d 876, 887 n.7 (9th Cir. 2010) ("[Defendant's] failure to file a brief does not compel a ruling in [plaintiff's] favor, given that the only sanction for failure to file an answering brief is forfeiture of oral argument.").

There remains a question of identifying the appropriate parties to the case before us—specifically, whether we should consider the arguments put forward by the Nevada intervenor, the Coalition for the Protection of Marriage. As plaintiffs consented to their intervention in the district court—at a point in the litigation before Governor Sandoval and Clerk-Recorder Glover indicated that they would no longer argue in support of the laws—and continue to so consent, the propriety of the intervenor's participation has never been adjudicated.

Because the state defendants have withdrawn their merits briefs, we face a situation akin to that in *Windsor*. There, a case or controversy remained between Windsor and the United States, which agreed with her that the Defense of Marriage Act was unconstitutional but nonetheless refused to refund the estate tax she had paid. Here as there, the state defendants' "agreement with [plaintiffs'] legal argument raises the risk that instead of a real, earnest and vital controversy, the Court faces a friendly, non-adversary proceeding . . . ." 133 S. Ct. at 2687 (citations and quotation marks omitted). Hearing from the Coalition helps us "to assure that concrete adverse-ness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). As a result, we consider the briefs and oral argument offered by the Coalition, which, Governor Sandoval believes, "canvass the arguments

against the Appellants' position and the related policy considerations."[5]

B.

Defendants argue that we are precluded from hearing this case by *Baker*, 409 U.S. 810. In that case, the Minnesota Supreme Court had rejected due process and equal protection challenges to a state law limiting marriage to a man and a woman. 191 N.W.2d 185, 186–87 (Minn. 1971). The United States Supreme Court summarily dismissed an appeal from that decision "for want of a substantial federal question." *Baker*, 409 U.S. at 810. Such summary dismissals "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions," *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam), until "doctrinal developments indicate otherwise," *Hicks v. Miranda*, 422 U.S. 332, 343–44 (1975) (citation and quotation marks omitted). Defendants contend that this decades-old case is still good law, and therefore bars us from concluding that same-sex couples have a due process or equal protection right to marriage.

However, "subsequent decisions of the Supreme Court" not only "suggest" but make clear that the claims before us present substantial federal questions.[6] *Wright v. Lane Cnty. Dist. Ct.*, 647 F.2d

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[5] For the sake of convenience, we refer throughout this opinion to arguments advanced generally by "defendants"; by this we mean the parties that continue actively to argue in defense of the laws—the Idaho defendants and the Nevada intervenor—and not Governor Sandoval and Clerk-Recorder Glover.

[6] To be sure, the Court made explicit in *Windsor* and *Lawrence* that it was not deciding whether states were required to allow same-sex couples to marry. *Windsor*, 133 S. Ct. at 2696 ("This opinion and its holding are confined to those lawful marriages

940, 941 (9th Cir. 1981); *see Windsor*, 133 S. Ct. at 2694–96 (holding unconstitutional under the Fifth Amendment a federal law recognizing opposite-sex-sex but not same-sex marriages because its "principal purpose [was] to impose inequality, not for other reasons like governmental efficiency"); *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (recognizing a due process right to engage in intimate conduct, including with a partner of the same sex); *Romer v. Evans*, 517 U.S. 620, 631–34 (1996) (invalidating as an irrational denial of equal protection a state law barring protection of lesbians and gays under state or local anti-discrimination legislation or administrative policies). Three other circuits have issued opinions striking down laws like those at issue here since *Windsor*, and all agree that *Baker* no longer precludes review. *Accord Baskin v. Bogan*, No. 14-2386, 2014 WL 4359059, at *7 (7th Cir. Sept. 4, 2014); *Bostic v. Schaefer*, 760 F.3d 352, 373–75 (4th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1204–08 (10th Cir. 2014). As any observer of the Supreme Court cannot help but realize, this case and others like it present not only substantial but pressing federal questions.

II.

Plaintiffs are ordinary Idahoans and Nevadans. One teaches deaf children. Another is a warehouse

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[recognized by states]."); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("The present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."). The Court did not reach the question we decide here because it was not presented to it. Although these cases did not tell us the answers to the federal questions before us, *Windsor* and *Lawrence* make clear that these are substantial federal questions we, as federal judges, must hear and decide.

manager. A third is an historian. Most are parents. Like all human beings, their lives are given greater meaning by their intimate, loving, committed relationships with their partners and children. "The common vocabulary of family life and belonging that other[s] [] may take for granted" is, as the Idaho plaintiffs put it, denied to them—as are all of the concrete legal rights, responsibilities, and financial benefits afforded opposite-sex married couples by state and federal law[7]—merely because of their sexual orientation.

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[7] Nevada, unlike Idaho, has enacted a domestic partnership regime. Since 2009, both same-sex and opposite-sex couples have been allowed to register as domestic partners. Nev. Rev. Stat. §§ 122A.100, 122A.010 *et seq*. Domestic partners are generally treated like married couples for purposes of rights and responsibilities—including with respect to children—under state law. However, domestic partners are denied nearly all of the benefits afforded married couples under federal law—including, since Windsor, same-sex couples married under state law.

The fact that Nevada has seen fit to give same-sex couples the opportunity to enjoy the benefits afforded married couples by state law makes its case for the constitutionality of its regime even weaker than Idaho's. With the concrete differences in treatment gone, all that is left is a message of disfavor. The Supreme Court has "repeatedly emphasized [that] discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants," can cause serious "injuries to those who are denied equal treatment solely because of their membership in a disfavored group." *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984) (citation omitted).

If Nevada were concerned, as the Coalition purports it to be, that state recognition of same-sex unions would make the institution of marriage "genderless" and thereby undermine opposite-sex spouses' commitments to each other and their children, it would be ill-advised to permit opposite-sex couples to participate in the alternative domestic partnership regime it has established. However, Nevada does just that.

Defendants argue that their same-sex marriage bans do not discriminate on the basis of sexual orientation, but rather on the basis of procreative capacity. Effectively if not explicitly, they assert that while these laws may disadvantage same-sex couples and their children, heightened scrutiny is not appropriate because differential treatment by sexual orientation is an incidental effect of, but not the reason for, those laws. However, the laws at issue distinguish on their face between opposite-sex couples, who are permitted to marry and whose out-of-state marriages are recognized, and same-sex couples, who are not permitted to marry and whose marriages are not recognized. Whether facial discrimination exists "does not depend on why" a policy discriminates, "but rather on the explicit terms of the discrimination." *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc*., 499 U.S. 187, 199 (1991). Hence, while the procreative capacity distinction that defendants seek to draw could in theory represent a *justification* for the discrimination worked by the laws, it cannot overcome the inescapable conclusion that Idaho and Nevada do discriminate on the basis of sexual orientation.

In *SmithKline*, we held that classifications on the basis of sexual orientation are subject to heightened scrutiny. 740 F.3d at 474. We explained:

> In its words and its deed, *Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review. In other words, *Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation.

Id. at 481.

Windsor, we reasoned, applied heightened scrutiny in considering not the Defense of Marriage Act's hypothetical rationales but its actual, motivating purposes.[8] *SmithKline*, 740 F.3d at 481. We also noted that *Windsor* declined to adopt the strong presumption in favor of constitutionality and the heavy deference to legislative judgments characteristic of rational basis review. *Id.* at 483. We concluded:

> *Windsor* requires that when state action discriminates on the basis of sexual orientation, we 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.

Id.

We proceed by applying the law of our circuit regarding the applicable level of scrutiny. Because Idaho and Nevada's laws discriminate on the basis of sexual orientation, that level is heightened scrutiny.

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[8] Although as discussed in the text, SmithKline instructs us to consider the states' actual reasons, and not post-hoc justifications, for enacting the laws at issue, these actual reasons are hard to ascertain in this case. Some of the statutory and constitutional provisions before us were enacted by state legislatures and some were enacted by voters, and we have been informed by all parties that the legislative histories are sparse. We shall assume, therefore, that the justifications offered in defendants' briefs were in fact the actual motivations for the laws.

III.

Defendants argue that their marriage laws survive heightened scrutiny because they promote child welfare by encouraging optimal parenting. Governor Otter argues that same-sex marriage "teaches everyone—married and unmarried, gay and straight, men and women, and all the children—that a child knowing and being reared by her mother and father is neither socially preferred nor officially encouraged." Governor Otter seeks to have the state send the opposite message to all Idahoans: that a child reared by its biological parents is socially preferred and officially encouraged.

This argument takes two related forms: First, defendants make a "procreative channeling" argument: that the norms of opposite-sex marriage ensure that as many children as possible are raised by their married biological mothers and fathers. They claim that same-sex marriage will undermine those existing norms, which encourage people in opposite-sex relationships to place their children's interests above their own and preserve intact family units, instead of pursuing their own emotional and sexual needs elsewhere. In short, they argue that allowing same-sex marriages will adversely affect opposite-sex marriage by reducing its appeal to heterosexuals, and will reduce the chance that accidental pregnancy will lead to marriage. Second, Governor Otter and the Coalition (but not the state of Idaho) argue that limiting marriage to opposite-sex couples promotes child welfare because children are most likely to thrive if raised by two parents of opposite sexes, since, they assert, mothers and fathers have "complementary"

approaches to parenting.[9] Thus, they contend, children raised by opposite-sex couples receive a better upbringing.

A.

We pause briefly before considering the substance of defendants' arguments to address the contention that their conclusions about the future effects of same-sex marriage on parenting are legislative facts entitled to deference. Defendants have not demonstrated that the Idaho and Nevada legislatures actually found the facts asserted in their briefs; even if they had, deference would not be warranted.

Unsupported legislative conclusions as to whether particular policies will have societal effects of the sort at issue in this case—determinations which often, as here, implicate constitutional rights—have not been afforded deference by the Court. To the contrary, we "retain[] an independent constitutional duty to review factual findings where constitutional rights are at stake. . . . Uncritical deference to [legislatures'] factual findings in these cases is inappropriate." *Gonzales v. Carhart*, 550 U.S. 124, 165–66 (2007); *see also Hodgson v. Minnesota*, 497 U.S. 417, 450–55 (1990).

B.

Marriage, the Coalition argues, is an "institution directed to certain great social tasks, with many of those involving a man and a woman united in the

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[9] These arguments are not novel. The Bipartisan Legal Advisory Group (BLAG) relied in part on similar contentions about procreative channeling and gender complementarity in its attempt to justify the federal Defense of Marriage Act, but the Court did not credit them. Brief on the Merits for Respondent BLAG at 44-49, *Windsor*, 133 S. Ct. 2675 (No. 12-307), 2013 U.S. S. Ct. Briefs LEXIS 280 at *74–82.

begetting, rearing, and education of children"; it is being "torn away," they claim, "from its ancient social purposes and transformed into a government-endorsed celebration of the private desires of two adults (regardless of gender) to unite their lives sexually, emotionally, and socially for as long as those personal desires last." Defendants struggle, however, to identify any means by which same-sex marriages will undermine these social purposes. They argue vehemently that same-sex marriage will harm existing and especially future opposite-sex couples and their children because the message communicated by the social institution of marriage will be lost.

As one of the Nevada plaintiffs' experts testified, there is no empirical support for the idea that legalizing same-sex marriage would harm—or indeed, affect—opposite-sex marriages or relationships. That expert presented data from Massachusetts, a state which has permitted same-sex marriage since 2004, showing no decrease in marriage rates or increase in divorce rates in the past decade.[10] *See* Amicus Brief of Massachusetts et al. 23–27; *see also* Amicus Brief of American Psychological Association et al. 8–13. It would seem that allowing couples who want to marry so badly that they have endured years of litigation to win the right to do so would reaffirm the state's endorsement, without reservation, of spousal and

[10] The Coalition takes issue with this conclusion, arguing that the effects of same-sex marriage might not manifest themselves for decades, because "something as massive and pervasive in our society and humanity as the man-woman marriage institution, like a massive ocean-going ship, does not stop or turn in a short space or a short time." Given that the discriminatory impact on individuals because of their sexual orientation is so harmful to them and their families, such unsupported speculation cannot justify the indefinite continuation of that discrimination.

parental commitment. From which aspect of same-sex marriages, then, will opposite-sex couples intuit the destructive message defendants fear? Defendants offer only unpersuasive suggestions.

First, they argue that since same-sex families will not include both a father and a mother, a man who has a child with a woman will conclude that his involvement in that child's life is not essential. They appear to contend that such a father will see a child being raised by two women and deduce that because the state has said it is unnecessary for that child—who has two parents—to have a father, it is also unnecessary for his child to have a father. This proposition reflects a crass and callous view of parental love and the parental bond that is not worthy of response. We reject it out of hand. *Accord Kitchen*, 755 F.3d at 1223 (concluding that it was "wholly illogical" to think that same-sex marriage would affect opposite-sex couples' choices); *Windsor v. United States*, 699 F.3d 169, 188 (2d Cir. 2012); *Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 998 (N.D. Cal. 2012); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 972 (N.D. Cal. 2010).

Defendants also propose another possible means by which endorsing same-sex marriage could discourage opposite-sex marriage, albeit less explicitly: opposite-sex couples who disapprove of same-sex marriage will opt less frequently or enthusiastically to participate in an institution that allows same-sex couples to participate. However, the fear that an established institution will be undermined due to private opposition to its inclusive shift is not a legitimate basis for retaining the status quo. In *United States v. Virginia*, the Court explained:

> The notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved, a prediction hardly different from other "self-fulfilling prophec[ies]," *see Mississippi Univ. for Women* [*v. Hogan*], 458 U.S. [718,] 730 [(1982)], once routinely used to deny rights or opportunities.
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> . . .
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> A like fear, according to a 1925 report, accounted for Columbia Law School's resistance to women's admission, although "[t]he faculty . . . never maintained that women could not master legal learning.[11] . . . No, its argument has been . . . more practical. If women were admitted to the Columbia Law School, [the faculty] said, then the choicer, more manly and red-blooded graduates of our great universities would go to the Harvard Law School!" The Nation, Feb. 18, 1925, p. 173.

518 U.S. 515, 542–44 (1996); *see also Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."). The *Sevcik* district court thus erred

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[11] Likewise, Governor Otter assures us that Idaho's laws were not motivated by judgments about the relative emotional commitments of same-sex and opposite-sex couples; his argument is about an "ethos," he claims, and so is not weakened by the fact that same-sex couples may, as he admits, be just as child-oriented.

in crediting the argument that "a meaningful percentage of heterosexual persons would cease to value the civil institution as highly as they previously had and hence enter it less frequently . . . because they no longer wish to be associated with the civil institution as redefined," both because defendants failed to produce any support for that prediction, and because private disapproval is a categorically inadequate justification for public injustice. *Sevcik*, 911 F. Supp. 2d at 1016.

Same-sex marriage, Governor Otter asserts, is part of a shift towards a consent-based, personal relationship model of marriage, which is more adult-centric and less child-centric.[12] The *Latta* district court was correct in concluding, however, that "marriage in Idaho is and has long been a designedly consent-based institution. . . . Idaho law is wholly indifferent to whether a heterosexual couple wants to marry because they share this vision" of conjugal marriage. *Latta*, 2014 WL 1909999, at *23.

Idaho focuses on another aspect of the procreative channeling claim. Because opposite-sex couples can accidentally conceive (and women may choose not to terminate unplanned pregnancies), so the argument goes, marriage is important because it serves to bind such couples together and to their children. This makes some sense. Defendants' argument runs off the rails, however, when they suggest that marriage's

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[12] He also states, in conclusory fashion, that allowing same-sex marriage will lead opposite-sex couples to abuse alcohol and drugs, engage in extramarital affairs, take on demanding work schedules, and participate in time-consuming hobbies. We seriously doubt that allowing committed same-sex couples to settle down in legally recognized marriages will drive opposite-sex couples to sex, drugs, and rock-and-roll.

stabilizing and unifying force is unnecessary for same-sex couples, because they always choose to conceive or adopt a child.[13] As they themselves acknowledge, marriage not only brings a couple together at the initial moment of union; it helps to keep them together, "from [that] day forward, for better, for worse, for richer, for poorer, in sickness and in health." Raising children is hard; marriage supports same-sex couples in parenting their children, just as it does opposite-sex couples.

Moreover, marriage is not simply about procreation, but as much about

> expressions of emotional support and public commitment . . . . [M]any religions recognize marriage as having spiritual significance; . . . therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication . . . .

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[13] As Judge Richard Posner put it, bluntly:

> [These states] think[] that straight couples tend to be sexually irresponsible, producing unwanted children by the carload, and so must be pressured . . . to marry, but that gay couples, unable as they are to produce children wanted or unwanted, are model parents—model citizens really—so have no need for marriage. Heterosexuals get drunk and pregnant, producing unwanted children; their reward is to be allowed to marry. Homosexual couples do not produce unwanted children; their reward is to be denied the right to marry. Go figure.

Baskin, 2014 WL 4359059, at *10 (7th Cir. Sept. 4, 2014).

Idaho and Nevada's laws are both over- and under-inclusive with respect to parental fitness. A man and a woman who have been convicted of abusing their children are allowed to marry; same-sex partners who have been adjudicated to be fit parents in an adoption proceeding are not.

> [M]arital status often is a precondition to the receipt of government benefits (e. g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimation of children born out of wedlock).

Turner v. Safley, 482 U.S. 78, 95–96 (1987) (recognizing that prisoners, too, enjoyed the right to marry, even though they were not allowed to have sex, and even if they did not already have children).

Although many married couples have children, marriage is at its essence an "association that promotes . . . a bilateral loyalty, not commercial or social projects." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (recognizing that married couples have a privacy right to use contraception in order to prevent procreation). Just as "it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse," *Lawrence*, 539 U.S. at 567, it demeans married couples—especially those who are childless—to say that marriage is simply about the capacity to procreate.

Additionally, as plaintiffs argue persuasively, Idaho and Nevada's laws are grossly over- and under-inclusive with respect to procreative capacity. Both states give marriage licenses to many opposite-sex couples who cannot or will not reproduce—as Justice Scalia put it, in dissent, "the sterile and the elderly are allowed to marry," *Lawrence*, 539 U.S. at 604–05—but not to same-sex couples who already have children or are in the process of having or adopting them.[14]

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[14] Defendants acknowledge this, but argue that it would be unconstitutionally intrusive to determine procreative capacity or intent for opposite-sex couples, and that the states must therefore

A few of Idaho and Nevada's other laws, if altered, would directly increase the number of children raised by their married biological parents. We mention them to illustrate, by contrast, just how tenuous any potential connection between a ban on same-sex marriage and defendants' asserted aims is. For that reason alone, laws so poorly tailored as those before us cannot survive heightened scrutiny.

If defendants really wished to ensure that as many children as possible had married parents, they would do well to rescind the right to no-fault divorce, or to divorce altogether. Neither has done so. Such reforms might face constitutional difficulties of their own, but they would at least further the states' asserted interest in solidifying marriage. Likewise, if Idaho and Nevada want to increase the percentage of children being raised by their two *biological* parents, they might do better to ban assisted reproduction using donor sperm or eggs, gestational surrogacy, and adoption, by both opposite-sex and same-sex couples, as well as by single people. Neither state does. *See* Idaho Code §§ 39-5401 *et seq*.; Nev. Rev. Stat. §§ 122A.200(1)(d), 126.051(1)(a), 126.510 *et seq*., 127.040; *see also* Carla Spivack, *The Law of Surrogate Motherhood in the United States*, 58 Am. J. Comp. L. 97, 102 & n.15 (2010); *Idaho is a destination for surrogacy*, KTVB.com (Dec. 5, 2013).

In extending the benefits of marriage only to people who have the capacity to procreate, while denying those same benefits to people who already have

paint with a broad brush to ensure that any couple that could possibly procreate can marry. However, Idaho and Nevada grant the right to marry even to those whose inability to procreate is obvious, such as the elderly.

children, Idaho and Nevada materially harm and demean same-sex couples and their children.[15] *Windsor*, 133 S. Ct. at 2694. Denying children resources and stigmatizing their families on this basis is "illogical and unjust." *Plyler v. Doe*, 457 U.S. 202, 220 (1982) (citation omitted). It is counterproductive, and it is unconstitutional.

C.

Governor Otter and the Coalition, but not the state of Idaho, also argue that children should be raised by both a male parent and a female parent. They assert that their marriage laws have "recognized, valorized and made normative the roles of 'mother' and 'father' and their uniting, complementary roles in raising their offspring," and insist that allowing same-sex couples to marry would send the message that "men and women are interchangeable [and that a] child does not need a mother and a father."

However, as we explained in *SmithKline, Windsor* "forbid[s] state action from 'denoting the inferiority'" of same-sex couples. 740 F.3d at 482 (citing *Brown v. Bd. of Educ*., 347 U.S. 483, 494 (1954)).

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[15] Idaho attempts to rebut testimony by the Idaho plaintiffs' expert that children of unmarried same-sex couples do just as well as those of married opposite-sex couples; the state mistakenly argues that this evidence shows that the children of same-sex couples are not harmed when the state withholds from their parents the right to marry. A more likely explanation for this expert's findings is that when same-sex couples raise children, whether adopted or conceived through the use of assisted reproductive technology, they have necessarily chosen to assume the financial, temporal, and emotional obligations of parenthood. This does not lead, however, to the conclusion that these children, too, would not benefit from their parents' marriage, just as children with opposite-sex parents do.

> It is the identification of such a class by the law for a separate and lesser public status that "make[s] them unequal." *Windsor*, 133 S. Ct. at 2694. DONIA was "practically a brand upon them, affixed by the law, an assertion of their inferiority." *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879). Windsor requires that classifications based on sexual orientation that impose inequality on gays and lesbians and send a message of second-class status be justified by some legitimate purpose.

SmithKline, 740 F.3d at 482. Windsor makes clear that the defendants' explicit desire to express a preference for opposite-sex couples over same-sex couples is a categorically inadequate justification for discrimination. Expressing such a preference is precisely what they *may not do.*

Defendants' argument is, fundamentally, non-responsive to plaintiffs' claims to marriage rights; instead, it is about the suitability of same-sex couples, married or not, as parents, adoptive or otherwise. That it is simply an ill-reasoned excuse for unconstitutional discrimination is evident from the fact that Idaho and Nevada already allow adoption by lesbians and gays. The Idaho Supreme Court has determined that "sexual orientation [is] wholly irrelevant" to a person's fitness or ability to adopt children. *In re Adoption of Doe*, 326 P.3d 347, 353 (Idaho 2014). "In a state where the privilege of becoming a child's adoptive parent does not hinge on a person's sexual orientation, it is impossible to fathom how hypothetical concerns about the same person's parental fitness could possibly relate to civil marriage." *Latta*, 2014 WL 1909999, at *23. By enacting a domestic partnership law, Nevada,

too, has already acknowledged that no harm will come of treating same-sex couples the same as opposite-sex couples with regard to parenting. Nev. Rev. Stat. § 122A.200(1)(d) affords same-sex domestic partners parenting rights identical to those of married couples, including those related to adoption, custody and visitation, and child support. *See also St. Mary v. Damon*, 309 P.3d 1027, 1033 (Nev. 2013) (en banc) ("Both the Legislature and this court have acknowledged that, generally, a child's best interest is served by maintaining two actively involved parents. To that end, the Legislature has recognized that the children of same-sex domestic partners bear no lesser rights to the enjoyment and support of two parents than children born to married heterosexual parents.").

To allow same-sex couples to adopt children and then to label their families as second-class because the adoptive parents are of the same sex is cruel as well as unconstitutional. Classifying some families, and especially their children, as of lesser value should be repugnant to all those in this nation who profess to believe in "family values." In any event, Idaho and Nevada's asserted preference for opposite-sex parents does not, under heightened scrutiny, come close to justifying unequal treatment on the basis of sexual orientation.

Thus, we need not address the constitutional restraints the Supreme Court has long imposed on sex-role stereotyping, which may provide another potentially persuasive answer to defendants' theory. *See Virginia*, 518 U.S. at 533 (explaining that justifications which "rely on overbroad generalizations about the different talents, capacities, or preferences of males and females" are inadequate to survive heightened scrutiny); *see also Caban v. Mohammed*,

441 U.S. 380, 389 (1979) (rejecting the claim that "any universal difference between maternal and paternal relations at every phase of a child's development" justified sex-based distinctions in adoption laws). We note, in addition, that defendants have offered no probative evidence in support of their "complementarity" argument.

IV.

Both the Idaho defendants and the Coalition advance a few additional justifications, though all are unpersuasive.[16] First, they argue that the population of each state is entitled to exercise its democratic will in regulating marriage as it sees fit. Each state "has an undeniable interest in ensuring that its rules of domestic relations reflect the widely held values of its people." *Zablocki v. Redhail*, 434 U.S. 374, 399 (1978) (Powell, J., concurring). True enough. But a primary purpose of the Constitution is to protect minorities from oppression by majorities. As *Windsor* itself made clear, "state laws defining and regulating marriage, of course, must respect the constitutional rights of persons." 133 S. Ct. at 2691 (citing *Loving v. Virginia*, 388 U.S. 1 (1967)). Thus, considerations of federalism cannot carry the day for defendants. They must instead rely on the substantive arguments that we find lacking herein.

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[16] None of the arguments advanced by other states in defense of their bans is any more persuasive. In particular, we agree with the Seventh Circuit that states may not "go slow" in extending to same-sex couples the right to marry; "it is sufficiently implausible that allowing same-sex marriage would cause palpable harm to family, society, or civilization to require the state to tender evidence justifying [if not proving] its fears; it has provided none." *Baskin*, 2014 WL 4359059, at *16–17.

Second, defendants argue that allowing same-sex couples to marry would threaten the religious liberty of institutions and people in Idaho and Nevada. Whether a Catholic hospital must provide the same health care benefits to its employees' same-sex spouses as it does their opposite-sex spouses, and whether a baker is civilly liable for refusing to make a cake for a same-sex wedding, turn on state public accommodations law, federal anti-discrimination law, and the protections of the First Amendment.[17] These questions are not before us. We merely note that avoiding the enforcement of anti-discrimination laws that "serv[e] compelling state interests of the highest order" cannot justify perpetuation of an otherwise unconstitutionally discriminatory marriage regime. *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (citation omitted).

Third, the Coalition argues that Nevada's ban is justified by the state's interest in protecting "the

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[17] *See, e.g., Elane Photography, LLC v. Willock*, 284 P.3d 428 (N.M. 2012) (holding that a wedding photographer was liable for discrimination against a same-sex couple under state public accommodations law, and that this law did not violate the First Amendment), *cert. denied*, 134 S. Ct. 1787 (2014). Nevada law currently prohibits discrimination based on sexual orientation in public accommodations, while Idaho law does not. Nev. Rev. Stat. §§ 651.050(3), 651.070; Dan Popkey, *Idaho doesn't protect gays from discrimination, but Otter says that does not make the state anti-gay*, Idaho Statesman (Feb. 23, 2014).

We note also that an increasing number of religious denominations do sanctify same-sex marriages. Amicus Brief of Bishops of the Episcopal Church in Idaho et al. 8–9. Some religious organizations prohibit or discourage interfaith and interracial marriage, but it would obviously not be constitutional for a state to do so. Amicus Brief of the Anti-Defamation League et al. 23–25.

traditional institution of marriage."[18] Modern marriage regimes, however, have evolved considerably; within the past century, married women had no right to own property, enter into contracts, retain wages, make decisions about children, or pursue rape allegations against their husbands. *See generally* Claudia Zaher, *When A Woman's Marital Status Determined Her Legal Status: A Reserach Guide on the Common Law Doctrine of Coverture*, 94 Law Libr. J. 459, 460–61 (2002) ("Under coverture, a wife simply had no legal existence. She became . . . 'civilly dead.'"). Women lost their citizenship when they married foreign men. *See* Kristin Collins, *When Father's Rights Are Mothers' Duties*, 109 Yale L.J. 1669, 1686–89 (2000). (In fact, women, married or not, were not allowed to serve on juries or even to vote. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 131–35 (1994).). Before no-fault divorce laws were enacted, separated spouses had to fabricate adulterous affairs in order to end their marriages. Lawrence M. Friedman, *A History of American Law* 577–78 (2005). As plaintiffs note, Nevada has been a veritable pioneer in changing these practices, enacting (and benefitting economically from) laws that made it among the easiest places in the country to get married and un-married. Both Idaho and Nevada's marriage regimes, as they exist today, bear little resemblance to those in place a century ago. As a result, defendants cannot credibly argue that their laws protect a "traditional institution"; at most, they preserve the status quo with respect to one aspect of marriage—exclusion of same-sex couples.

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[18] This argument was not advanced to this Court by the Idaho defendants.

Certainly, the exclusion of same-sex couples from marriage is longstanding. However, "it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been." *Goodridge v. Dep't of Pub. Health*, 798 N.E. 2d 941, 961 n.23 (Mass. 2003). The anti-miscegenation laws struck down in Loving were longstanding. Here as there, however, "neither history nor tradition [can] save [the laws] from constitutional attack." *Lawrence*, 539 U.S. at 577–78 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

V.

Idaho and Nevada's marriage laws, by preventing same-sex couples from marrying and refusing to recognize same-sex marriages celebrated elsewhere,[19] impose profound legal, financial, social and psychic harms on numerous citizens of those states. These harms are not inflicted on opposite-sex couples, who may, if they wish, enjoy the rights and assume the responsibilities of marriage. Laws that treat people differently based on sexual orientation are unconstitutional unless a "legitimate purpose . . . overcome[s]" the injury inflicted by the law on lesbians and gays and their families. *SmithKline*, 740 F.3d at 481–82.

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[19] Because we hold that Idaho and Nevada may not discriminate against same-sex couples in administering their own marriage laws, it follows that they may not discriminate with respect to marriages entered into elsewhere. Neither state advances, nor can we imagine, any different—much less more persuasive—justification for refusing to recognize same-sex marriages performed in other states or countries.

Defendants' essential contention is that bans on same-sex marriage promote the welfare of children, by encouraging good parenting in stable opposite-sex families. Heightened scrutiny, however, demands more than speculation and conclusory assertions, especially when the assertions are of such little merit. Defendants have presented no evidence of any such effect. Indeed, they cannot even explain the manner in which, as they predict, children of opposite-sex couples will be harmed. Their other contentions are equally without merit. Because defendants have failed to demonstrate that these laws further any legitimate purpose, they unjustifiably discriminate on the basis of sexual orientation, and are in violation of the Equal Protection Clause.

The official message of support that Governor Otter and the Coalition wish to send in favor of opposite-sex marriage is equally unconstitutional, in that it necessarily serves to convey a message of disfavor towards same-sex couples and their families. This is a message that Idaho and Nevada simply may not send.

The lessons of our constitutional history are clear: inclusion strengthens, rather than weakens, our most important institutions. When we integrated our schools, education improved. *See Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 492–95 (1954). When we opened our juries to women, our democracy became more vital. *See Taylor v. Louisiana*, 419 U.S. 522, 535–37 (1975). When we allowed lesbian and gay soldiers to serve openly in uniform, it enhanced unit cohesion. *See Witt v. Dep't of Air Force*, 527 F.3d 806, 821 n.11 (9th Cir. 2008). When same-sex couples are married, just as when opposite-sex couples are married, they serve as models of loving commitment to all.

The judgment of the district court in *Latta v. Otter* is AFFIRMED. The judgment of the district court in *Sevcik v. Sandoval* is REVERSED, and the case is REMANDED to the district court for the prompt issuance of an injunction permanently enjoining the state, its political subdivisions, and its officers, employees, and agents, from enforcing any constitutional provision, statute, regulation or policy preventing otherwise qualified same-sex couples from marrying, or denying recognition to marriages celebrated in other jurisdictions which, if the spouses were not of the same sex, would be valid under the laws of the state.

AFFIRMED REVERSED and REMANDED.

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 14-35420 & 14-35421

LATTA, ET AL.

v.

OTTER, ET AL.

No. 12-17688

SEVCIK, ET AL.

v.

SANDOVAL, ET AL.

FILED October 7, 2014.

REINHARDT, Circuit Judge, concurring:

I, of course, concur without reservation in the opinion of the Court. I write separately only to add that I would also hold that the fundamental right to marriage, repeatedly recognized by the Supreme Court, in cases such as *Loving v. Virginia*, 388 U.S. 1 (1967), *Zablocki v. Redhail*, 434 U.S. 374 (1978), and *Turner v. Safley*, 482 U.S. 78 (1987), is properly understood as including the right to marry an individual of one's choice. That right applies to same-

sex marriage just as it does to opposite-sex marriage. As a result, I would hold that heightened scrutiny is appropriate for an additional reason: laws abridging fundamental rights are subject to strict scrutiny, and are invalid unless there is a "compelling state interest" which they are "narrowly tailored" to serve. *United States v. Juvenile Male*, 670 F.3d 999, 1012 (9th Cir. 2012) (citing *Reno v. Flores*, 507 U.S. 292, 302 (1993)), *cert. denied*, 133 S. Ct. 234 (2012)). Because the inadequacy of the states' justifications has been thoroughly addressed, I write only to explain my view that the same-sex marriage bans invalidated here also implicate plaintiffs' substantive due process rights.

Like all fundamental rights claims, this one turns on how we describe the right. Plaintiffs and defendants agree that there is a fundamental right to marry, but defendants insist that this right consists only of the right to marry an individual of the opposite sex. In *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997), the Supreme Court explained "that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." Our articulation of such fundamental rights must, we are told, be "carefully formulat[ed]." *Id*. at 722 (citations and quotation marks omitted).

However, "careful" does not mean "cramped." Our task is to determine the scope of the fundamental right to marry as inferred from the principles set forth by the Supreme Court in its prior cases. *Turner* held that prisoners who had no children and no conjugal visits during which to conceive them—people who could not be biological parents—had a due process right to marry. 482 U.S. at 94–97. *Zablocki* held that fathers with outstanding child support obligations—people

who were, at least according to adjudications in family court, unable to adequately provide for existing children—had a due process right to marry. 434 U.S. at 383–87.

In each case, the Supreme Court referred to—and considered the historical roots of—the general right of people to marry, rather than a narrower right defined in terms of those who sought the ability to exercise it. These cases rejected status-based restrictions on marriage not by considering whether to recognize a new, narrow fundamental right (i.e., the right of prisoners to marry or the right of fathers with unpaid child support obligations to marry) or determining whether the class of people at issue enjoyed the right as it had previously been defined, but rather by deciding whether there existed a sufficiently compelling justification for depriving plaintiffs of the right they, as people, possessed.[1] *See id.* at 384 ("[D]ecisions of this Court confirm that the right to marry is of fundamental importance for all individuals.").

The third and oldest case in the fundamental right to marry trilogy, *Loving*, is also the most directly on point. That case held that Virginia's anti-miscegenation laws, which prohibited and penalized interracial marriages, violated the Fourteenth Amendment's Equal Protection and Due Process

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[1] *Turner* and *Zablocki* illustrate another important point, pertinent to the adequacy of defendants' justifications for curtailing the right. The first of these cases involved plaintiffs whom the state was entitled to prevent from procreating, and the second involved those who were unable to support existing offspring financially. If the fundamental right to marry extends to them, it certainly cannot be limited only to those who can procreate or to those who, in the eyes of the state, would form part of an ideal parenting unit.

Clauses. 388 U.S. at 2–6. In a rhetorical stroke as uncomprehending as it is unavailing, defendants contend that lesbians and gays are not denied the freedom to marry by virtue of the denial of their right to marry individuals of the same sex, as they are still free to marry individuals of the opposite sex. Defendants assert that their same-sex marriage bans are unlike the laws in *Turner* and *Zablocki* because they do not categorically bar people with a particular characteristic from marrying, but rather limit whom lesbians and gays, and all other persons, may marry. However, Loving itself squarely rebuts this argument. Mildred Jeter and Richard *Loving* were not barred from marriage altogether. Jeter was perfectly free to marry a black person, and Loving was perfectly free to marry a white person. They were each denied the freedom, however, to marry the person whom they chose—the other. The case of lesbians and gays is indistinguishable. A limitation on the right to marry another person, whether on account of race or for any other reason, is a limitation on the right to marry.[2]

Defendants urge that "man-woman" and "genderless" marriage are mutually exclusive, and that permitting the latter will "likely destroy[]" the former. Quite the opposite is true. Loving teaches that Virginia's anti-miscegenation laws did not simply "deprive the

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[2] Defendants are apparently concerned that if we recognize a fundamental right to marry the person of one's choice, this conclusion will necessarily lead to the invalidation of bans on incest, polygamy, and child marriage. However, fundamental rights may sometimes permissibly be abridged: when the laws at issue further compelling state interests, to which they are narrowly tailored. Although such claims are not before us, it is not difficult to envision that states could proffer substantially more compelling justifications for such laws than have been put forward in support of the same-sex marriage bans at issue here.

Lovings of liberty without due process of law." 388 U.S. at 12. They did far worse; as the Court declared, the laws also "surely . . . deprive[d] all the State's citizens of liberty without due process of law." *Id*. (emphasis added).

When Virginia told Virginians that they were not free to marry the one they loved if that person was of a different race, it so grievously constrained their "freedom of choice to marry" that it violated the constitutional rights even of those citizens who did not themselves wish to enter interracial marriages or who were already married to a person of the same race. *Id*. When Idaho tells Idahoans or Nevada tells Nevadans that they are not free to marry the one they love if that person is of the same sex, it interferes with the universal right of all the State's citizens—whatever their sexual orientation—to "control their destiny." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

To define the right to marry narrowly, as the right to marry someone of the opposite sex, would be to make the same error committed by the majority in *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986), which considered whether there was a "fundamental right to engage in homosexual sodomy." This description of the right at issue "fail[ed] to appreciate the extent of the liberty at stake," the Court stated in *Lawrence*, 539 U.S. at 567. *Lawrence* rejected as wrongheaded the question whether "homosexuals" have certain fundamental rights; "persons"—of whatever orientation—are rights-holders. *See id.* Fundamental rights defined with respect to the subset of people who hold them are fundamental rights misdefined. The question before us is not whether lesbians and gays have a fundamental right to marry a person of the same sex; it is whether a person has a fundamental right to

marry, to enter into "the most important relation in life," *Maynard v. Hill*, 125 U.S. 190, 205 (1888), with the one he or she loves. Once the question is properly defined, the answer follows ineluctably: yes.

Historically, societies have strictly regulated intimacy and thereby oppressed those whose personal associations, such as committed same-sex relationships, were, though harmful to no one, disfavored. Human intimacy, like "liberty[,] [has] manifold possibilities." *Lawrence*, 539 U.S. at 578. Although "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress[,] [a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." *Id*. at 578-79.

We, as judges, deal so often with laws that confine and constrain. Yet our core legal instrument comprehends the rights of all people, regardless of sexual orientation, to love and to marry the individuals they choose. It demands not merely toleration; when a state is in the business of marriage, it must affirm the love and commitment of same-sex couples in equal measure. Recognizing that right dignifies them; in so doing, we dignify our Constitution.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 14-35420 & 14-35421

LATTA, ET AL.

v.

OTTER, ET AL.

No. 12-17688

SEVCIK, ET AL.

v.

SANDOVAL, ET AL.

FILED October 7, 2014.

BERZON, Circuit Judge, concurring:

I agree that Idaho and Nevada's same-sex marriage prohibitions fail because they discriminate on the basis of sexual orientation and I join in the Opinion of the Court. I write separately because I am persuaded that Idaho and Nevada's same-sex marriage bans are also unconstitutional for another reason: They are classifications on the basis of gender that do not survive the level of scrutiny applicable to such classifications.

I. The Same-Sex Marriage Prohibitions Facially Classify on the Basis of Gender

"[S]tatutory classifications that distinguish between males and females are 'subject to scrutiny under the Equal Protection Clause.'" *Craig v. Boren*, 429 U.S. 190, 197 (1976) (quoting *Reed v. Reed*, 404 U.S. 71, 75 (1971)). "To withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* "The burden of justification" the state shoulders under this intermediate level of scrutiny is "demanding": the state must convince the reviewing court that the law's "proffered justification" for the gender classification "is 'exceedingly persuasive.'" *United States v. Virginia*, 518 U.S. 515, 533 (1996) ("VMI"). Idaho and Nevada's same-sex marriage bans discriminate on the basis of sex and so are invalid unless they meet this "demanding" standard.

A. Idaho and Nevada's same-sex marriage prohibitions facially classify on the basis of sex.[1] Only women may marry men, and only men may marry women.[2] Susan Latta may not marry her partner Traci

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[1] "Sex" and "gender" are not necessarily coextensive concepts; the meanings of these terms and the difference between them are highly contested. *See, e.g.*, Katherine Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. Pa. L. Rev 1 (1995). For present purposes, I will use the terms "sex" and "gender" interchangeably, to denote the social and legal categorization of people into the generally recognized classes of "men" and "women."

[2] Idaho Const. art. III § 38 ("A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state."); Idaho Code § 32-201(1) ("Marriage is a personal relation arising out of a civil contract between a man and a woman . . . ."); Nev. Const. art. I, § 21 ("Only a marriage

Ehlers for the sole reason that Latta is a woman; Latta could marry Ehlers if Latta were a man. Theodore Small may not marry his partner Antioco Carillo for the sole reason that Small is a man; Small could marry Carillo if Small were a woman. But for their gender, plaintiffs would be able to marry the partners of their choice. Their rights under the states' bans on same-sex marriage are wholly determined by their sex.

A law that facially dictates that a man may do X while a woman may not, or vice versa, constitutes, without more, a gender classification. "[T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether [a policy] involves disparate treatment through explicit facial discrimination does not depend on why the [defendant] discriminates but rather on the explicit terms of the discrimination." *UAW v. Johnson Controls, Inc*., 499 U.S. 187, 199 (1991).[3] Thus, plaintiffs challenging

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between a male and female person shall be recognized and given effect in this state."); Nev. Rev. Stat. § 122.020 ("[A] male and a female person . . . may be joined in marriage.").

[3] *UAW v. Johnson Controls* was a case brought under Title VII of the Civil Rights act of 1964, which, inter alia, bans employment policies that discriminate on the basis of sex. Title VII provides it is

> an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; (2) to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee,

policies that facially discriminate on the basis of sex need not separately show either "intent" or "purpose" to discriminate. Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 277–78 (1979).

Some examples help to illuminate these fundamental precepts. Surely, a law providing that women may enter into business contracts only with other women would classify on the basis of gender. And that would be so whether or not men were similarly restricted to entering into business relationships only with other men.

Likewise, a prison regulation that requires correctional officers be the same sex as the inmates in a prison "explicitly discriminates . . . on the basis of

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> because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a). The Supreme Court has "analog[ized]" to its decisions interpreting what constitutes discrimination "because of" a protected status under Title VII in analyzing Fourteenth Amendment equal protection claims and vice versa. *See, e.g., Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 133 (1976), *superseded by statute on other grounds as recognized in Johnson Controls*, 499 U.S. at 219 ("While there is no necessary inference that Congress . . . intended to incorporate into Title VII the concepts of discrimination which have evolved from court decisions construing the Equal Protection Clause of the Fourteenth Amendment, the similarities between the congressional language and some of those decisions surely indicate that the latter are a useful starting point in interpreting the former."). As the Court has explained, "[p]articularly in the case of defining the term 'discrimination,'" Title VII must be interpreted consistently with Fourteenth Amendment equal protection principles, because Congress does not define "discrimination" in Title VII. *See Gilbert*, 429 U.S. at 133; see also 42 U.S.C. § 2000e. I therefore rely on Title VII cases throughout this Opinion for the limited purpose of determining whether a particular classification is or is not sex-based.

. . . sex." *Dothard v. Rawlinson*, 433 U.S. 321, 332, 332 n. 16 (1977). Again, that is so whether women alone are affected or whether men are similarly limited to serving only male prisoners.[4]

Further, it can make no difference to the existence of a sex-based classification whether the challenged law imposes gender homogeneity, as in the business partner example or *Dothard*, or gender heterogeneity. Either way, the *classification* is one that limits the affected individuals' opportunities based on their sex, as compared to the sex of the other people involved in the arrangement or transaction.

As Justice Johnson of the Vermont Supreme Court noted, the same-sex marriage prohibitions, if anything, classify *more* obviously on the basis of sex than they do on the basis of sexual orientation: "A woman is denied the right to marry another woman because her would-be partner is a woman, not because one or both are lesbians. . . . [S]exual orientation does not appear as a qualification for marriage" under these laws; sex does. *Baker v. State*, 744 A.2d 864, 905 (Vt. 1999)

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[4] *Dothard* in fact dealt with a regulation that applied equally to men and women. *See* 433 U.S. at 332 n. 16 ("By its terms [the regulation at issue] applies to contact positions in both male and female institutions."); *see also id.* at 325 n. 6. *Dothard* ultimately upheld the sex-based discrimination at issue under Title VII's "bona fide occupational qualification" exception, 42 U.S.C. § 2000e-2(e), because of the especially violent, sexually charged nature of the particular prisons involved in that case, and because the regulation applied only to correctional officers in "contact positions" (i.e. working in close physical proximity to inmates) in maximum security institutions. *See Dothard*, 433 U.S. at 336–37 (internal quotation marks omitted). For present purposes, the salient holding is that the same-sex restriction *was* overtly a sex-based classification, even if it could be justified by a sufficiently strong BFOQ showing. *Id.* at 332–33.

(Johnson, J., concurring in part and dissenting in part).

The statutes' gender focus is also borne out by the experience of one of the Nevada plaintiff couples:

> When Karen Goody and Karen Vibe went to the Washoe County Marriage Bureau to obtain a marriage license, the security officer asked, "Do you have a man with you?" When Karen Vibe said they did not, and explained that she wished to marry Karen Goody, she was told she could not even obtain or complete a marriage license application . . . [because] "[t]wo women can't apply" . . . [and] marriage is "between a man and a woman."

Notably, Goody and Vibe were not asked about their sexual orientation; Vibe was told she was being excluded because of her gender and the gender of her partner.

Of course, the reason Vibe wants to marry Goody, one presumes, is due in part to their sexual orientations.[5] But that does not mean the classification at issue is not sex-based. *Dothard* also involved a facial sex classification intertwined with presumptions about sexual orientation, in that instance heterosexuality. The Supreme Court in

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[5] The need for such a presumption, as to a factor that does not appear on the face of the same-sex marriage bans, suggests that the gender discrimination analysis is, if anything, a closer fit to the problem before us than the sexual orientation rubric. While the same-sex marriage prohibitions obviously operate to the disadvantage of the people likely to wish to marry someone of the same gender—i.e. lesbians, gay men, bisexuals, and otherwise-identified persons with same-sex attraction—the individuals' *actual* orientation is irrelevant to the application of the laws.

Dothard agreed that the state was justified in permitting only male officers to guard male inmates, because there was "a real risk that other inmates, deprived of a normal heterosexual environment, would assault women guards because they were women." 433 U.S. at 335. Thus, *Dothard*'s reasoning confirms the obvious: a statute that imposes a sex qualification, whether for a marriage license or a job application, is sex discrimination, pure and simple, even where assumptions about sexual orientation are also at play.

Lawrence v. Texas, 539 U.S. 558 (2003) also underscores why the continuation of the same-sex marriage prohibitions today is quite obviously about gender. *Lawrence* held that it violates due process for states to criminalize consensual, noncommercial same-sex sexual activity that occurs in private between two unrelated adults. *See id*. at 578. After Lawrence, then, the continuation of the same-sex marriage bans necessarily turns on the gender identity of the spouses, not the sexual activity they may engage in. To attempt to bar that activity would be unconstitutional. *See id*. The Nevada intervenors recognize as much, noting that Lawrence "differentiates between the fundamental right of gay men and lesbians to enter an intimate relationship, on one hand, and, on the other hand, the right to marry a member of one's own sex." The "right to marry a member of one's own sex" expressly turns on sex.

B. In concluding that these laws facially classify on the basis of gender, it is of no moment that the prohibitions "treat men as a class and women as a class equally" and in that sense give preference to

neither gender, as the defendants[6] fervently maintain. That argument revives the long-discredited reasoning of *Pace v. Alabama*, which upheld an anti-miscegenation statute on the ground that "[t]he punishment of each offending person, whether white or black, is the same." 106 U.S. 583, 585 (1883), overruled by McLaughlin v. Florida, 379 U.S. 184 (1964). Plessy v. Ferguson, 163 U.S. 537 (1896), overruled by Brown v. Board of Education, 347 U.S. 483 (1954), similarly upheld racial segregation on the reasoning that segregation laws applied equally to black and white citizens.

This narrow view of the reach of the impermissible classification concept is, of course, no longer the law after *Brown. Loving v. Virginia* reinforced the post-Brown understanding of impermissible classification under the Fourteenth Amendment in a context directly analogous to the present one. Addressing the constitutionality of anti-miscegenation laws banning interracial marriage, *Loving* firmly "reject[ed] the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discrimination." 388 U.S. 1, 8 (1967). As *Loving* explained, "an even-handed state purpose" can still be "repugnant to the Fourteenth Amendment," *id*. at 11 n. 11, because restricting individuals' rights, choices, or opportunities "solely because of racial classifications violates the central meaning of the Equal Protection Clause"

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[6] Following the style of the Opinion of the Court, *see* Op. Ct. at 9 n. 4, I will refer throughout this Opinion to arguments advanced generally by "defendants," meaning the parties that continue actively to argue in defense of the laws, i.e. the Idaho defendants and the Nevada intervenors.

even if members of all racial groups are identically restricted with regard to interracial marriage. *Id*. at 12. "Judicial inquiry under the Equal Protection Clause . . . does not end with a showing of equal application among the members of the class defined by the legislation." *McLaughlin*, 379 U.S. 184 at 191.

If more is needed to confirm that the defendants' "equal application" theory has no force, there is more—cases decided both before and after *Loving. Shelley v. Kraemer*, for example, rejected the argument that racially restrictive covenants were constitutional because they would be enforced equally against both black and white buyers. *Shelley v. Kraemer* 334 U.S. 1, 21–22 (1948). In so holding, *Shelley* explained: "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Id*. at 22. *Shelley* also observed that "a city ordinance which denied to colored persons the right to occupy houses in blocks in which the greater number of houses were occupied by white persons, and imposed similar restrictions on white persons with respect to blocks in which the greater number of houses were occupied by colored persons" violated the Fourteenth Amendment despite its equal application to both black and white occupants. *See id*. at 11 (describing *Buchanan v. Warley*, 245 U.S. 60 (1917)).

The same individual rights analysis applies in the context of gender classifications. Holding unconstitutional peremptory strikes on the basis of gender, *J.E.B.* explained that "individual jurors themselves have a right to nondiscriminatory jury selection procedures . . . . [T]his right extends to both men and women." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127,

140–41 (1994). "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 State violates the individual right in question)." *Id.* at 152 (Kennedy, J., concurring).

City of Los Angeles, Dep't of Water & Power v. Manhart further explains why, even in "the absence of a discriminatory effect on women as a class" or on men as a class, the same-sex marriage bars constitute gender classifications, because they "discriminate against *individual[s]* . . . because of their sex." 435 U.S. 702, 716 (1978) (emphasis added). In that case, the parties recognized that women, as a class, lived longer than men. *Id.* at 707–09. The defendant Department argued that this fact justified a policy that facially required all women to contribute larger monthly sums to their retirement plans than men, out of fairness to men as a class, who otherwise would subsidize women as a class. *Id.* at 708–09. *Manhart* rejected this justification for the sex distinction, explaining that the relevant focus must be "on fairness to individuals rather than fairness to classes," and held, accordingly, that the policy was unquestionably sex discriminatory. *Id*. at 709, 711.

Under all these precedents, it is simply irrelevant that the same-sex marriage prohibitions privilege neither gender as a whole or on average. Laws that strip individuals of their rights or restrict personal choices or opportunities solely on the basis of the *individuals*' gender are sex discriminatory and must be subjected to intermediate scrutiny. *See J.E.B*., 511 U.S. at 140–42. Accordingly, I would hold that Idaho and Nevada's same-sex marriage prohibitions facially

classify on the basis of gender, and that the "equal application" of these laws to men and women as a class does not remove them from intermediate scrutiny.[7]

C. The same-sex marriage prohibitions also constitute sex discrimination for the alternative reason that they impermissibly prescribe different treatment for similarly situated subgroups of men and women. That is, the same-sex marriage laws treat the subgroup of men who wish to marry men less favorably than the otherwise similarly situated subgroup of women who want to marry men. And the laws treat

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[7] Several courts have so held. *See Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 982 n. 4 (N.D. Cal. 2012) ("Ms. Golinski is prohibited from marrying Ms. Cunninghis, a woman, because Ms. Golinski is a woman. If Ms. Golinski were a man, DOMA would not serve to withhold benefits from her. Thus, DOMA operates to restrict Ms. Golinski's access to federal benefits because of her sex."), *initial hearing en banc denied*, 680 F.3d 1104 (9th Cir. 2012*) and appeal dismissed*, 724 F.3d 1048 (9th Cir. 2013) ; *In re Levenson*, 560 F.3d 1145, 1147 (9th Cir. EDR 2009) (Reinhardt, J., presiding) ("If [Levenson's husband] were female, or if Levenson himself were female, Levenson would be able to add [his husband] as a beneficiary. Thus, the denial of benefits at issue here was sex-based and can be understood as a violation of the . . . prohibition of sex discrimination."); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010) ("Perry is prohibited from marrying Stier, a woman, because Perry is a woman. If Perry were a man, Proposition 8 would not prohibit the marriage. Thus, Proposition 8 operates to restrict Perry's choice of marital partner because of her sex."), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); Baehr v. Lewin, 852 P.2d 44, 59 (Haw. 1993) (plurality op.) (a same-sex marriage bar, "on its face, discriminates based on sex"); *Baker*, 744 A.2d at 905 (Johnson, J., concurring in part and dissenting in part) (a same-sex marriage bar presents "a straightforward case of sex discrimination" because it "establish[es] a classification based on sex").

the subgroup of women who want to marry women less favorably than the subgroup of otherwise identically situated men who want to marry women.

The Supreme Court has confirmed that such differential treatment of similarly-situated sex-defined subgroups also constitutes impermissible sex discrimination. *Phillips v. Martin Marietta Corp*., for example, held that an employer's refusal to hire women with preschool-age children, while employing men with children the same age, was facial sex discrimination, even though all men, and all women without preschool-age children, were treated identically. *See* 400 U.S. 542, 543–44 (1971) (per curiam). And the Seventh Circuit held an airline's policy requiring female flight attendants, but not male flight attendants, to be unmarried was discrimination based on sex, relying on *Phillips* and explaining that a classification that affects only some members of one gender is still sex discrimination if similarly situated members of the other gender are not treated the same way. "The effect of the statute is not to be diluted because discrimination adversely affects only a portion of the protected class." *Sprogis v. United Air Lines, Inc*., 444 F.2d 1194, 1198 (7th Cir. 1971).

Of those individuals who seek to obtain the state-created benefits and obligations of legal marriage to a woman, men may do so but women may not. Thus, at the subclass level—the level that takes into account the similar situations of affected individuals—women as a group and men as a group are treated differently. For this reason as well I would hold that Idaho and Nevada's same-sex marriage prohibitions facially classify on the basis of gender. They must be reviewed under intermediate scrutiny.

D. One further point bears mention. The defendants note that the Supreme Court summarily rejected an equal protection challenge to a same-sex marriage bar in *Baker v. Nelson*, 409 U.S. 810 (1972), holding there was no substantial federal question presented in that case. But the Court did not clarify that sex-based classifications receive intermediate scrutiny until 1976. *See Craig*, 429 U.S. at 221, 218 (Rehnquist, J., dissenting) (describing the level of review prescribed by the majority as "new," and as "an elevated or 'intermediate' level scrutiny"). As this fundamental doctrinal change postdates *Baker*, *Baker* is no longer binding as to the sex discrimination analysis, just as it is no longer binding as to the sexual orientation discrimination analysis. See Op. Ct. at 9–11.

II. Same-Sex Marriage Bars Are Based in Gender Stereotypes

Idaho and Nevada's same sex marriage laws not only classify on the basis of sex but also, implicitly and explicitly, draw on "archaic and stereotypic notions" about the purportedly distinctive roles and abilities of men and women.

Eradicating the legal impact of such stereotypes has been a central concern of constitutional sex-discrimination jurisprudence for the last several decades. *See*, *e.g.*, *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982). The same-sex marriage bans thus share a key characteristic with many other sex-based classifications, one that underlay the Court's adoption of intermediate scrutiny for such classifications.

The Supreme Court has consistently emphasized that "gender-based classifications . . . may be reflective of 'archaic and overbroad' generalizations about

gender, or based on 'outdated misconceptions concerning the role of females in the home rather than in the marketplace and world of ideas.'" *J.E.B.*, 511 U.S. at 135 (quoting *Schlesinger v. Ballard*, 419 U.S. 498, 506–07 (1975); *Craig*, 429 U.S. at 198–99) (some internal quotation marks omitted). Laws that rest on nothing more than "the 'baggage of sexual stereotypes,' that presume[] the father has the 'primary responsibility to provide a home and its essentials,' while the mother is the 'center of home and family life'" have been declared constitutionally invalid time after time. *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (quoting *Orr v. Orr*, 440 U.S. 268, 283 (1979); *Stanton v. Stanton*, 421 U.S. 7, 10 (1975); *Taylor v. Louisiana*, 419 U.S. 522 (1975)). Moreover, "gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization." *J.E.B.*, 511 U.S. at 139 n. 11. And hostility toward nonconformance with gender stereotypes also constitutes impermissible gender discrimination. *See generally Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *accord Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (harassment against a person for "failure to conform to [sex] stereotypes" is gender-based discrimination) (internal quotation marks omitted).

The notion underlying the Supreme Court's anti-stereotyping doctrine in both Fourteenth Amendment and Title VII cases is simple, but compelling: "[n]obody should be forced into a predetermined role on account of sex," or punished for failing to conform to prescriptive expectations of what behavior is appropriate for one's gender. *See* Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. Cin. L. Rev. 1, 1 (1975). In other words, laws that give effect to "pervasive sex-role

stereotype[s]" about the behavior appropriate for men and women are damaging because they restrict individual choices by punishing those men and women who do not fit the stereotyped mold. *Nev. Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 731, 738 (2003).

Idaho and Nevada's same-sex marriage prohibitions, as the justifications advanced for those prohibitions in this Court demonstrate, patently draw on "archaic and stereotypic notions" about gender. *Hogan*, 458 U.S. at 725. These prohibitions, the defendants have emphatically argued, communicate the state's view of what is both "normal" and preferable with regard to the romantic preferences, relationship roles, and parenting capacities of men and women. By doing so, the laws enforce the state's view that men and women "naturally" behave differently from one another in marriage and as parents.

The defendants, for example, assert that "gender diversity or complementarity among parents . . . provides important benefits" to children, because "mothers and fathers tend on average to parent differently and thus make unique contributions to the child's overall development." The defendants similarly assert that "[t]he man-woman meaning at the core of the marriage institution, reinforced by the law, has always recognized, valorized, and made normative the roles of 'mother' and 'father' and their uniting, complementary roles in raising their offspring."

Viewed through the prism of the Supreme Court's contemporary anti-stereotyping sex discrimination doctrine, these proferred justifications simply underscore that the same-sex marriage prohibitions discriminate on the basis of sex, not only in their form—which, as I have said, is sufficient in itself—but also in

reviving the very infirmities that led the Supreme Court to adopt an intermediate scrutiny standard for sex classifications in the first place. I so conclude for two, somewhat independent, reasons.

A. First, and more obviously, the gender stereotyping at the core of the same-sex marriage prohibitions clarifies that those laws affect men and women in basically the same way as, not in a fundamentally different manner from, a wide range of laws and policies that have been viewed consistently as discrimination based on sex. As has been repeated again and again, legislating on the basis of such stereotypes limits, and is meant to limit, the choices men and women make about the trajectory of their own lives, choices about work, parenting, dress, driving—and yes, marriage. This focus in modern sex discrimination law on the preservation of the ability freely to make individual life choices regardless of one's sex confirms that sex discrimination operates at, and must be justified at, the level of individuals, not at the broad class level of all men and women. Because the same-sex marriage prohibitions restrict individuals' choices on the basis of sex, they discriminate based on sex for purposes of constitutional analysis precisely to the same degree as other statutes that infringe on such choices—whether by distributing benefits or by restricting behavior—on that same ground.

B. Second, the long line of cases since 1971 invalidating various laws and policies that categorized by sex have been part of a transformation that has altered the very institution at the heart of this case, marriage. Reviewing that transformation, including the role played by constitutional sex discrimination challenges in bringing it about, reveals that the

same sex marriage prohibitions seek to preserve an outmoded, sex-role-based vision of the marriage institution, and in that sense as well raise the very concerns that gave rise to the contemporary constitutional approach to sex discrimination.

(i) Historically, marriage was a profoundly unequal institution, one that imposed distinctly different rights and obligations on men and women. The law of coverture, for example, deemed the "the husband and wife . . . one person," such that "the very being or legal existence of the woman [was] suspended . . . or at least [was] incorporated and consolidated into that of the husband" during the marriage. 1 William Blackstone, Commentaries on the Laws of England 441 (3d rev. ed. 1884). Under the principles of coverture, "a married woman [was] incapable, without her husband's consent, of making contracts . . . binding on her or him." *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring). She could not sue or be sued without her husband's consent. See, e.g., Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* 11–12 (2000). Married women also could not serve as the legal guardians of their children. *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973) (plurality op.).

Marriage laws further dictated economically disparate roles for husband and wife. In many respects, the marital contract was primarily understood as an economic arrangement between spouses, whether or not the couple had or would have children. "Coverture expressed the legal essence of marriage as reciprocal: a husband was bound to support his wife, and in exchange she gave over her property and labor." Cott, *Public Vows*, at 54. That is why "married women traditionally were denied the

legal capacity to hold or convey property . . . ." *Frontiero*, 411 U.S. at 685. Notably, husbands owed their wives support even if there were no children of the marriage. *See*, *e.g*., Hendrik Hartog, *Man and Wife in America: A History* 156 (2000).

There was also a significant disparity between the rights of husbands and wives with regard to physical intimacy. At common law, "a woman was the sexual property of her husband; that is, she had a duty to have intercourse with him." John D'Emilio & Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* 79 (3d ed. 2012). Quite literally, a wife was legally "the possession of her husband, . . . [her] husband's property." Hartog, Man and Wife in America, at 137. Accordingly, a husband could sue his wife's lover in tort for "entic[ing]" her or "alienat[ing]" her affections and thereby interfering with his property rights in her body and her labor. *Id*. A husband's possessory interest in his wife was undoubtedly also driven by the fact that, historically, marriage was the only legal site for licit sex; sex outside of marriage was almost universally criminalized. *See*, *e.g*., Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 Yale L.J. 756, 763–64 (2006).

Notably, although sex was strongly presumed to be an essential part of marriage, the ability to procreate was generally not. *See*, *e.g*., Chester Vernier, American Family Laws: A Comparative Study of the Family Law of the Forty-Eight American States, Alaska, the District of Columbia, and Hawaii (to Jan. 1, 1931) (1931) I § 50, 239–46 (at time of survey, grounds for annulment typically included impotency, as well as incapacity due to minority or "non-age"; lack of understanding and insanity; force or duress; fraud;

disease; and incest; but not inability to conceive); II § 68, at 38–39 (1932) (at time of survey, grounds for divorce included "impotence"; vast majority of states "generally held that impotence . . . does not mean sterility but must be of such a nature as to render complete sexual intercourse practically impossible"; and only Pennsylvania "ma[d]e sterility a cause" for divorce).

The common law also dictated that it was legally impossible for a man to rape his wife. Men could not be prosecuted for spousal rape. A husband's "incapacity" to rape his wife was justified by the theory that "'the marriage constitute[d] a blanket consent to sexual intimacy which the woman [could] revoke only by dissolving the marital relationship.'" *See*, *e.g*., Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 Calif. L. Rev 1373, 1376 n. 9 (2000) (quoting Model Penal Code and Commentaries, § 213.1 cmt. 8(c), at 342 (Official Draft and Revised Comments 1980)).

Concomitantly, dissolving the marital partnership via divorce was exceedingly difficult. Through the mid-twentieth century, divorce could be obtained only on a limited set of grounds, if at all. At the beginning of our nation's history, several states did not permit full divorce except under the narrowest of circumstances; separation alone was the remedy, even if a woman could show "cruelty endangering life or limb." Peter W. Bardaglio, *Reconstrucing the Household: Families, Sex, and the Law in the Nineteenth-Century South* 33 (1995); *see also id*. 32–33. In part, this policy dovetailed with the grim fact that, at English common law, and in several states through the beginning of the nineteenth century, "a husband's prerogative to chastise his wife"—that is, to beat her short of

permanent injury—was recognized as his marital right. Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 Yale L.J. 2117, 2125 (1996).

Perhaps unsurprisingly, the profoundly unequal status of men and women in marriage was frequently cited as justification for denying women equal rights in other arenas, including the workplace. "[S]tate courts made clear that the basis, and validity, of such laws lay in stereotypical beliefs about the appropriate roles of men and women." *Hibbs v. Dep't of Human Res.*, 273 F.3d 844, 864 (9th Cir. 2001), *aff'd sub nom. Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721. Justice Bradley infamously opined in 1887 that "the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman." *Bradwell*, 83 U.S. at 141 (Bradley, J., concurring). On this view, women could be excluded from various professions because "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." *Id.* Instead, the law gave effect to the belief that "[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother." *Id*.

As a result of this separate-spheres regime, "'[h]istorically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second.' . . . Stereotypes about women's domestic roles [we]re reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men." *Hibbs*, 538 U.S. at 736 (quoting the Joint Hearing before the Subcommittee

on Labor–Management Relations and the Subcommittee on Labor Standards of the House Committee on Education and Labor, 99th Cong., 2d Sess., at 100 (1986)). Likewise, social benefits programs historically distinguished between men and women on the assumption, grounded in the unequal marital status of men and women, that women were more likely to be homemakers, supported by their working husbands. *See*, *e.g*., *Califano v. Goldfarb*, 430 U.S. 199, 205–07 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 644–45 (1975).

(ii) This asymmetrical regime began to unravel slowly in the nineteenth century, starting with the advent of Married Women's Property Acts, which allowed women to possess property in their own right for the first time. *See*, *e.g*., Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings*, *1860–1930*, 82 Geo. L. Rev. 2127(1994). Eventually, state legislatures revised their laws. Today, of course, a married woman may enter contracts, sue and be sued without her husband's participation, and own and convey property. The advent of "no fault" divorce regimes in the late 1960s and early 1970s made marital dissolutions more common, and legislatures also directed family courts to impose child and spousal support obligations on divorcing couples without regard to gender. *See* Cott, *Public Vows*, at 205–06. As these legislative reforms were taking hold, "in 1971 . . . the Court f[ou]nd for the first time that a state law violated the Equal Protection Clause because it arbitrarily discriminated on the basis of sex." *Hibbs*, 273 F.3d at 865 (citing *Reed*, 404 U.S. 71).

This same legal transformation extended into the marital (and nonmarital) bedroom. Spousal rape has

been criminalized in all states since 1993. See, e.g., Sarah M. Harless, *From the Bedroom to the Courtroom: The Impact of Domestic Violence Law on Marital Rape Victims*, 35 Rutgers L.J. 305, 318 (2003). *Griswold v. Connecticut*, 381 U.S. 479 (1965), held that married couples have a fundamental privacy right to use contraceptives, and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), later applied equal protection principles to extend this right to single persons. More recently, *Lawrence* clarified that licit, consensual sexual behavior is no longer confined to marriage, but is protected when it occurs, in private, between two consenting adults, regardless of their gender. *See* 539 U.S. at 578.

In the child custody context, mothers and fathers today are generally presumed to be equally fit parents. *See*, *e.g.*, Cott, *Public Vows*, at 206. *Stanley v. Illinois*, 405 U.S. 645, 658 (1972), for example, held invalid as an equal protection violation a state law that presumed unmarried fathers, but not unwed mothers, unfit as parents. Later, the Supreme Court expressly "reject[ed] . . the claim that . . . [there is] any universal difference between maternal and paternal relations at every phase of a child's development." *Caban v. Mohammed*, 441 U.S. 380, 389 (1979). Likewise, both spouses in a marriage are now entitled to economic support without regard to gender. *See* Cott, at 206–07. Once again, equal protection adjudication contributed to this change: *Orr*, 440 U.S. at 278–79, struck down a state statutory scheme imposing alimony obligations on husbands but not wives.

In short, a combination of constitutional sex-discrimination adjudication, legislative changes, and social and cultural transformation has, in a sense, already rendered contemporary marriage "genderless,"

to use the phrase favored by the defendants. *See* Op. Ct. at 12 n. 6. For, as a result of these transformative social, legislative, and doctrinal developments, "[g]ender no longer forms an essential part of marriage; marriage under law is a union of equals." *Perry*, 704 F. Supp. 2d at 993. As a result, in the states that currently ban same-sex marriage, the legal norms that currently govern the institution of marriage are "genderless" in every respect *except* the requirement that would-be spouses be of different genders. With that exception, Idaho and Nevada's marriage regimes have jettisoned the rigid roles marriage as an institution once prescribed for men and women. In sum, "the sex-based classification contained in the[se] marriage laws," as the only gender classification that persists in some states' marriage statutes, is, at best, "a vestige of sex-role stereotyping" that long plagued marital regimes before the modern era, *see Baker*, 744 A.2d at 906 (Johnson, J., concurring in part and dissenting in part), and, at worst, an attempt to reintroduce gender roles.

The same-sex marriage bars constitute gender discrimination both facially and when recognized, in their historical context, both as resting on sex stereotyping and as a vestige of the sex-based legal rules once imbedded in the institution of marriage. They must be subject to intermediate scrutiny.

III. Idaho and Nevada's Same-Sex Marriage Prohibitions Fail Under Intermediate Scrutiny

For Idaho and Nevada's same-sex marriage prohibitions to survive the intermediate scrutiny applicable to sex discriminatory laws, it must be shown that these laws "serve important governmental objectives and [are] substantially related to achievement of those objectives." *Craig*, 429 U.S. at 197.

"The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women." *Hogan*, 458 U.S. at 725–26.

In part, the interests advanced by the defendants fail because they are interests in promoting and enforcing gender stereotyping and so simply are not legitimate governmental interests. And even if we assume that the other governmental objectives cited by the defendants are legitimate and important, the defendants have not shown that the same-sex marriage prohibitions are substantially related to achieving any of them.

The asserted interests fall into roughly three categories: (1) ensuring children are raised by parents who provide them with the purported benefits of "gender complementarity," also referred to as "gender diversity"; (2) "furthering the stability of family structures through benefits targeted at couples possessing biological procreative capacity," and/or discouraging "motherlessness" or "fatherlessness in the home"; and (3) promoting a "child-centric" rather than "adult-centric" model of marriage."[8] The

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[8] The defendants also assert that the state has an interest in "accommodating religious freedom and reducing the potential for civic strife." But, as the Opinion of the Court notes, even if allowing same-sex marriage were likely to lead to religious strife, which is highly doubtful, to say the least, that fact would not justify the denial of equal protection inherent in the gender-based classification of the same-sex marriage bars. *See Watson v. City of Memphis*, 373 U.S. 526, 535 (1963) (rejecting the city's proffered justification that delay in desegregating park facilities was necessary to avoid interracial "turmoil," and explaining

defendants insist that "genderless marriage run[s] counter to . . . [these] norms and ideals," which is why "man-woman marriage" must be preserved.

The Opinion of the Court thoroughly demonstrates why all of these interests are without merit as justifications for sexual orientation discrimination. I add this brief analysis only to show that the justifications are likewise wholly insufficient under intermediate scrutiny to support the sex-based classifications at the core of these laws.

A. The Idaho defendants assert that the state has an interest in ensuring children have the benefit of parental "gender complementarity." There must be "space in the law for the distinct role of 'mother' [and] the distinct role of 'father' and therefore of their united, complementary role in raising offspring," the Idaho defendants insist. On a slightly different tack, the Nevada intervenors similarly opine that "[s]ociety has long recognized that diversity in education brings a host of benefits to students," and ask, "[i]f that is true in education, why not in parenting?"

Under the constitutional sex-discrimination jurisprudence of the last forty years, neither of these purported justifications can possibly pass muster as a justification for sex discrimination. Indeed, these justifications are laden with the very "'baggage of sexual stereotypes'" the Supreme Court has repeatedly disavowed. *Califano v. Westcott*, 443 U.S. at 89 (quoting *Orr*, 440 U.S. at 283).

(i) It should be obvious that the stereotypic notion "that the two sexes bring different talents

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"constitutional rights may not be denied simply because of hostility to their assertion or exercise").

to the parenting enterprise," runs directly afoul of the Supreme Court's repeated disapproval of "generalizations about 'the way women are,'" *VMI*, 518 U.S. at 550, or "the way men are," as a basis for legislation. Just as *Orr*, 440 U.S. at 279–80, rejected gender-disparate alimony statutes "as effectively announcing the State's preference for an allocation of family responsibilities under which the wife plays a dependent role," so a state preference for supposed gender-specific parenting styles cannot serve as a legitimate reason for a sex-based classification.

This conclusion would follow "[e]ven [if] some statistical support can be conjured up for the generalization" that men and women behave differently as marital partners and/or parents, because laws that rely on gendered stereotypes about how men and women behave (or should behave) must be reviewed under intermediate scrutiny. *See J.E.B.*, 511 U.S. at 140. It has even greater force where, as here, the supposed difference in parenting styles lacks reliable empirical support, even "on average."[9] Communicating such archaic gender-role stereotypes to children, or to parents and potential parents, is not a legitimate governmental interest, much less a substantial one.

(ii) The assertion that preserving "man-woman marriage" is permissible because the state has a substantial interest in promoting "diversity" has no more merit than the "gender complementarity" justification. Diversity is assuredly a weighty interest

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[9] As one of the plaintiffs' expert psychologists, Dr. Michael Lamb, explained, "[t]here . . . is no empirical support for the notion that the presence of both male and female role models in the home enhances the adjustment of children and adolescents."

in the context of public educational institutions, with hundreds or thousands of individuals. But "[t]he goal of community diversity has no place . . . as a requirement of marriage," which, by law, is a private institution consisting only of two persons. *Baker v. State*, 744 A.2d at 910 (Johnson, J., concurring in part and dissenting in part). "To begin with, carried to its logical conclusion, the [Nevada intervenors'] rationale could require all marriages to be between [two partners], not just of the opposite sex, but of different races, religions, national origins, and so forth, to promote diversity." *Id.* Such an absurd requirement would obviously be unconstitutional. *See Loving*, 388 U.S. 1.

Moreover, even if it were true that, on average, women and men have different perspectives on some issues because of different life experiences, individual couples are at least as likely to exhibit conformity as diversity of personal characteristics. Sociological research suggests that individual married couples are more likely to be *similar* to each other in terms of political ideology, educational background, and economic background than they are to be dissimilar; despite the common saying that "opposites attract," in actuality it appears that "like attracts like." *See*, *e.g*., John R. Alford et al., *The Politics of Mate Choic*e, 73:2 J. Politics 362, 376 (2011) ("[S]pousal concordance in the realm of social and political attitudes is extremely high."); Jeremy Greenwood et al., *Marry Your Like: Assortative Mating and Income Inequality* (Population Studies Ctr., Univ. Of Penn., Working Paper No. 14-1, at 1, 2014) (Since the 1960s, "the degree of assortative mating [with regard to educational level] has increased."). Further, there is no evidence of which I am aware that gender is a better predictor of diversity of viewpoints or of parenting styles than

other characteristics. Such "gross generalizations that would be deemed impermissible if made on the basis of race [do not become] somehow permissible when made on the basis of gender." *J.E.B.*, 511 U.S. at 139–40.

In short, the defendants' asserted state interests in "gender complementarity" and "gender diversity" are not legitimate "important governmental objectives." *See Craig*, 429 U.S. at 197. Accordingly, I do not address whether excluding same-sex couples from marriage is substantially related to this goal.

B. The defendants also argue that their states have an important interest in "encouraging marriage between opposite-sex partners" who have biological children, so that those children are raised in an intact marriage rather than in a cohabiting or single-parent household. Assuming that this purpose is in fact a "important governmental objective," the defendants have entirely failed to explain how excluding same-sex couples from marriage is substantially related to achieving the objective of furthering family stability.

(i) I will interpret the asserted state goal in preventing "fatherlessness" and "motherlessness" broadly. That is, I shall assume that the states want to discourage parents from abandoning their children by encouraging dual parenting over single parenting. If the asserted purpose were instead read narrowly, as an interest in ensuring that a child has both a mother and a father in the home (rather than two mothers or two fathers), the justification would amount to the same justification as the asserted interest in "gender complementarity," and would fail for the same reason. That is, the narrower version of the family stability justification rests on impermissible gender

stereotypes about the relative capacities of men and women.

Discouraging single parenting by excluding same-sex couples from marriage is oxymoronic, in the sense that it will likely achieve exactly the opposite of what the states say they seek to accomplish. The defendants' own evidence suggests that excluding same-sex couples from marriage renders their unions less stable, increasing the risk that the children of those couples will be raised by one parent rather than two.

True, an increasing number of children are now born and raised outside of marriage, a development that may well be undesirable.[10] But that trend began apace well before the advent of same-sex marriage and has been driven by entirely different social and legal developments. The trend can be traced to declines in marriage rates, as well as to the rise in divorce rates after the enactment of "no fault" divorce regimes in the late 1960s and early 1970s. "The proportion of adults who declined to marry at all rose substantially between 1972 and 1998 . . . . [In the same period,] [t]he divorce rate rose more furiously, to equal more than half the marriage rate, portending that at least one in two marriages would end in divorce." Cott, *Public Vows*, at 203. The defendants' assertion that excluding

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[10] According to the defendants, "[b]etween 1970 and 2005, the proportion of children living with two married parents dropped from 85 percent to 68 percent," and as of 2008, "[m]ore than a third of all U.S. children [were] . . . born outside of wedlock." *See* Benjamin Scafidi, Institute for American Values, *The Taxpayer Costs of Divorce and Unwed Childbearing: First-Ever Estimates for the Nation and All Fifty States 7 (2008).*

same-sex couples from marriage will do anything to reverse these trends is utterly unsubstantiated.

(ii) The defendants' appeal to biology is similarly without merit. Their core assertion is that the states have a substantial interest in channeling opposite-sex couples into marriage, so that any accidentally produced children are more likely to be raised in a two-parent household. But the exclusion of same-sex couples from the benefits and obligations of state-sanctioned marriage is assuredly not "substantially related," *Craig*, 429 U.S. at 197, to achieving that goal.

The reason only opposite-sex couples should be allowed to marry, we are told by the defendants, is that they "possess the unique ability to create new life." But both same-sex and opposite-sex couples can and do produce children biologically related only to one member of the couple, via assisted reproductive technology or otherwise. And both same-sex and opposite-sex couples adopt children, belying the notion that the two groups necessarily differ as to their biological connection to the children they rear.

More importantly, the defendants "cannot explain how the failure of *opposite-sex* couples to accept responsibility for the children they create relates at all to the exclusion of same-sex couples from the benefits of marriage." *Baker*, 744 A.2d at 911 (Johnson, J., concurring in part and dissenting in part). For one thing, marriage has never been restricted to opposite-sex couples able to procreate; as noted earlier, the spousal relationship, economic and otherwise, has always been understood as a sufficient basis for state approval and regulation. *See supra* pp. 18–21. For another, to justify sex discrimination, the state must explain why the *discriminatory feature* is closely related to the state interest. *See Hogan*, 458 U.S.

at 725–26. The states thus would have to explain, without reliance on sex-stereotypical notions, why the bans on same-sex marriage advance their interests in inducing more biological parents to marry each other. No such showing has been or can be made.

Biological parents' inducements to marry will remain exactly what they have always been if same-sex couples can marry. The legal benefits of marriage—taxation, spousal support, inheritance rights, familial rights to make decisions concerning the illness and death of a spouse, and so on—will not change. *See*, *e.g*. *Turner v. Safley*, 482 U.S. 78, 95–96 (1987). The only change will be that now-excluded couples will enjoy the same rights. As the sex-based exclusion of same-sex couples from marrying does not in any way enhance the marriage benefits available to opposite-sex couples, that exclusion does not substantially advance—or advance at all—the state interest in inducing opposite-sex couples to raise their biological children within a stable marriage.

(iii) Finally, the defendants argue that "the traditional marriage institution" or "man-woman marriage . . . is relatively but decidedly more child-centric" than "genderless marriage," which they insist is "relatively but decidedly more adult-centric."

These assertions are belied by history. As I have noted, *see supra* pp. 18–24, "traditional marriage" was in fact quite "adult-centric." Marriage was, above all, an economic arrangement between spouses. *See*, *e.g*., Cott, *Public Vows*, at 54. Whether or not there were children, the law imposed support obligations, inheritance rules, and other rights and burdens upon married men and women. Moreover, couples unwilling or unable to procreate have never been prevented from marrying. Nor was infertility generally recognized as

a ground for divorce or annulment under the old fault-based regime, even though sexual impotence was. *See*, *e.g*., Vernier, I §50, II § 68.

Further, the social concept of "companionate marriage"—that is, legal marriage for companionship purposes without the possibility of children—has existed since at least the 1920s. See Christina Simmons, *Making Marriage Modern: Women's Sexuality from the Progressive Era to World War II* 121 (2009). The Supreme Court called on this concept when it recognized the right of married couples to use contraception in 1965. *Griswold*, 381 U.S. at 486. *Griswold* reasoned that, with or without procreation, marriage was "an association for as noble a purpose as any." *Id.*

Same-sex marriage is thus not inherently less "child-centric" than "traditional marriage."[11] In both versions, the couple may bear or adopt and raise children, or not.

Finally, a related notion the defendants advance, that allowing same-sex marriage will render the marriage institution "genderless," in the sense that gender roles within opposite-sex marriages will be altered, is also ahistorical. As I have explained, those roles have already been profoundly altered by social, legislative, and adjudicative changes. All these changes were adopted toward the end of eliminating

[11] Moreover, if the assertion that same-sex marriages are more "adult-centric" is meant to imply state disapproval of the sexual activity presumed to occur in same-sex marriages, that disapproval could not be a legitimate state purpose. After *Lawrence*, the right to engage in same-sex sexual activity is recognized as a protected liberty interest. *See* 539 U.S. at 578.

the gender-role impositions that previously inhered in the legal regulation of marriage.

In short, the "child-centric" "adult-centric" distinction is an entirely ephemeral one, at odds with the current realities of marriage as an institution. There is simply no substantial relationship between discouraging an "adult-centric" model of marriage and excluding same-sex couples.

III. Conclusion

"Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women." *J.E.B.*, 511 U.S. at 130–31. Idaho and Nevada's same-sex marriage proscriptions *are* sex based, and these bans *do* serve to preserve "invidious, archaic, and overbroad stereotypes" concerning gender roles. The bans therefore must fail as impermissible gender discrimination.

I do not mean, by presenting this alternative analysis, to minimize the fact that the same-sex marriage bans necessarily have their greatest effect on lesbian, gay, bisexual, and transgender individuals. Still, it bears noting that the social exclusion and state discrimination against lesbian, gay, bisexual, and transgender people reflects, in large part, disapproval of their nonconformity with gender-based expectations.[12] That is, such individuals are often

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[12] Although not evidently represented among the plaintiff class, transgender people suffer from similar gender stereotyping expectations. *See*, *e.g.*, *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000) (discrimination on the basis of transgender status is also gender discrimination).

discriminated against because they are not acting or speaking or dressing as "real men" or "real women" supposedly do. "[S]tereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women." *Centola v. Porter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002); *see also* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. Rev. 197 (1994). The same-sex marriage prohibitions, in other words, impose harms on sexual orientation and gender identity minorities precisely because they impose and enforce *gender*-normative behavior.

I do recognize, however, that the gender classification rubric does not adequately capture the essence of many of the restrictions targeted at lesbian, gay, and bisexual people. Employment discrimination, housing discrimination, and peremptory strikes on the basis of sexual orientation, to name a few of the exclusions gays, lesbians, and other sexual orientation minorities have faced, are primarily motivated by stereotypes about sexual orientation; by animus against people based on their nonconforming sexual orientation; and by distaste for same-sex sexual activity or the perceived personal characteristics of individuals who engage in such behavior. *See*, *e.g.*, *Romer v. Evans*, 517 U.S. 620 (1996); *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (2014). And those sorts of restrictions do not turn directly on gender; they do not withhold a benefit, choice, or opportunity from an individual because that individual is a man or a woman. Although the gender stereotyping so typical of sex discrimination may be present, *see generally* Koppelman, 69 N.Y.U. L. Rev. 197, those restrictions are better analyzed as sexual orientation discrimination, as we did in *SmithKline*. 740 F.3d at 480–84.

As to the same-sex marriage bans in particular, however, the gender discrimination rubric does squarely apply, for the reasons I have discussed. And as I hope I have shown, the concepts and standards developed in more than forty years of constitutional sex discrimination jurisprudence rest on the understanding that "[s]anctioning sex-based classifications on the grounds that men and women, simply by virtue of their gender, necessarily play different roles in the lives of their children and in their relationships with each other causes concrete harm to women and to men throughout our society." Deborah A. Widiss et al., *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 Harv. J. L. & Gender 461, 505 (2007). In my view, the same-sex marriage bans belie that understanding, and, for that reason as well, cannot stand.

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

[Filed May 13, 2014]

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

SUSAN LATTA and TRACI EHLERS, LORI WATSEN and SHARENE WATSEN, SHELIA ROBERTSON and ANDREA ALTMAYER, AMBER BEIERLE and RACHAEL ROBERTSON,

Plaintiffs,

v.

C. L. "BUTCH" OTTER, as Governor of the State of Idaho, in his official capacity, and CHRISTOPHER RICH, as Recorder of Ada County, Idaho, in his official capacity,

Defendants,

and

STATE OF IDAHO,

Defendant-Intervenor.

MEMORANDUM DECISION AND ORDER

I. INTRODUCTION

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.

—The Honorable Harry Blackmun[1]

[1] *Bowers v. Hardwick*, 478 U.S. 186, 211 (1986) (Blackmun, J., dissenting), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

This case asks a basic and enduring question about the essence of American government: Whether the will of the majority, based as it often is on sincere beliefs and democratic consensus, may trump the rights of a minority. Plaintiffs are two same-sex couples who desire to marry in Idaho and two same-sex couples who legally married in other states and wish to have their marriages recognized in Idaho. Under the Constitution and laws of the State of Idaho (Idaho's Marriage Laws), marriage between a man and a woman is the only legally recognized domestic union. Idaho effectively prohibits same-sex marriage and nullifies same-sex marriages legally celebrated in other states. Plaintiffs request the Court declare these laws unconstitutional and enjoin Idaho from enforcing them, which would allow the Unmarried Plaintiffs to marry and the Married Plaintiffs to be legally recognized as married in the state they consider home.

Although 17 states legally recognize same-sex marriages,[2] Idaho is one of many states that has chosen the opposite course. Like courts presiding over similar cases across the country, the Court must examine whether Idaho's chosen course is constitutional. Significantly, the Supreme Court of the United States recently held that the federal government cannot constitutionally define marriage as a legal union between one man and one woman.

[2] Six states have legalized same-sex marriage through court decisions (California, Connecticut, Iowa, Massachusetts, New Jersey, and New Mexico); eight have done so through legislation (Delaware, Hawaii, Illinois, Minnesota, New Hampshire, New York, Rhode Island, and Vermont); and three have legalized same-sex marriage by popular vote (Maine, Maryland, and Washington). *See Kitchen v. Herbert*, 961 F.Supp.2d 1181, 1192 n.4 (D. Utah 2013). The District of Columbia also legalized same-sex marriage through legislation. *Id.*

United States v. Windsor, 133 S. Ct. 2675 (2013). Writing for the majority in *Windsor*, Justice Kennedy reasoned the "purpose and effect" of the federal man-woman marriage definition was "to disparage and injure" legally married same-sex couples in derogation of the liberty, due process, and equal protection guaranteed by the Fifth Amendment to the United States Constitution. *Id.* at 2696. Here, the Court considers a related but distinct question: Do Idaho's Marriage Laws deny Plaintiffs the due process or equal protection guaranteed by the Fourteenth Amendment to the United States Constitution?

After careful consideration, the Court finds Idaho's Marriage Laws unconstitutional. This conclusion reaffirms a longstanding maxim underlying our system of government—a state's broad authority to regulate matters of state concern does not include the power to violate an individual's protected constitutional rights. *See, e.g., id*. at 2691 ("State laws defining and regulating marriage, of course, must respect the constitutional rights of persons. . . ."). Idaho's Marriage Laws deny its gay and lesbian citizens the fundamental right to marry and relegate their families to a stigmatized, second-class status without sufficient reason for doing so. These laws do not withstand any applicable level of constitutional scrutiny.

II. BACKGROUND

Marriage works a fundamental change on the lives of all who experience it. The decision to marry is both a deeply personal expression of love and a public declaration of commitment. For many, marriage is also a profoundly important religious institution, cementing and celebrating a life-long union enriched by enduring traditions. These traditions vary from faith to faith, but when most people think of marriage

they think of the ceremony—the wedding—with all of the hope and joy those pivotal moments entail. Compared to the immense personal and spiritual significance of marriage as a ceremonial rite, the civil institution of marriage is much more prosaic.

A. Idaho's Marriage Laws

A series of licensing statutes govern civil marriage in Idaho. As far as the State is concerned, marriage is a contract evidenced by a State-issued license and a solemnization. Idaho Code § 32-201(1). The solemnization itself can be secular or religious, and the officiant need not be an ordained minister. *Id.* §§ 32-303 to -304. Regardless of their preferred method of solemnization, opposite-sex couples are eligible for a marriage license so long as they meet certain minimal requirements. *See id*. §§ 32-202 (age limitations); -205, -206 (consanguinity limitations); -207 (prohibition of polygamous marriages).

A multitude of legal benefits and responsibilities flow from a valid civil marriage contract. These marital benefits include the right to be recognized as a spouse when petitioning to adopt a child born to a spouse, *see id*. §§ 16-1503, -1506; have access to an ill spouse at the hospital and to make medical decisions for an ill or incapacitated spouse without a written power of attorney, *see id.* § 39-4504; file a joint state income tax return as a married couple, *see id.* § 63-3031; inherit a share of the estate of a spouse who dies without a will, *see id*. § 15-2-102; preclude a spouse from testifying in a court proceeding about confidential communications made during the marriage, *see id.* § 9-203; and jointly own community property with right of survivorship, *see id.* § 15-6-401. These incidents of marriage touch every aspect of a person's life. From the deathbed to the tax form, property rights to

parental rights, the witness stand to the probate court, the legal status of "spouse" provides unique and undeniably important protections. Opposite-sex married couples enjoy many of these benefits by automatic operation of law.

A couple need not marry in Idaho to enjoy these benefits, as Idaho generally follows the so-called "place of celebration rule." *See 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."). Under this longstanding rule, a marriage contracted outside Idaho will be valid in Idaho if the marriage is valid where contracted. *See* Idaho Code § 32-209. That is, unless the marriage is between two persons of the same sex. *Id.*

Same-sex couples are categorically prohibited from obtaining a marriage license in Idaho or from having their otherwise valid out-of-state marriages recognized in Idaho. But for the fact they are same-sex couples, Plaintiffs would either be recognized as married or be eligible to marry.

Plaintiffs challenge three specific provisions of Idaho law.[3] First, Idaho Code § 32-201 defines marriage as

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[3] The Idaho Code is replete with provisions referencing "husband and wife" or the traditional, opposite-sex definition of marriage. *See, e.g., id.* §§ 32-202 (referring to "the male" and "the female" parties to a marriage contract); 32-304 (requiring couple to declare they "take each other as husband and wife"); 32-901 to -929 (relating to "Husband and Wife – Separate and Community Property"). The Court need not survey these scattered provisions because, as discussed in Part II.D below, Plaintiffs' requested relief is broad enough to cover any source of Idaho law that would

"a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making it is necessary." *Id.* § 32-201(1). This statute prohibits same-sex marriage regardless of whether a couple otherwise qualifies for a marriage license.

Second, Idaho Code § 32-209 provides the mechanism by which Idaho recognizes the legal validity of marriages contracted in other states or countries. The statute provides:

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

Id. § 32-209. This statute creates a two-tiered system for out-of-state marriages. While opposite-sex couples benefit from the place of celebration rule, married same-sex couples shed their marital status upon entering Idaho. Although the State's non-recognition policy is not limited to same-sex marriages and marriages contracted with the intent to evade Idaho law, the statute lists no other form of marriage specifically.

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prohibit or refuse to recognize same-sex marriages, wherever contracted.

Third, the Idaho Constitution effectively bans legal recognition of same-sex unions. In November of 2006, a majority of Idaho's electorate voted to add the following language to the Idaho Constitution: "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.

This provision has the combined legal effect of the two statutes referenced above. But, by virtue of its place in the Idaho Constitution, the amendment imposes powerful restraints on Idaho's Legislature and Judiciary. The provision effectively precludes a state court from finding that Idaho law requires the State to recognize any type of same-sex union. And it precludes every legislative body in Idaho from recognizing civil unions or any other same-sex relationship approximating marriage. Absent a superseding constitutional amendment, no branch of state government may authorize or recognize the marriage of two persons of the same sex. Thus, Idaho's Marriage Laws prevent same-sex couples, whether married or unmarried, from obtaining the marital status and benefits afforded to opposite-sex couples.

B. The Plaintiffs

Plaintiffs are four same-sex couples. The Married Plaintiffs, Susan Latta and Traci Ehlers, and Lori Watsen and Sharene Watsen, legally married in other states and wish to have their marriages recognized in Idaho. The Unmarried Plaintiffs, Shelia Robertson and Andrea Altmayer, and Amber Beierle and Rachael Robertson, desire to be married in Idaho, but the County Recorder of Ada County, Defendant Rich, denied their marriage license applications. The following undisputed facts are contained in the pleadings and in Plaintiffs' declarations.

1. *Susan Latta and Traci Ehlers*

Susan Latta has lived in Boise for 22 years. Traci Ehlers has resided in Idaho's Treasure Valley for 38 years. Latta is a professional artist and adjunct professor at Boise State University, and Ehlers owns a small business in Boise. They met at a book club and began dating in 2003. Ehlers proposed to Latta in 2004, and, in 2006, the couple celebrated "a meaningful but not legally binding wedding ceremony in Boise." (Latta Dec. ¶ 11, Dkt. 48.) In 2008, the couple legally married in California soon after that state began allowing same-sex marriages. Neither Latta nor Ehlers had been married before, but they decided to marry because they wanted to spend the rest of their lives together. Although Ehlers never thought she would have children, she is now step-mother to Latta's children and step-grandmother to Latta's grandchildren.

Both Latta and Ehlers attest that Idaho's refusal to recognize their marriage complicates and demeans their lives. They worry about the ramifications of aging without a legally recognized marriage, a reality that implicates taxes, inheritance, Social Security benefits, hospital visitation rights, and medical decision-making. Although they can file a "married" tax return for federal purposes, Idaho law requires them to file "single" state tax returns. Latta and Ehlers plan to seek professional assistance to prepare their state tax returns. The couple also is unsure about the status of property they acquired during their marriage because a quitclaim deed purporting to grant each of them title to community property with right of survivorship may not be enforceable absent a legally recognized marriage. Ehlers explains, "it is painful that the state we love, the place that we have made

our home, where we vote and pay taxes, where we have our businesses, where we participate, and volunteer, and donate, treats us as second-class citizens." (Ehlers Dec. ¶ 18, Dkt. 49.)

2. *Lori Watsen and Sharene Watsen*

Lori and Sharene Watsen reside in Boise, where Sharene works as a physician assistant and Lori works as a social worker. Friends introduced the Watsens in 2009, and the two have been together as a couple since their first date. In 2011, the couple married in a small legal ceremony in New York. They held a larger celebration of their marriage at their church in Boise during the summer of 2012. The Watsens both describe their marriage as an important symbol of their love for and commitment to each other, not least because they both grew up in deeply religious families that value the institution greatly.

Also in 2012, the Watsens decided to start a family. Their son was conceived by artificial insemination in September 2012, and Sharene gave birth in May 2013. Although they requested that Lori be listed as their son's parent, his birth certificate lists only Sharene. In the summer of 2013, the Watsens hired an attorney to assist Lori's adoption of their son. An Ada County magistrate judge dismissed the adoption petition and, despite their valid New York marriage, deemed Lori to be Sharene's unmarried "cohabitating, committed partner" without legal standing to adopt Sharene's son. (S. Watsen Dec. Ex. C., Dkt. 51-3 at 5.) The couple felt demeaned by the magistrate judge's decision, and Lori plans to again petition for adoption.[4]

[4] After the dismissal of Lori Watsen's adoption petition, the Idaho Supreme Court held "Idaho's adoption statutes plainly allow" a woman to adopt her same-sex partner's children. *In re*

Like Latta and Ehlers, the Watsens are concerned about the many complications Idaho's Marriage Laws add to their family life. Lori Watsen must create a new medical power of attorney every six months, for, without one, she cannot consent to medical treatment for her son. In addition, the Watsens have the same tax and community property problems as Latta and Ehlers. Above all, Lori Watsen wants their "son to have the same pride in us, as his parents, that I feel for my parents, who have been married for 50 years." (L. Watsen Dec. ¶ 36, Dkt. 50.)

3. *Shelia Robertson and Andrea Altmayer*

Shelia Robertson and Andrea Altmayer live together in Boise. Altmayer works as a massage therapist. Robertson, who has advanced training in communicative disorders, teaches deaf students at a local school district and works part-time as a video relay interpreter.

The two have been in a committed, exclusive relationship since friends introduced them 16 years ago. If Idaho allowed same-sex marriages, they would have married years ago. Although the couple considered marrying outside Idaho, they did not wish to incur the expense of traveling away from their family and friends only to return home with a marriage not recognized in Idaho. Even so, Robertson and Altmayer decided to start a family. Altmayer became pregnant through artificial insemination and gave birth to their son in 2009.

Adoption of Doe, —P.3d—, 2014 WL 527144, at *6 (Idaho Feb. 10, 2014). The court made clear it would not "imply . . . restrictions based on Idaho's marital statutes" and that "sexual orientation was wholly irrelevant to our analysis." *Id.*

Similar to the Watsens' experience, Robertson and Altmayer completed birth certificate forms identifying Altmayer as the mother and Robertson as a parent. But the birth certificate lists only Altmayer as their son's parent. The lack of a legally recognized parental relationship between Robertson and her son means she cannot consent to medical treatment for him and otherwise prevents the couple from equally sharing numerous parental responsibilities. Robertson and Altmayer worry their son will not have the security and stability afforded by two legal parents. Both are deeply concerned their son will grow up believing there is something wrong with his family because his parents cannot marry.

On November 6, 2013, Robertson and Altmayer submitted a marriage license application to the Ada County Recorder. The application was denied only because Robertson and Altmayer are both women. Demeaned but undeterred by this experience, the couple wishes to be married "so that other people understand that we are a family, in a permanent life-long relationship." (S. Robertson Dec. ¶ 15, Dkt. 53.)

4. *Amber Beierle and Rachael Robertson*

Amber Beierle and Rachael Robertson both grew up, reside, and wish to marry in Idaho. Beierle holds a M.S. in Applied Historical Research and works for the Idaho State Historical Society. Roberston is an Army veteran, having served a tour of duty in Iraq from June 2004 to November 2005. During her military service, Robertson earned the Army Combat Medal and the Soldier Good Conduct Medal. She was honorably discharged from the Army in 2008 and now manages a warehouse in Boise.

Beierle and Robertson met in 2006 and began dating in 2010. The two have been in a committed, exclusive relationship since Valentine's Day, 2011. They bought a house together in December of 2012. The couple plans to raise children, but they worry their children will grow up thinking something is wrong with their family because Beierle and Robertson cannot marry. Although they considered marrying in another state, they wish to be married in their home state of Idaho. And, even if they were married in another state, Idaho law would prevent them from being buried together at the Idaho Veterans Cemetery because they are a same-sex couple.

Beierle and Robertson also applied for a marriage license on November 6, 2013. Although they otherwise qualify for a marriage license, the Ada County Recorder's Office denied the application because they are both women. This experience demeaned Beierle and Robertson. They "want to have the same freedom as opposite-sex couples to marry the person [they] love and to share the benefits and responsibilities of marriage and in the recognition and protections of marriage." (Beierle Dec. ¶ 19, Dkt. 54.)

C. The Defendants

Defendant C.L. "Butch" Otter is the Governor of the State of Idaho. He is sued in his official capacity. As Governor, Defendant Otter is responsible for upholding and ensuring compliance with the Idaho Constitution and statutes enacted by the Legislature, including the marriage laws at issue in this case. *See* Idaho Const. Art. IV, § 5 ("The supreme executive power of the state is vested in the governor, who shall see that the laws are faithfully executed.").

Defendant Christopher Rich is Recorder of Ada County, Idaho. He is sued in his official capacity. As the Ada County Recorder, Defendant Rich has "the authority to issue marriage licenses to any party applying for the same who may be entitled under the laws of this state to contract matrimony." Idaho Code § 32-401. On November 6, 2013, an authorized deputy of Defendant Rich denied the Unmarried Plaintiffs' applications for marriage licenses because, as same-sex couples, they were not entitled to contract matrimony in Idaho.

Early in this case, the State of Idaho moved and was permitted to intervene as a defendant. (Dkt. 38.) The State, by and through the Idaho Attorney General, asserts a strong, independent interest in defending Idaho's laws against constitutional attack. Throughout this litigation, the State has joined in Recorder Rich's motions and briefing.

D. Requested Relief

Plaintiffs bring suit under 42 U.S.C. § 1983, alleging that Governor Otter and Recorder Rich acted in their official capacities and under color of law to deprive them of rights protected by the Fourteenth Amendment to the United States Constitution.[5] They request a declaration that all Idaho laws prohibiting same-sex marriage or barring recognition of valid out-of-state same-sex marriages violate the due process and equal protection guarantees in the Fourteenth Amendment. They also request a permanent injunction against enforcement of any Idaho law that would prohibit or withhold recognition of same-sex marriages. These

[5] There is no dispute that Plaintiffs have standing to bring this lawsuit or, considering the relief requested, that Defendants are proper parties.

claims constitute a facial constitutional attack on the validity of any Idaho law that prohibits same-sex marriage in Idaho or withholds recognition of same-sex marriages validly contracted in another state.[6]

III. STANDARD OF REVIEW

The parties seek judicial resolution of this case via three motions: Defendant Recorder Rich and Defendant-Intervenor Idaho's motion to dismiss for failure to state a claim (Dkt. 43)[7], Plaintiffs' motion for summary judgment (Dkt. 45), and Defendant Governor Otter's motion for summary judgment (Dkt. 57). Typically, motions to dismiss are evaluated under different standards than motions for summary judgment. But here, the motion to dismiss must be treated as a motion for summary judgment.

Recorder Rich and Defendant-Intervenor Idaho's motion to dismiss attaches and references numerous documents outside the pleadings. These documents include five articles on marriage and parenting. (Dkt. 30-6 to -10.) The parties vigorously dispute the meaning and import of the sociological literature on these points. Because the Court considered the literature submitted with the motion to dismiss, the

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[6] The undersigned United States Magistrate Judge has jurisdiction over this matter by virtue of all parties' express written consent. 28 U.S.C. § 636(c); *see also* D. Idaho Loc. Civ. R. 72.1(a)(1) (authorization to decide civil cases with the parties' consent), (Dkt. 40) (consents).

[7] Recorder Rich first moved to dismiss this case on January 9, 2014. (Dkt. 30.) After the Court permitted the State to intervene, the State filed a motion to dismiss that adopted all arguments made in Recorder Rich's initial motion. (Dkt. 41.) Plaintiffs thereafter filed an Amended Complaint, (Dkt. 42), which Recorder Rich and the State jointly moved to dismiss based on the reasons stated in their earlier motions to dismiss. (Dkt. 43.)

motion must be treated as a motion for summary judgment. Fed. R. Civ. P. 12(d); *see also Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 921-22 (9th Cir. 2004) (finding a represented party's submission of extra-pleading materials justified treating motion to dismiss as motion for summary judgment). The Court will evaluate all pending motions under the summary judgment standard.

A party is entitled to summary judgment when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When parties submit cross-motions for summary judgment, "the court must review the evidence submitted in support of each cross-motion" and decide each on its own merits. *Fair Housing Council of Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001).

IV. ANALYSIS

The Court has considered the parties' briefs and supporting materials, as well as oral arguments presented during a May 5, 2014 hearing on all dispositive motions. As a preliminary matter, the Court finds the Supreme Court's summary decision in *Baker v. Nelson*, 409 U.S. 810 (1972), does not prevent lower federal courts from deciding the constitutional issues in this case. With respect to Plaintiffs' due process claim, Idaho's Marriage Laws are subject to strict scrutiny because they infringe upon Plaintiffs' fundamental right to marry. Under the Equal Protection Clause, Idaho's Marriage Laws are subject to heightened scrutiny because they intentionally discriminate on the basis of sexual orientation. The Court finds that Idaho's Marriage Laws do not survive any applicable level of constitutional scrutiny and therefore violate the Equal Protection and Due

Process Clauses of the Fourteenth Amendment to the United States Constitution. The reasons for these findings are discussed below.

A. *Baker v. Nelson*

Defendants initially argue that *Baker v. Nelson* is binding precedent that shields Idaho's Marriage Laws from constitutional attack. *Baker* was an appeal to the United States Supreme Court from a decision of the Supreme Court of Minnesota. The Minnesota court held that neither Minnesota law nor the United States Constitution required the issuance of marriage licenses to a same-sex couple. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), appeal dismissed, 409 U.S. 810 (1972). Based on a brief review of then-existing due process and equal protection jurisprudence, the Minnesota court rejected the plaintiffs' due process and equal protection claims. On appeal, the Supreme Court summarily dismissed the case "for want of a substantial federal question." *Baker*, 409 U.S. at 810.

Summary dismissals have real but narrow precedential value. "A summary disposition affirms only the judgment of the court below, and no more may be read into [the] action than was essential to sustain the judgment." *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 182-83 (1979) (citations omitted). The dismissal "prevent[s] lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided" in the action. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). When a case raises the precise issue addressed by a summary dismissal, "the lower courts are bound . . . until such time as the [Supreme] Court informs them that they are not." *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (quotation omitted). Defendants correctly note that *Baker* necessarily decided the precise issues presented

in this case and that the Supreme Court has not expressly overruled Baker in the four decades after it was summarily decided.

Although *Baker* speaks to the precise issues presented in this case, there is good reason to find its guidance no longer binding. The Supreme Court has instructed that "inferior federal courts had best adhere to the view that if the Court has branded a question as insubstantial, it remains so *except when doctrinal developments indicate otherwise*." *Hicks*, 422 U.S. at 344 (emphasis added). Defendants make forceful arguments about the binding nature of summary dismissals, but they overlook the doctrinal developments exception stated in *Hicks*. In fact, Defendants cite only one case that analyzes the doctrinal developments since *Baker*, and that case was decided before *Windsor*. *See Jackson v. Abercrombie*, 884 F.Supp.2d 1065, 1085-86 (D. Haw. 2012) (concluding pre-*Windsor* doctrinal developments did not overcome *Baker*). The Supreme Court's due process and equal protection jurisprudence has developed significantly in the four decades after *Baker*, and, in last year's *Windsor* decision, the Court dramatically changed tone with regard to laws that withhold marriage benefits from same-sex couples.

In 1972, the Supreme Court had not recognized gender as a quasi-suspect classification. *See Frontiero v. Richardson*, 411 U.S. 677 (1973).[8] Nor had the Court

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[8] November 22, 1971—less than a year before the summary decision in Baker—was the first time the Supreme Court struck down a law because it unconstitutionally discriminated on the basis of gender. *Reed v. Reed*, 404 U.S. 71 (1971). Overruling the Idaho Supreme Court, Reed held that Idaho's statutory prefer-

applied heightened equal protection scrutiny to gender-based classifications. *See Craig v. Boren*, 429 U.S. 190 (1976). It was not until 1996 that the Supreme Court recognized laws based on a "'bare . . . desire to harm'" homosexuals were not rationally related to any legitimate government interest. *Romer v. Evans*, 517 U.S. 620 (1996) (quoting *U.S. Dept. of Agric. v. Moreno*, 413 U.S. 528 (1973)). Since *Baker*, the Supreme Court's equal protection jurisprudence has expanded, scrutinizing both gender and sexual orientation discrimination in more exacting ways.

In 1972, states could constitutionally criminalize private, consensual sex between adults of the same sex based on nothing more than moral disapproval of the homosexual lifestyle. *See Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003). But, just 11 years ago, the Court reversed course and held the government could not lawfully "demean [homosexuals'] existence or control their destiny by making their private sexual conduct a crime." *Lawrence*, 539 U.S. at 574. Lawrence reaffirmed that the Due Process Clause protects fundamental rights of personhood, definitively establishing that individuals do not forfeit their rights because of their sexual orientation. *Id.* At the very least, *Romer* and *Lawrence* strongly suggest that state-approved discrimination based on sexual orientation is now a substantial federal question.

Although courts formerly were reluctant to find these developments sufficient to overcome *Baker, e.g., Jackson*, 884 F.Supp.2d at 1085-86, much has changed

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ence for male estate administrators was "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment. . . ." *Id.* at 76.

in just the last year. In June of 2013, the Supreme Court struck down the federal man-woman definition of marriage because, when applied to legally married same-sex couples, it "demean[ed] the couple, whose moral and sexual choices the Constitution protects." *Windsor*, 133 S. Ct. at 2694. In doing so, the Supreme Court affirmed the decision of the United States Court of Appeals for the Second Circuit, which expressly held that Baker did not foreclose review of the federal marriage definition. *Windsor v. United States*, 699 F.3d 169, 178-80 (2d Cir. 2012) ("Even if *Baker* might have had resonance . . . in 1971, it does not today."). Also last summer, the Supreme Court declined to review a decision invalidating California's voter-approved man-woman marriage definition. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). The Supreme Court dismissed the appeal not because Baker rendered the question insubstantial, but because the law's supporters lacked standing to defend it after the State of California decided not to. These are doctrinal developments sufficient to overcome the narrow precedential effect of a summary dismissal.

Since *Windsor*, no federal court has ruled to the contrary. In fact, every court to consider Baker in the context of a post-*Windsor* challenge to laws against same-sex marriage has found that doctrinal developments since 1972 provide ample reason to reach the merits. *Kitchen v. Herbert*, 961 F.Supp.2d 1181, 1194-95 (D. Utah 2013); *Bishop v. U.S.*, 962 F.Supp.2d 1252 (N.D. Okla. 2014); *Bostic v. Rainey*, 970 F.Supp.2d 456, 468-70 (E.D. Va. 2014); *McGee v. Cole*, — F.Supp.2d—, 2014 WL 321122 at *8-10 (S.D. W.Va. Jan. 29, 2014); *Bourke v. Beshear*, —F.Supp.2d—, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014); *De Leon v. Perry*, —F.Supp.2d—, 2014 WL 715741, at *8-10 (W.D. Tex. Feb. 26, 2014); *DeBoer v. Snyder*, —F.Supp.2d—,

2014 WL 1100794, at * 15 n.6 (E.D. Mich. Mar. 21, 2014). Consistent with the findings of its sister courts, the Court concludes that Baker is not controlling and does not bar review of Plaintiffs' claims.

B. Due Process

The Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees fair process and places substantive limits on the States' authority to constrain individual liberty. Many of our most cherished liberties originate in the Bill of Rights—among them the freedoms of speech, press, and religion; the right to be free from unreasonable searches and seizures; and the right to just compensation when the government takes private property. Initially, the Bill of Rights guarded against only actions by the federal government. But, upon the adoption of the Fourteenth Amendment, a more comprehensive protection came into force: "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive a person of life, liberty, or property, without due process of law; nor deny to any person the equal protection of the laws." U.S. Const. amend. XIV, § 1. Now, most of the Bill of Rights applies to the states by virtue of the Fourteenth Amendment. *See McDonald v. City of Chicago*, 130 S. Ct. 3020, 3034-36, 3050 (2010) (chronicling "selective incorporation" of the Bill of Rights and incorporating the Second Amendment).

The Supreme Court also has recognized that the liberty guaranteed by the Fourteenth Amendment extends beyond the Bill of Rights to "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of

personhood were they formed under the compulsion of the State." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

An individual's protected liberties include certain fundamental rights of personhood. These rights center on the most significant decisions of a lifetime—whom to marry, whether to have children, and how to raise and educate children. *Lawrence*, 539 U.S. at 574. These choices are protected because they implicate "associational rights . . . 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971)).

Ordinarily, laws do not offend the Due Process Clause when they are rationally related to a legitimate government interest. *Washington v. Glucksburg*, 521 U.S. 702, 722 (1997). But laws that implicate fundamental rights are subject to strict scrutiny, surviving only if narrowly tailored to a compelling government interest. *Reno v. Flores*, 507 U.S. 292, 301-02 (1993). The essential issue for due process purposes is whether Idaho's Marriage Laws infringe on Plaintiffs' fundamental rights.

The decisions of the United States Supreme Court "confirm that the right to marry is of fundamental importance for all individuals." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978). "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men" and women. *Loving v. Virginia*, 388 U.S. 1, 11 (1967). "It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a

bilateral loyalty, not commercial or social projects." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

Against this background, Plaintiffs wish to exercise their fundamental right to marry. Defendants acknowledge that the fundamental right to marry exists, but they argue it does not extend to same-sex couples. Rather, Defendants contend Plaintiffs seek recognition of a new fundamental right, the right to same-sex marriage.

Defendants appropriately note that the Supreme Court has explicitly cautioned against finding new fundamental rights. "[T]he Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksburg*, 521 U.S. at 720-21 (quotations and citations omitted). A "careful description" of the newly asserted liberty interest also is necessary. *Id.* at 721. Moreover, the "Nation's history, legal traditions, and practices . . . provide the crucial guideposts for responsible decisionmaking, that direct and restrain [the Court's] exposition of the Due Process Clause." *Id.* (quotation and citation omitted).

The *Glucksburg* decision is instructive on how the Supreme Court evaluates new fundamental rights. There, the plaintiffs asserted the State of Washington's ban on causing or aiding another person's suicide violated a constitutionally protected right to choose the manner of one's own death. The Supreme Court surveyed the history of the law regarding suicide, concluding "[t]he history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit

it." *Id.* at 728. Given this largely unbroken tradition, the Court declined to recognize a new constitutionally protected right to suicide or assisted suicide. The Supreme Court then upheld Washington's assisted suicide ban because the ban rationally related to Washington's legitimate interest in preserving human life.

The restraint exercised in *Glucksburg* is not warranted here. Although marriage is not mentioned in the Bill of Rights, the Supreme Court has uniformly treated marriage as an established fundamental right. A long line of cases recognize marriage as a fundamental right, variously describing it as a right of liberty, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), of privacy, *Griswold*, 381 U.S. at 486, and of association, *M.L.B.*, 519 U.S. at 116. This exalted status among personal rights is based on the recognition that marriage "involv[es] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy. . . ." *Casey*, 505 U.S. at 851. In fact, *Glucksburg* cites the right to marry as one of the well-established fundamental rights. 521 U.S. at 720.

Because the right to marry is fundamental, the Supreme Court has repeatedly invalidated laws that infringe upon it. In the pathmarking case of *Loving v. Virginia*, our Nation's highest court found unconstitutional a Virginia statute banning interracial marriages. 388 U.S. 1 (1967). Similar to the Idaho Marriage Laws challenged here, Virginia's anti-miscegenation laws prohibited the issuance of marriage licenses to interracial couples and further forbade attempts to evade the ban by marrying out-of-state. *Loving*, 388 U.S. at 4-6. Violation of these Virginia's law was a criminal offense punishable by

imprisonment for up to five years. *Id.* at 5. Regardless of the historical precedent for such laws, the Supreme Court made clear that "the freedom to marry or not marry[] a person of another race resides with the individual and cannot be infringed by the State." *Id.* at 12.

The Supreme Court reaffirmed the fundamental and individual character of the right to marry in *Zablocki v. Redhail*. There, the Court reviewed a Wisconsin law that required residents to seek court permission to marry if a Wisconsin resident had children not in the resident's custody. *Zablocki*, 434 U.S. at 375. Under that law, permission to marry would be granted only if the resident could show full compliance with any child-support obligations and further demonstrate children covered by a support order were "not then and [were] not likely thereafter to become public charges." *Id.* (quoting Wis. Stat. § 245.10 (1973)). Despite the State's interest in child welfare, the Supreme Court invalidated the statute because it "unnecessarily impinge[d] on the right to marry" in a context where Wisconsin had "numerous other means" for advancing its interest. *Id.* at 388-89.

Next, in 1987, the Supreme Court struck down a Missouri prison regulation that restricted inmates' right to marry. *Turner v. Safley*, 482 U.S. 78 (1987). Under the regulation, an inmate could marry only with approval from the superintendent of prisons, permission that would be granted under "compelling" circumstances such as pregnancy or the birth of an illegitimate child. *Id.* at 82. While prisoners are subject to a variety of restrictions on their constitutional liberties, the Court found that "[m]any important attributes of marriage remain, however, after taking into account the limitations imposed by

prison life." *Id.* at 95. Recognizing the emotional, public, and spiritual significance of marriage, as well as the many government benefits that flow from marital status, the Court struck down the prison regulation. According to the Supreme Court, "these incidents of marriage, like the religious and personal aspects of the marriage commitment, are unaffected by the fact of confinement or the pursuit of legitimate penological objectives." *Id.* at 95-96.

More recently, the Supreme Court confirmed that gay and lesbian individuals do not forfeit their constitutional liberties simply because of their sexual orientation. *Lawrence*, 539 U.S. 558. The Court observed that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Id.* at 574. Emphasizing that these are personal rights, the Court concluded "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Id.* (emphasis added). And, less than one year ago, the Supreme Court struck down the federal Defense of Marriage Act's man-woman definition of marriage because it amounted to unconstitutional "interference with the equal dignity of same-sex marriages" recognized by some states. *Windsor*, 133 S. Ct. at 2693. The message of these cases is unmistakable—all individuals have a fundamental right to marry.

Defendants argue these cases do not apply here because the Supreme Court has recognized a fundamental right to only heterosexual marriage. Relying on *Glucksburg*, the Defendants characterize this case as one involving the "right to same-sex marriage," a

right lacking both historical precedent and constitutional protection. Defendants' argument suffers from three critical flaws.

This "new right" argument attempts to narrowly parse a right that the Supreme Court has framed in remarkably broad terms. Loving was no more about the "right to interracial marriage" than *Turner* was about the "prisoner's right to marry" or *Zablocki* was about the "dead-beat dad's right to marry." Even in cases with such vastly different facts, the Supreme Court has consistently upheld the right to marry, as opposed to a sub-right tied to the facts of the case. While *Glucksburg* demands that new rights be carefully described and deeply rooted, the cases above demonstrate that the Supreme Court has long recognized an unembellished right to marry.

On the other hand, the holding in Glucksburg followed directly from the unbroken pattern of state laws and legal traditions disapproving suicide and assisted suicide. 521 U.S. at 710-11 ("Indeed, opposition to and condemnation of suicide—and, therefore, assisting suicide—are consistent and enduring themes of our philosophical, legal, and cultural heritages."). Given that context, it was a truly novel proposition to say that the concept of "liberty" substantively protects a person's freedom to end his or her life. Finding the policy of condemning and discouraging suicide both deeply rooted and nearly universal in contemporary society, the Court declined to recognize a new fundamental right. *Id.* at 728.

The context here is dramatically different. Far from a uniform pattern of laws rejecting the practice, a fast-growing number of states now recognize that same-sex and opposite-sex marriages are equal. And, while *Glucksburg* makes much of the consistent legal,

medical, and social policies against suicide, the Court is not aware of a similarly pervasive policy against marriage. To the contrary, the Defendants make abundantly clear that marriage is a life-affirming institution—something to be encouraged because it provides stability not only for couples, but also for children.

Finally, and most critically, the Supreme Court's marriage cases demonstrate that the right to marry is an individual right, belonging to all. *See Lawrence*, 539 U.S. at 574. If every individual enjoys a constitutional right to marry, what is the substance of that right for gay or lesbian individuals who cannot marry their partners of choice? Traditional man-woman marriage is no answer, as this would suggest that gays and lesbians can switch off their sexual orientation and choose to be content with the universe of opposite-sex partners approved by the State.[9] Defendants offer no other answer.

In their effort to avoid the question, Defendants commit the same analytical mistake as the majority in *Bowers v. Hardwick*, the decision that declined to "announce a fundamental right to engage in homosexual sodomy." 478 U.S. 186, 191 (1986), overruled by *Lawrence*, 539 U.S. at 577. The crucial mistake in *Bowers* was that the majority narrowed and thus "fail[ed] to appreciate the extent of the liberty at stake." *Lawrence*, 539 U.S. at 567. For that reason, the

[9] "No credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation." *Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 966 (N.D. Cal. 2010); *see also Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (reviewing literature on the essential link between sexual and personal identity).

Supreme Court in *Lawrence* concluded "*Bowers* was not correct when it was decided, and it is not correct today." *Id.* at 577. Lawrence instructs not only that gay and lesbian individuals enjoy the same fundamental rights to make intimate personal choices as heterosexual individuals enjoy, but that judicial attempts to parse those rights out of existence will be met with a harsh rebuke.

The Supreme Court's marriage cases recognize an individual's fundamental right to marry. The right transcends one's race, confinement to prison, or ability to support children. Lawrence unequivocally cements marriage as among the constitutionally protected liberties shared by homosexual and heterosexual persons alike. The teaching of these cases is that the fundamental right to marry cannot be narrowed in the manner Defendants urge. Idaho's Marriage Laws render the Plaintiff couples legal strangers, stripping them of the choice to marry or remain married in the state they call home. Therefore, Idaho's Marriage Laws impermissibly infringe on Plaintiffs' fundamental right to marry.[10]

C. Equal Protection

Plaintiffs also claim Idaho's Marriage Laws violate the Equal Protection Clause of the Fourteenth Amendment. That clause "commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be

[10] For this reason, Idaho's Marriage Laws are subject to strict due process and equal protection scrutiny. *See Zablocki*, 434 U.S. at 388. But the Laws do not survive under the lower level of equal protection scrutiny applied in Part IV.D below. Consequently, the Laws would fail strict scrutiny.

treated alike." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985) (quoting U.S. Const., amend XIV, § 1). The equal protection guarantee is in tension with the reality that laws almost inevitably draw lines between groups of people, advantaging some and disadvantaging others. *Romer v. Evans*, 517 U.S. 620, 631 (1996). The Supreme Court has developed tiers of judicial scrutiny in an effort to reconcile this practical reality with the constitutional principle. The level of scrutiny depends on the characteristics of the disadvantaged group or the rights implicated by the classification.

A law that neither targets a suspect class nor burdens a fundamental right is subject to rational basis scrutiny. *Heller v Doe*, 509 U.S. 312, 319-21 (1993). The Court in such cases presumes the law is valid unless the challenger can show the difference in treatment bears no rational relation to a conceivable government interest. *Id.* "A classification does not fail rational-basis review because it 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Id.* at 321 (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)). But, even under this most deferential standard, the "State may not rely on a classification whose relationship to the asserted goal is so attenuated as to render the decision arbitrary or irrational." *Cleburne*, 473 U.S. at 446. For this reason, courts "insist on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632; *see also Heller*, 509 U.S. at 321 (explaining the classification must "find some footing in the realities of the subject addressed by the legislation").

Strict scrutiny lies at the other end of the spectrum. This level of scrutiny applies when a legislative

classification "impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976). Such classifications are presumed unconstitutional and will survive strict scrutiny only when the government can show the law is narrowly tailored to a compelling governmental interest. *See Zablocki*, 434 U.S. at 388.

"Between the extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). These classifications are considered "quasi-suspect," and survive heightened constitutional scrutiny only if the State shows the classification is "substantially related to an important governmental objective." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

Discrimination against a quasi-suspect class, such as women, must be supported by an "exceedingly persuasive justification" and "not hypothesized or invented post hoc in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996). The purpose of this heightened level of scrutiny is to ensure quasi-suspect classifications do not perpetuate unfounded stereotypes or second-class treatment. *Id.* at 534.

The Court's principal tasks here are to determine the form of discrimination at issue and next identify and apply the appropriate level of scrutiny.

1. *Form of Discrimination*

Plaintiffs argue that Idaho's Marriage Laws discriminate against individuals on the basis of sex and sexual orientation. The Defendants counter that

Idaho's Marriage Laws do not prefer one sex over the other, nor do they target gay and lesbian persons.

A person's gender and sexual orientation are two sides of the same coin. As one court aptly observed, "sex and sexual orientation are necessarily interrelated, as an individual's choice of romantic or intimate partner based on sex is a large part of what defines an individual's sexual orientation." *Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 996 (N.D. Cal. 2010). However, the Supreme Court has not equated sexual orientation discrimination and sex discrimination despite several opportunities to do so. *See Romer*, 517 U.S. at 635 ("We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else."); *Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring) ("[T]he conduct targeted by this law is conduct that is closely correlated with being homosexual."); *Windsor*, 133 S. Ct. 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 the State."). Considering the Supreme Court's treatment of this issue, this Court finds that sex discrimination and sexual orientation discrimination are "distinct phenomena." *In re Marriage Cases*, 183 P.3d 384, 439 (Cal. 2008); *see also Bishop v. U.S.*, 962 F.Supp.2d 1252 (N.D. Okla. 2014) ("Common sense dictates that the intentional discrimination occurring in this case has nothing to do with gender-based prejudice or stereotypes, and the law cannot be subject to heightened scrutiny on that basis.").

Idaho's Marriage Laws allow heterosexuals, but not homosexuals, to marry and thus clearly discriminate on the basis of sexual orientation. This distinction does

not prefer one gender over the other—two men have no more right to marry under Idaho law than two women. In other words, Idaho's Marriage Laws are facially gender neutral and there is no evidence that they were motivated by a gender discriminatory purpose. *See In re Kandu*, 315 B.R. 123, 143 (Bankr. W.D. Wash. 2004) ("The test to evaluate whether a facially gender-neutral statute discriminates on the basis of sex is whether the law can be traced to a discriminatory purpose.") (internal quotations omitted).

2. *Level of Scrutiny*

Plaintiffs advance two reasons for applying heightened scrutiny to Idaho's Marriage Laws. First, they argue sexual orientation is subject to heightened scrutiny under recent precedent of the United States Court of Appeals for the Ninth Circuit. Second, they claim that classifications based on sexual orientation are constitutionally suspect.

a. Ninth Circuit Precedent

Plaintiffs first argue that heightened scrutiny applies to sexual orientation discrimination by virtue of the Ninth Circuit's recent decision in *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 484 (9th Cir. 2014). The Defendants claim *SmithKline* is distinguishable on its facts. The State and Recorder Rich argue *SmithKline* is a case about discriminatory jury selection and, as such, its holding is limited to cases involving intentional sexual orientation discrimination based on stereotypes. In a similar vein, Governor Otter claims *SmithKline* is inapplicable because Idaho's Marriage Laws are not motivated by animus toward homosexuals. Defendants misread the case.

SmithKline involved a constitutional challenge to a preemptory strike of a prospective juror during jury selection for a trial between two pharmaceutical companies, *SmithKline Beecham and Abbott Laboratories*. The parties' dispute centered on the pricing of HIV medications, which is "a subject of considerable controversy in the gay community." *Id.* at 474. During the jury selection process, Juror B was the only self-identified gay member of the jury pool. Immediately after Abbott exercised its first peremptory strike against Juror B, *SmithKline*'s counsel raised a Batson challenge that the trial judge denied.[11] The Ninth Circuit concluded that Abbott's challenge amounted to purposeful sexual orientation discrimination before answering the dispositive question: Whether classifications based on sexual orientation are subject to heightened scrutiny.

To answer this question, the Ninth Circuit looked to the Supreme Court's equal protection analysis in *Windsor*. Although *Windsor* does not announce the level of scrutiny, the *SmithKline* court considered what the Supreme Court "actually did" and determined the Supreme Court's analysis was inconsistent with pure rational basis review. *Id.* at 481. *SmithKline*'s examination of *Windsor* is authoritative and binding upon this Court.

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[11] In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court found that the Equal Protection Clause limits the privilege of exercising peremptory strikes when selecting a jury. Although Batson considered strikes based on race, its underlying constitutional principle now extends to classes of persons subject to intermediate or strict equal protection scrutiny. *J.E.B. v. Alabama*, 511 U.S. 127, 143 (1994) ("Parties may . . . exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review.").

According to *SmithKline*, *Windsor*'s constitutional analysis exhibits none of the hallmarks of rational basis review. First, the Supreme Court ignored the hypothetical justifications for the Defense of Marriage Act and instead carefully considered the law's actual purpose. *Id.* at 481-82 (citing *Windsor*, 133 S. Ct. at 2693-94). Second, "the critical part of *Windsor* begins by demanding that Congress's purpose '*justify* disparate treatment of the group.'" *Id.* at 482 (quoting *Windsor*, 133 S. Ct. at 2693). Wholly inconsistent with rational basis review, this demand neither defers to legislative choices nor presumes a law is constitutional. *Compare Williamson v. Lee Optical*, 348 U.S. 483, 487 (1955) ("[I]t is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement.") with *Windsor,* 133 S. Ct. at 2696 ("The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."). Concluding its analysis, the Ninth Circuit held that "*Windsor* requires that when state action discriminates on the basis of sexual orientation, we 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.

This holding is unqualified and logically preceded the court's analysis of the Batson challenge. Indeed, the Batson analysis otherwise would have been foreclosed because the Ninth Circuit's pre-*Windsor* equal protection precedent held that sexual orientation discrimination is subject to rational basis review. *See High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990), abrogation

recognized by *SmithKline*, 740 F.3d at 483. Reexamining its precedent in light of *Windsor*, the *SmithKline* court found that "earlier cases applying rational basis review to classifications based on sexual orientation cannot be reconciled with *Windsor*." 740 F.3d at 483. Only after the Ninth Circuit found Juror B belonged to a group subject to heightened scrutiny did it then proceed with its Batson analysis. In this Court's view, *SmithKline* establishes a broadly applicable equal protection principle that is not limited to the jury selection context.

Also, contrary to Defendants' contentions, *SmithKline* does not limit the application of heightened scrutiny to instances of proven animus or irrational stereotyping. *SmithKline* addresses purposeful discrimination and the perpetuation of impermissible stereotypes, but it does so in the context of the Batson analysis—not in the discussion about *Windsor*. *Id.* at 484-86. With respect to *Windsor*, the court's holding is undeniably broad: "Windsor's heightened scrutiny applies to classifications based on sexual orientation." *Id.* at 483. Had the Ninth Circuit intended to limit its holding to cases involving animus or irrational stereotyping, it easily could have done so. Instead, it found *Windsor* to be "dispositive of the question of the appropriate level of scrutiny in this case," a case that fits into the broader category of "classifications based on sexual orientation." *Id.* at 480. Just as the Ninth Circuit was "bound by [Windsor's] controlling, higher authority" when deciding *SmithKline*, this Court is bound to apply Windsor's heightened scrutiny to Idaho's Marriage Laws.[12]

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[12] Currently, Nevada's laws prohibiting same-sex marriage are before the Ninth Circuit and Oregon's are before the District of Oregon. The Attorneys General of Nevada and Oregon both

b. Suspect class

Apart from *SmithKline*, Plaintiffs also contend Idaho's Marriage Laws are subject to heightened scrutiny because classifications based on sexual orientation are constitutionally suspect. The Court need not dissect this argument because the Supreme Court has accepted it by implication. If homosexuals are not a suspect or quasi-suspect class, the Supreme Court would have applied rational basis scrutiny in *Windsor*. But, as recognized in *SmithKline*, the Supreme Court applied heightened scrutiny. Indeed, the Supreme Court affirmed the Second Circuit without questioning (or even discussing) the lower court's express holding:

> A) homosexuals as a group have historically endured persecution and discrimination; B) homosexuality has no relation to aptitude or ability to contribute to society; C) homosexuals are a discernible group with non-obvious distinguishing characteristics, especially in the subset of those who enter same-sex marriages; and D) the class remains a politically weakened minority.

Windsor v. United States, 699 F.3d 169, 181-82 (2d Cir. 2012), *aff'd United States v. Windsor*, 133 S. Ct. 2675 (2013). The Second Circuit's holding was both approved and essential to the scrutiny the Supreme Court applied in *Windsor*. Had the Supreme Court disagreed with the Second Circuit, it would not have applied heightened scrutiny. It is not necessary to

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recently concluded that heightened scrutiny under *SmithKline* eviscerates the legal bases for their defenses. (Dkt. 77-2 at 5; Dkt. 77-3 at 22.) Consequently, both Attorneys General have refused to defend their state's marriage laws.

repeat the Second Circuit's analysis, for that analysis is implicit in both *Windsor* and *SmithKline*.

D. Idaho's Marriage Laws Fail Constitutional Scrutiny

Because Idaho's Marriage Laws impermissibly infringe on Plaintiffs' fundamental right to marry, the Laws are subject to strict due process and equal protection scrutiny. But *SmithKline* directs the Court to apply heightened equal protection scrutiny to laws that discriminate on the basis of sexual orientation. Idaho's Marriage Laws do not withstand this heightened scrutiny.

At a minimum, the Court must examine Idaho's Marriage Laws "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. Based on Windsor, and as explained in *SmithKline*, four principles guide the Court's equal protection analysis. The Court (1) looks to the Defendants to justify Idaho's Marriage Laws, (2) must consider the Laws' actual purposes, (3) need not accept hypothetical, post hoc justifications for the Laws, and (4) must decide whether the Defendants' proffered justifications overcome the injury and indignity inflicted on Plaintiffs and others like them. *See id*. at 481-83.

These principles most closely correspond to the intermediate scrutiny test applied to quasi-suspect classifications based on gender and illegitimacy. *See Windsor v. United States*, 699 F.3d 169, 185-88 (2d Cir. 2012) (applying intermediate scrutiny). In those cases "the burden of justification is demanding and it rests entirely on the State." *United States v. Virginia*, 518

U.S. 515, 533 (1996). While intermediate scrutiny permits classifications designed to remedy economic injuries or promote equality, the test focuses on “differential treatment” and “denial of opportunity” to ensure that discriminatory laws do not “create or perpetuate the legal, social, and economic inferiority” of the affected class. *Id.* at 533-34.

1. *The Actual Purpose of Idaho’s Marriage Laws*

The Court begins its inquiry into the actual purpose of Idaho’s Marriage Laws by examining their text. *See Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 926 (9th Cir. 2004). “The plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.” *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989). The meaning of Idaho’s Marriage Laws could not be plainer.

The only recognized domestic legal union in Idaho is a “marriage between a man and a woman.” Idaho Const. Art. III, § 28. A marriage can be licensed and solemnized only if it is “a civil contract between a man and a woman. . . .” Idaho Code § 32-201. All marriages contracted outside of Idaho are valid in Idaho except marriages that violate Idaho’s public policy. *Id.* § 32-209. The statutory list of marriages that violate Idaho’s public policy is nonexclusive, but it specifically identifies only two categories—“same-sex marriages, and marriages entered into . . . with the intent to evade the prohibitions of” Idaho’s Marriage Laws. *Id.* The parties do not cite, and the Court does not find, a published Idaho case holding that anything other than same-sex marriage violates the public policy set forth in Idaho Code § 32-209. Each of these laws

unambiguously expresses a singular purpose—to exclude same-sex couples from civil marriage in Idaho.

The Laws' legislative history makes their exclusionary purpose even clearer. Idaho Code Sections 32-201 and 32-209 were both amended in the mid-1990's, at a time when no state recognized same-sex marriage. In 1993, however, the Hawaii Supreme Court became the first court in the country to strike down a statutory same-sex marriage ban. *Baehr v. Lewin*, 852 P.2d 44, 61 (Haw. 1993) (remanding for consideration of justifications for the ban). After *Baehr*, over half of the states passed laws prohibiting same-sex marriage. *See Bourke v. Beshear*, 2014 WL 556729, at *1 n.1 (W.D. Ken. Feb. 12, 2014) (listing laws). In addition, the United States Congress reacted in 1996 by passing the Defense of Marriage Act—the law found partially unconstitutional in *Windsor*. The present versions of Sections 32-201 and 32-209 also took effect in 1996.

The Idaho Legislature amended § 32-201 in 1995 to add, among other language, the words "between a man and a woman." 1995 Idaho Sess. Laws, ch. 104, § 3. In addition to this definitional change, the 1995 amendment abolished common law marriage. *Id.* §§ 3-5. Indeed, abolition of common law marriage appears to be the amendment's primary purpose, as its legislative history does not include a single direct reference to the "between a man and a woman" provision. The Compiler's Notes for the 1995 amendment do, however, include the following:

> It is the intent of this act to promote the stability and best interests of marriage and the family. Marriage is the institution that is the foundation of the family and of society. Its stability is basic to morality and civilization and of vital interest to society and the state.

> Common-law marriages entered into in this state on and after January 1, 1996, will no longer be recognized.

1995 Idaho Sess. Laws, ch. 104, § 1. The stated intent and apparent purpose of the amendment to Idaho Code § 32-201 was to promote family stability, morality, and a traditional view of the marriage institution.

Section 32-201's man-woman marriage definition took effect on January 1, 1996. A few months later, the Idaho Legislature amended § 32-209 to include a public policy against same-sex and evasive marriages. 1996 Idaho Sess. Laws, Ch. 331, § 1. From Idaho's territorial days until the amendment's approval in 1996, Idaho law codified the long-established "place of celebration rule," whereby "[a]ll 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 Hilton v. Stewart*, 96 P. 579, 583 (Idaho 1908) ("This statute merely announces the general rule of law, as we understand it, that any contract which is a valid marriage according to the law of the place where the contract is made is valid everywhere.").

But in 1996, the Legislature ended Idaho's tradition of comity toward out-of-state marriages. At the time, Speaker of the House Simpson voiced his concern that Hawaii might recognize same-sex marriages and leave Idaho with no choice but to reinforce its current policy or recognize same-sex marriage by default. Relating to Recognition of Foreign Marriages: Minutes for Feb. 15, 1996 Meeting on H.B. 658 Before the H. Judiciary, Rules, & Admin. Comm., 53d Legis. Sess., 2d Reg. Sess. 2 (Idaho 1996). According to Representative William Sali, there was no time to delay or study the

matter because Hawaii would dictate Idaho's marriage policy if the Legislature did not act. *Id.* Despite opposition from religious leaders, civil liberties advocates, and both homosexual and heterosexual citizens, the bill easily passed the House and Senate before arriving on Governor Batt's desk.

With the Governor's signature, the law took immediate effect on March 18, 1996. This swift transition from bill to governing law was due to a legislative declaration of emergency that accompanied the substantive changes to § 32-209. 1996 Idaho Sess. Laws, Ch. 331, § 2. The Legislature's sense of urgency was vindicated when, later that year, a Hawaii trial court rejected every proffered justification for Hawaii's same-sex marriage ban and enjoined Hawaii from denying marriage license applications solely because of the applicants' sexual orientation. *Baehr v. Miike*, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), *superseded by statute*, Haw. Rev. Stat. § 572-1 (1998). Thus, the purpose of the 1996 amendment to Idaho Code § 32-209 was to buttress Idaho's traditional definition of marriage against changes in other states' marriage laws.

By 2003, the highest courts in Vermont and Massachusetts had ruled that their respective state constitutions precluded the denial of marriage benefits on the basis of sexual orientation. *Baker v. State*, 744 A.2d 864 (Vt. 1999); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). These developments again prompted legislative reactions across the country. This time, however, the Idaho Legislature sought to place on the ballot a proposed amendment to the Idaho Constitution that would prevent an Idaho court from reaching a result similar to those in Vermont and Massachusetts. Efforts to do so in 2004

and 2005 failed to garner the necessary two-thirds majority in the Idaho Senate. But, in 2006, a third measure was introduced in the House, debated, and this time passed both chambers. H.R.J. Res. 2, 58th Leg., 2d Reg. Sess. (Idaho 2006). The legislative approval allowed the following question to appear on the November 2006 general election ballot:

> Shall Article III, of the Constitution of the State of Idaho be amended by the addition of a new Section 28, 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?

(Dkt. 57-8 at 2.)

The public debate over the proposal, which became known as Amendment 2, centered on tradition, family, and equality. *See generally* (Dkt. 57-4; Dkt. 57-7 at 6-16, 18-20, 35; Dkt. 57-8 at 5, 42-128.) Supporters of the amendment argued that traditional marriage between a man and a woman formed a foundation for stable and nurturing families. Both sides debated the relative quality of opposite-sex versus same-sex parenting. Those opposed to the amendment emphasized that same-sex couples could be just as loving and committed to each other and their children as opposite-sex couples. Some framed the debate in explicitly religious terms, but faith leaders spoke out on both sides. Others characterized the matter as a secular issue, often citing the need for equality among citizens.

On November 7, 2006, Idaho's electorate took to the ballot box, and 63.3% voted in favor of Amendment 2. (Dkt. 57-8 at 8.) The amendment immunized Idaho's man-woman marriage definition from attack in the

State's courts or legislative bodies. As a result, nothing short of a successful federal constitutional challenge or a superseding amendment to Idaho's Constitution would be sufficient to change Idaho's Marriage Laws.

Because over 280,000 Idahoans voted for Amendment 2, it is not feasible for the Court to infer a particular purpose or intent for the provision. But, as Plaintiffs argue, it is obvious that Idaho's Marriage Laws purposefully discriminate on the basis of sexual orientation. Suggesting that the laws' discriminatory effects are merely incidental, Defendants characterize them as efforts to preserve Idaho's traditional civil marriage institution. "But 'preserving the traditional institution of marriage' is just a kinder way of describing the State's moral disapproval of same-sex couples." *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting). Although the Court finds Idaho's Marriage Laws were motivated, in part, by important governmental interests, their history demonstrates that moral disapproval of homosexuality was an underlying, animating factor. As with DOMA, the "practical effect" of Idaho's Marriage Laws is "to impose a disadvantage, a separate status, and so a stigma" on a class of people based solely on their sexual orientation. *Windsor*, 133 S. Ct. at 2693. The question now is whether any of the Defendants' asserted justifications overcome the inequality imposed upon Plaintiffs and others like them.

2. *Asserted Justifications for Idaho's Marriage Laws*

All Defendants assert that Idaho's Marriage Laws relate to the State's interest in maximizing child welfare but differ on how the means—denying marital status to same-sex couples—serve this child-welfare end. Governor Otter primarily contends the definition

fosters a traditional, child-centric marriage culture and otherwise promotes optimal family structures. The State and Recorder Rich claim the definition allows Idaho to channel its limited fiscal resources toward naturally procreative relationships.

Aside from child welfare, the Governor and amicus curiae Cornerstone Family Council of Idaho assert Idaho's Marriage Laws serve additional, important interests. They maintain that the Laws further the State's interest in federalism. Governor Otter also claims Idaho's Marriage Laws serve the State's interests in accommodating religious freedom, avoiding civic strife, and affirming democratic consensus. The Court addresses each asserted justification below.

a. Child Welfare

Governor Otter contends that Idaho's Marriage Laws advance the State's interest in protecting children. Children are indeed both vulnerable and essential to the perpetuation of society. And, although the Court agrees that the State has a compelling interest in maximizing child welfare, the link between the interest in protecting children and Idaho's Marriage Laws is so attenuated that it is not rational, let alone exceedingly persuasive.

Governor Otter observes that man-woman marriage is an ancient and traditional "child-centered institution, one focused first and foremost on the welfare of children rather than the emotional interests of adults."[13] (Dkt. 57-2 at 10.) The Governor emphasizes

[13] The Governor does not argue that Idaho's Marriage Laws advance traditional marriage for tradition's sake alone. But it bears repeating that the "[a]ncient lineage of a legal concept does not give it immunity from attack for lacking a rational basis." *Heller v. Doe*, 509 U.S. 312, 326 (1993). Moreover, "'the fact that

this "conjugal" view of marriage encourages "parents to routinely sacrifice their own interests to the legitimate needs and interests of their children." (*Id.*) And, the Governor asserts, Idaho's Marriage Laws reinforce this traditional, child-centric norm by offering marital status only to couples with the natural capacity to procreate.

The Governor claims that recognizing same-sex marriages would radically redefine the institution by imposing a "consent-based" marriage regime. Without the normative guidance of traditional marriage, the Governor fears that the social institution of marriage will erode. This deinstitutionalization of marriage could cause parents to turn away from the self-sacrifice that, the Governor asserts, is a hallmark of Idaho's traditional, child-centric regime.

The Governor also claims that Idaho's Marriage Laws further the State's interest in child-welfare by promoting optimal family structures. Citing to volumes of sociological studies, the Governor advances the general proposition that two parents in a low-conflict marriage constitute the optimal child-rearing environment. *See generally* (Dkt. 57-8 at 103-128; 57-9 through 57-11 at 150.) Plaintiffs do not dispute this general conclusion. (Lamb Dec., Dkt. 47 ¶¶ 17-20.) But the Governor further argues that children uniquely benefit from parental gender "complementarity"—that is, parenting by parents of the opposite sex. (Dkt. 90

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the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.'" *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

at 3.) Plaintiffs counter by emphasizing the broad consensus among sociological experts that gender of the two parents makes no difference for a child's well-being. (Lamb Dec., Dkt. 47 ¶¶ 32-36.) Thus, the parties fundamentally disagree on whether same-sex parenting negatively affects a child's well-being.[14]

The best that can be said for Defendants' position is that some social scientists quibble with the prevailing consensus that the children of same-sex parents, on average, fare no better or worse than the children of opposite-sex parents. (*Id.* ¶¶ 35-41.) But the Court need not—even if it could at the summary judgment stage—resolve this sociological debate. The parties' debate over the scientific literature distracts from the essential inquiry into the logical link between child welfare and Idaho's wholesale prohibition of same-sex marriage. That link is faulty for at least four reasons.

First, civil marriage in Idaho is and has long been a designedly consent-based institution. The law speaks of marriage as a "civil contract . . . to which the consent of parties capable of making it is necessary." Idaho Code 32-201. True, "throughout human history and across many cultures, marriage has been viewed as an exclusively opposite-sex institution and as one inextricably linked to procreation and biological kinship." *Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting). But Idaho law is wholly indifferent to whether a heterosexual couple wants to marry because they share this vision or simply seek a tax break. That such a crass objective would be sufficient

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[14] Two federal district courts have held bench trials that focused on this question. *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (2010); *DeBoer v. Snyder*, 2014 WL 1100794 (E.D. Mich. March 21, 2014). Both found that the overwhelming scientific consensus favors the "no differences" view.

to obtain a marriage license does not mean marriage is a cheap convenience. Instead, it means that the value of marriage derives from a place beyond the law's reach.

Important as the child-centered vision of marriage is, Idaho's consent-based marriage regime does not require heterosexual couples to accept or follow this norm. Whatever the beliefs or intentions of the parties, there is nothing conjugal or child-centric about the formality of obtaining a marriage license. The Governor offers only conjecture to support his critical point—that allowing Plaintiffs or people like them to marry risks vitiating the child-centered norm. There is no evidence that allowing same-sex marriages will have any effect on when, how, or why opposite-sex couples choose to marry.

Second, Idaho does not condition marriage licenses or marital benefits on heterosexual couples' ability or desire to have children. No heterosexual couple would be denied the right to marry for failure to demonstrate the intent to procreate. Indeed, as the State and Recorder Rich observe, "[a]ttempting to restrict civil marriage to couples who intend to have children would demand governmental inquiry into sensitive matters of personal privacy and raise insuperable, or at a minimum very significant, privacy-based constitutional concerns." (Dkt. 73 at 17.) To claim that civil marriage is somehow tied to a governmental interest in procreation is to "threaten the legitimacy of marriages involving post-menopausal women, infertile individuals, and individuals who choose to refrain from procreating." *Bostic v. Rainey*, 970 F.Supp.2d 456, 478-79 (E.D. Va. 2014).

Third, Idaho does not withhold marriage licenses from heterosexual couples who might be, or are, non-

optimal parents. Under Idaho law, everyone from multiple divorcees, "dead-beat dads," *see Zablocki*, 434 U.S. 374, to prison inmates, *see Turner v. Safley*, 482 U.S. 78 (1987), may marry, as long as they marry someone of the opposite sex. Yet Plaintiffs—six of whom have children or step-children—are deemed unworthy of marital benefits because they might be less fit parents according to an inconclusive body of scientific literature. To the extent this amounts to a presumption of parental unfitness, it bears emphasis that a similar presumption was found unconstitutional over 40 years ago. *Stanley v. Illinois*, 405 U.S. 645 (1972) (holding due process entitles unwed fathers to a hearing before they could be deemed unfit parents). Constitutionality aside, "sexual orientation [is] wholly irrelevant" to whether a person can adopt children in Idaho. *In re Adoption of Doe*, —P.3d—, 2014 WL 527144, at *6 (Idaho February 10, 2014). In a state where the privilege of becoming a child's adoptive parent does not hinge on a person's sexual orientation, it is impossible to fathom how hypothetical concerns about the same person's parental fitness possibly could relate to civil marriage.

Finally, and most importantly, the Governor's child welfare rationales disregard the welfare of children with same-sex parents. It is undisputed that "poverty and social isolation [are] associated with maladjustment [in children], and adequate resources support[] healthy adjustment." (Lamb Dec., Dkt. 47 ¶ 18.c.) It is also clear that "[m]arriage can yield important benefits for children and families, including state and federal legal protections, economic resources, family stability, and social legitimacy.

These benefits are equally advantageous for children and adolescents in families headed by same-sex

and different-sex couples." (*Id.* ¶ 48.) Although the State and Recorder Rich dismiss same-sex households as "statistically insignificant," (Dkt. 73 at 12 n.3), no Defendant suggests that the State's child welfare interest does not extend to the children in these households.

In this most glaring regard, Idaho's Marriage Laws fail to advance the State's interest because they withhold legal, financial, and social benefits from the very group they purportedly protect—children. As Justice Kennedy observed, a law that withdraws these benefits "humiliates . . . 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." *Windsor*, 133 S. Ct. at 2694. Failing to shield Idaho's children in any rational way, Idaho's Marriage Laws fall on the sword they wield against same-sex couples and their families.

b. *Focusing Governmental Resources on Couples with Biological Procreative Capacity*

The State and Recorder Rich articulate a somewhat different link between child welfare and Idaho's prohibition of same-sex marriage. They propose that Idaho's interest in child welfare is served by directing the State's limited resources to opposite-sex couples. The State is justified in reserving marital benefits for these couples, the argument continues, because only they have the natural ability to procreate. Pointing to the public costs of divorce, single parenting, and tax breaks for married couples, Recorder Rich and the State argue that the State can avoid some of these costs by not allowing same-sex couples to marry.

Even in rational basis cases, the Supreme Court has rejected the argument that cost-cutting is a sufficient reason for denying benefits to a discrete group. *Plyler v. Doe*, 457 U.S. 202, 229 (1982) (invalidating a Texas statute that denied free public education to children of undocumented immigrants). When Arizona threatened to deny health care benefits to the same-sex domestic partners of state employees, the Ninth Circuit affirmed the district court's rejection of the Arizona's cost-saving rationale. *Diaz v. Brewer*, 656 F.3d 1008, 1013 (9th Cir. 2011). In both cases, the chief constitutional problem was that the states' attempts to cut costs fell on an arbitrarily selected group.

Because heightened scrutiny applies here, the Court must focus on the Laws' actual purposes. The Court finds that defending the State's fiscal resources is not an actual purpose of any law challenged in this case. Aside from the cost of putting Amendment 2 on the ballot, (Dkt. 57-7 at 3), the record indicates that the only public costs referenced during the debate over the measure were the cost of defending it in litigation, (Dkt. 57-8 at 5), and the cost of driving businesses away from Idaho with a State-approved message of intolerance. (*Id.* at 74.)

Even assuming cost-cutting was an actual purpose for Idaho's Marriage Laws, the State and Rich do not explain how avoiding the public cost of same-sex marriages improves child welfare. The Laws do not create new benefits for naturally procreative couples; instead, they arbitrarily withhold benefits from a "statistically insignificant" class of households with children. (Dkt. 73 at 12 n.3.) There is no showing that forbidding same-sex marriages makes naturally procreative couples more likely to marry, let alone stay married. Nor is there any evidence that the State has

any compunction about expending its limited resources on non-procreative or unstable heterosexual marriages.

Defendants' only explanation is that a law "does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality." *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (internal quotation omitted). While this may be the case when a court reviews economic legislation under the rational basis standard, e*.g., U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 174 (1980), more precision is necessary where, as here, the law discriminates on the basis of sexual orientation. *See SmithKline*, 740 F.3d at 481-82. If Idaho's Marriage Laws seek to improve child welfare by focusing limited public resources on heterosexual marriages, they do so in a patently arbitrary manner. They are at once grossly overinclusive—by expending the State's limited resources on unstable marriages and married couples with no intent or ability to procreate—and dramatically underinclusive—by denying those resources to children whose parents happen to be homosexual. The burden of this imprecision falls on families that seek the same stability that Idaho claims to incentivize. This is not fiscal prudence; it is a State-endorsed message of unworthiness that does not withstand constitutional scrutiny.

c. *Federalism*

Governor Otter and amicus curiae Cornerstone Family Council of Idaho claim that federalism principles require the Court to uphold the State's traditional authority to define marriage. Defendants also make two more specific state's rights arguments. In particular, Governor Otter claims that Idaho's

policy against recognizing out-of-state same-sex marriages must be accepted under the well-established public policy exception to the Full Faith and Credit Clause. *See Nevada v. Hall*, 440 U.S. 410, 422 (1979). Defendants also claim that Section 2 of the federal Defense of Marriage Act, codified at 28 U.S.C. § 1738C, authorizes Idaho to refuse recognition of same-sex marriages. All of these arguments fail to consider that "neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment." *Saenz v. Rowe*, 526 U.S. 489, 508 (1999).

It is true federalism favors preserving a state's right to choose policies uniquely suited to the preferences of its citizens. By creating a system with both state and federal governments, the "Framers [of the Constitution] thus ensured that powers which 'in the ordinary course of affairs, concern the lives, liberties, and properties of the people' were held by governments more local and more accountable than a distant bureaucracy." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578 (2012) (quoting The Federalist No. 45, at 293 (J. Madison)). Thus, "a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). *Windsor* upheld this principle by invalidating the federal man-woman marriage definition, in part, because of its "unusual deviation" from the federal government's usual deference to state domestic relations laws. 133 S. Ct. at 2693.

However, "States are not the sole intended beneficiaries of federalism." *Bond v. United States*, 131

S. Ct. 2355, 2364 (2011). Federalism has another dimension, one that "secures to citizens the liberties that derive from the diffusion of sovereign power." *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting).

> Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake.

Bond, 131 S. Ct. at 2364 (citation omitted). Federalism is not just a bulwark against federal government overreach; it is also an essential check on state power.

For that reason, "federalism" is no answer where, as here, individuals claim their state government has trampled their constitutional rights. Indeed, *Windsor* also recognizes the transcendent quality of individual constitutional rights, even when those rights conflict with a state's traditional sovereign authority. "State laws defining and regulating marriage, of course, *must respect the constitutional rights of persons*, *see, e.g., Loving*. . ." *Windsor*, 133 S. Ct. at 2691 (emphasis added). As other courts have recognized, *Windsor*'s citation to *Loving* for this proposition "is a disclaimer of enormous proportions." *Bishop v. U.S.*, 962 F.Supp.2d 1252, 1279 (N.D. Okla. 2014). In *Loving*, Virginia's sovereign authority over marital relations could not save the State's anti-miscegenation laws. And, just as in *Loving*, Idaho's right to regulate

domestic relations is subject to the paramount rights of its citizens. That is the way of our federal system.

d. *Accommodating Religious Freedom, Avoiding Civic Strife, and Assuring Social Consensus*

Finally, Governor Otter argues that Idaho's Marriage Laws should be upheld because they serve the related goals of supporting religious liberty, avoiding the potential for religion-centered conflicts, and affirming a prevailing social consensus on marriage. Analogizing to the Supreme Court's days-old decision in *Schuette v. BAMN*, 134 S. Ct. 1623 (2014), the Governor argues that "a state's voters can ban preferences" and that courts should "let[] the people make difficult policy choices through democratic means." (Dkt. 93 at 2.) Yet the Governor acknowledges, as he must, this "is not to say the State can invoke concerns about religious freedom or religion-related social strife as a basis for denying rights otherwise guaranteed by the Constitution." (Dkt. 57-2 at 53.)

The Governor's argument concerning religious liberty is myopic. No doubt many faiths around the world and in Idaho have longstanding traditions of man-woman marriage rooted in scripture. But not all religions share the view that opposite-sex marriage is a theological imperative. In fact, some of the Plaintiffs actively worship in faiths that recognize and support their unions. (S. Watsen Dec. ¶ 13, Dkt. 51.) To the extent Governor Otter argues that Idaho has a legitimate interest in validating a particular religious view of marriage, that argument blithely disregards the religious liberty of congregations active in Idaho. "By recognizing the right to marry a partner of the same sex, the State allows these groups the freedom to practice their religious beliefs without mandating that

other groups must adopt similar practices." *Kitchen v. Herbert*, 961 F.Supp.2d 1181, 1214 (D. Utah 2013).

Likewise, a desire to protect or maintain a particular social consensus does not withstand constitutional scrutiny. "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 Colo.*, 377 U.S. 713, 736-37 (1964). The Supreme Court's decision in *Schuette* says nothing to the contrary. Unlike this case, *Schuette* involved the Michigan electorate's vote to stop the racially discriminatory, albeit arguably beneficial, practice of affirmative action. 134 S. Ct. at 1630 ("The question here concerns not the permissibility of race-conscious admissions policies under the Constitution but whether, and in what manner, voters in the States may choose to prohibit the consideration of racial preferences in governmental decisions, in particular with respect to school admissions."). Far from establishing a state's right to violate the Fourteenth Amendment by majority vote, Schuette stands for the unremarkable proposition that voters can and should be allowed to end their state's discriminatory policies. That principle has no application in a case, like this one, where voters imposed a purposefully discriminatory policy that undermines a fundamental right.

Rather, the dispositive principle in this case is that "fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). The Supreme Court has endorsed this principle again and again. As Justice Robert Jackson so eloquently put it:

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary

> and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Railway Express Agency v. New York, 336 U.S. 106, 112-113 (1949) (Jackson, J., concurring).

This principle resonates today, as 10 federal courts across the country have in recent months reached similar conclusions on the very issues present in this case.[15] Considering many of the same arguments and much of the same law, each of these courts concluded that state laws prohibiting or refusing to recognize same-sex marriage fail to rationally advance legitimate state interests. This judicial consensus was forged from each court's independent analysis of Supreme Court cases extending from *Loving* through

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[15] *Kitchen v. Herbert*, 961 F.Supp.2d 1181, (D. Utah 2013); *Bishop v. U.S.*, 962 F.Supp.2d 1252 (N.D. Okla. 2014); *Bourke v. Beshear*, —F.Supp.2d—, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014); *Bostic v. Rainey*, 970 F.Supp.2d 456 (E.D. Va. 2014); *Lee v. Orr*, —F.Supp.2d—, 2014 WL 683680 (N.D. Ill. Feb 21, 2014); *De Leon v. Perry*, —F.Supp.2d—, 2014 WL 715741 (W.D. Tex. Feb. 26, 2014); *Tanco v. Haslam*, —F.Supp.2d—, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014); *DeBoer v. Snyder*, —F.Supp.2d—, 2014 WL 1100794 (E.D. Mich. Mar. 21, 2014); *Henry v. Himes*, —F.Supp.2d—, 2014 WL 1418395 (S.D. Ohio Apr. 14, 2014); *Baskin v. Bogan*, —F.Supp.2d—, 2014 WL 1568884 (S.D. Ind. Apr. 18, 2014).

Romer, *Lawrence*, and *Windsor*. The logic of these precedents virtually compels the conclusion that same-sex and opposite-sex couples deserve equal dignity when they seek the benefits and responsibilities of civil marriage. Because Idaho's Marriage Laws do not withstand any applicable form of constitutional scrutiny, the Court finds they violate the Fourteenth Amendment to the United States Constitution.

V. CONCLUSION

The Plaintiffs are entitled to extraordinary remedies because of their extraordinary injuries. Idaho's Marriage Laws withhold from them a profound and personal choice, one that most can take for granted. By doing so, Idaho's Marriage Laws deny same-sex couples the economic, practical, emotional, and spiritual benefits of marriage, relegating each couple to a stigmatized, second-class status. Plaintiffs suffer these injuries not because they are unqualified to marry, start a family, or grow old together, but because of who they are and whom they love.

The Defendants offered no evidence that same-sex marriage would adversely affect opposite-sex marriages or the well-being of children. Without proof, the Defendants' justifications echo the unsubstantiated fears that could not prop up the anti-miscegenation laws and rigid gender roles of days long past. Then as now, it is the duty of the courts to apply the law to the facts in evidence. Here, the facts are clear and the law teaches that marriage is a fundamental right of all citizens, which neither tradition nor the majority can deny.

The Fourteenth Amendment guarantees of due process and equal protection lie at the core of our constitutional system. While the Supreme Court has

not expressly decided the issues of this case, it has over the decades marked the path that leads to today's decision. "[T]he history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded." *United States v. Virginia*, 518 U.S. 515, 557 (1996). Slow as the march toward equality may seem, it is never in vain.

ORDER

The Court GRANTS Plaintiffs' Motion for Summary Judgment (Dkt. 45). Defendant Governor Otter's Motion for Summary Judgment (Dkt. 57) arid Defendant Recorder Rich and Defendant-Intervenor Idaho's Motions to Dismiss (Dkt. 30, 41, 43) are DENIED.

The Court hereby DECLARES that Idaho's Marriage Laws are unconstitutional because they violate Plaintiffs' rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

The Court PERMANENTLY ENJOINS the State of Idaho and its officers, employees, agents, and political subdivisions from enforcing Article III, § 28 of the Idaho Constitution; Idaho Code Sections 32-201 and 32-209; and any other laws or regulations to the extent they do not recognize same-sex marriages validly contracted outside Idaho or prohibit otherwise qualified same-sex couples from marrying in Idaho. This injunction shall take effect at 9:00 a.m. MDT on May 16, 2014.

IT IS SO ORDERED.

Dated: May 13, 2014. /s/ Candy Wagahoff Dale
Candy Wagahoff Dale
Chief U.S. Magistrate Judge

APPENDIX E

(ORDER LIST: 574 U.S.)

FRIDAY, OCTOBER 10, 2014

ORDER IN PENDING CASE

14A374 OTTER, GOV. OF ID, ET AL. V. LATTA, SUSAN, ET AL.

The application for stay presented to Justice Kennedy and by him referred to the Court is denied. The orders heretofore entered by Justice Kennedy are vacated.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Oct. 13, 2014]

No. 14-35420
D.C. No. 1:13-cv-00482-CWD
District of Idaho, Boise

SUSAN LATTA; ET AL.,

Plaintiffs-Appellees,

v.

C.L. OTTER, "BUTCH"; ET AL.,

Defendant-Appellant,

And

CHRISTOPHER RICH, Recorder of Ada County, Idaho, in his official capacity,

Defendant,

STATE OF IDAHO,

Intervenor-Defendant.

No. 14-35421
D.C. No. 1:13-cv-00482-CWD
District of Idaho, Boise

SUSAN LATTA; ET AL.,

Plaintiffs-Appellees,

v.

C.L. OTTER, "Butch"; et al.,

Defendant,

and

CHRISTOPHER RICH, Recorder of Ada County, Idaho, in his official capacity,

Defendant-Appellant,

STATE OF IDAHO,

Intervenor-Defendant-Appellant.

ORDER

Before: REINHARDT, GOULD, and BERZON, Circuit Judges.

Plaintiff-Appellees' motion to dissolve the stay is GRANTED, effective at 9 a.m. PDT Wednesday, October 15, 2014. *See Nken v. Holder*, 556 U.S. 418, 426 (2009).

APPENDIX G

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-35420
D.C. No. 1:13-cv-00482-CWD

OPINION re Order

Filed October 15, 2014

SUSAN LATTA; TRACI EHLERS; LORI WATSEN;
SHARENE WATSEN; SHELIA ROBERTSON;
ANDREA ALTMAYER; AMBER BEIERLE;
RACHAEL ROBERTSON,

Plaintiffs-Appellees,

v.

C.L. OTTER,
"Butch"; Governor of the State of Idaho,
in his official capacity,

Defendant-Appellant,

And

CHRISTOPHER RICH, Recorder of Ada County,
Idaho, in his official capacity,

Defendant,

STATE OF IDAHO,

Intervenor-Defendant.

No. 14-35421
D.C. No. 1:13-cv-00482-CWD

District of Idaho, Boise

SUSAN LATTA; TRACI EHLERS; LORI WATSEN;
SHARENE WATSEN; SHELIA ROBERTSON;
ANDREA ALTMAYER; AMBER BEIERLE;
RACHAEL ROBERTSON,

Plaintiffs-Appellees,

v.

C.L. OTTER,
"Butch"; Governor of the State of Idaho,
in his official capacity,

Defendant,

and

CHRISTOPHER RICH, Recorder of Ada County,
Idaho, in his official capacity,

Defendant-Appellant,

STATE OF IDAHO,

Intervenor-Defendant-Appellant.

Appeal from the United States District Court
for the District of Idaho

Candy W. Dale, Magistrate Judge, Presiding

Argued and Submitted September 8, 2014
San Francisco, California

Before: REINHARDT, GOULD, and BERZON, Circuit Judges.

PER CURIAM:

On October 10, 2014, the plaintiffs moved for dissolution of the stay of the district court's order enjoining the enforcement of Idaho's laws prohibiting same-sex marriage. In *Latta v. Otter*, No. 14-35420, 2014 WL 4977682 (9th Cir. Oct. 7, 2014), we decided the appeal, and held unconstitutional Idaho's statutes and constitutional amendments preventing same-sex couples from marrying and refusing to recognize same-sex marriages performed elsewhere. The stay pending appeal was issued a number of months ago, before the relevant factual and legal developments that dictate the outcome of the present motion. In light of our decision in *Latta* and the other recent decisions by circuit courts across the country in essentially identical cases, as well as the Supreme Court's decisions on October 6, 2014 to deny certiorari in all pending same-sex marriage cases and thus to permit same-sex marriages in all affected states notwithstanding any state statute or constitutional provisions to the contrary, Governor Otter can no longer meet the test for the grant or continuation of a stay. We therefore granted the plaintiffs' motion for dissolution of the stay of the district court's order on October 13, 2014, effective October 15, 2014.

The party seeking a stay—or continuation of a stay—bears the burden of showing his entitlement to a stay. *See Nken v. Holder*, 556 U.S. 418, 433–44 (2009). In ruling on the propriety of a stay, we consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* at 434.

Governor Otter cannot make a strong showing that he is likely to succeed on the merits. *See id*. We have now held that the plaintiffs have in fact succeeded on the merits of the case, agreeing with every court of appeals to address same-sex marriage bans subsequent to *United States v. Windsor*, 133 S. Ct. 2675 (2013). Governor Otter argues that reversal of this case—either via certiorari review or en banc proceedings—remains likely because we applied heightened scrutiny to the laws at issue, whereas nine other circuits have declined to hold that gays and lesbians constitute a suspect class. Governor Otter is wrong. The cases he cites all predate *Windsor.* The post-*Windsor* cases either do not reach the question of whether heightened scrutiny under the Equal Protection Clause applies (while applying strict scrutiny under a fundamental rights analysis) or suggest that heightened scrutiny review under the Equal Protection Clause may be applicable. *See Baskin v. Bogan*, No. 14-2386, 2014 WL 4359059, *1–3 (7th Cir. Sept. 4, 2014); *Bostic v. Schaefer*, 760 F.3d 352, 375 n.6 (4th Cir. 2014); *Bishop v. Smith*, 760 F.3d 1070, 1074 (10th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1229–30 (10th Cir. 2014).

The panel's decision in this case was dictated by *SmithKline Beecham Corp.v. Abbott Labs*., 740 F.3d 471 (9th Cir. 2014), which held that heightened scrutiny applies to classifications on the basis of sexual orientation. This court voted not to rehear *SmithKline* en banc only a short time ago, and we are bound by its actions. Specifically, *SmithKline* is the binding law of the circuit. Moreover, the various courts of appeals to have considered the issue of same-sex marriage post-*Windsor* have all reached the same result—the invalidation of same-sex marriage bans. These courts have applied varying types of scrutiny or

have failed to identify clearly any applicable level, but irrespective of the standard have all reached the same result. Finally, the fact that we applied heightened scrutiny is irrelevant to whether the Supreme Court is likely to grant certiorari to review our decision. The Court is free to review—or not review—the type of scrutiny applied to classifications based on sexual orientation in *any* case challenging a ban on same-sex marriage. The level of scrutiny applied in a particular case is not likely to affect its decision as to which, if any, same-sex marriage case it may ultimately review. Governor Otter's arguments that are based on *SmithKline* or the level of scrutiny applied are thus unpersuasive.

Moreover, when a motions panel of this court originally entered the stay of the district court's order, it did so based on the Supreme Court's stay in *Herbert v. Kitchen*, 143 S. Ct. 893 (2014), the Utah same-sex marriage case. However, on Monday, October 6, the Supreme Court denied certiorari and vacated stays in all seven of the same-sex marriage cases that were pending before it, including *Herbert*. As a result of the Supreme Court's action, marriages have begun in those states. At the time the Supreme Court denied certiorari in all the pending cases, it was aware that there were cases pending in other circuit courts that had not yet been decided but that might subsequently create a conflict. The existence of those pending cases, and the possibility of a future conflict, did not affect the Court's decision to permit the marriages to proceed, and thus, Governor Otter's argument that we should maintain the stay in order to await the results of cases pending in other circuits is unavailing.

Additionally, after the panel's issuance of the merits decision in this case affirming the district court's

injunction, the Supreme Court denied Idaho's application for a stay of this court's mandate without published dissent, and vacated Justice Kennedy's temporary stay entered two days earlier. It did so despite Idaho's representation to the Court that granting its application was necessary to allow the Court to exercise its "unique role as final arbiter of the profoundly important constitutional questions surrounding the constitutionality of State marriage laws." Because the Supreme Court has thus rejected the argument that a stay was necessary to any potential exercise of its jurisdiction to review this case, we decline to second-guess that decision. The first *Nken* factor strongly supports dissolution of the stay.

We now turn to the second and third factors governing the propriety of a stay: whether irreparable injury to the applicant will result absent a stay and whether continuance of the stay will injure other parties interested in the proceeding. On the one hand, there is some authority suggesting that "a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined." *Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997); *but see Indep. Living Ctr. of So. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 658 (9th Cir. 2009) (characterizing this statement in Coal. for Econ. Equity as dicta, and explaining that while "a state may suffer an abstract form of harm whenever one of its acts is enjoined . . . [t]o the extent that is true . . . it is not dispositive of the balance of harms analysis."), *vacated and remanded on other grounds sub nom. Douglas v. Indep. Living Ctr. of So. Cal, Inc.*, 132 S. Ct. 1204 (2012).[1] On the other hand, the plaintiffs and

[1] Individual justices, in orders issued from chambers, have expressed the view that a state suffers irreparable injury when

countless gay and lesbian Idahoans would face irreparable injury were we to permit the stay to continue in effect. "Idaho['s] . . . marriage laws, by preventing same-sex couples from marrying and refusing to recognize same-sex marriages celebrated elsewhere, impose profound legal, financial, social and psychic harms on numerous citizens of those states." *Latta*, 2014 WL 4977682 at *11; *see also Baskin v. Bogan*, 14-2386, 2014 WL 4359059 (7th Cir. Sept. 4, 2014) ("The harm to homosexuals (and . . . to their adopted children) of being denied the right to marry is considerable."); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (holding that a deprivation of constitutional rights, "for even minimal periods of time, unquestionably constitutes irreparable injury"). Additionally, were this case to be reversed, notwithstanding our firm belief that such an outcome is unlikely, the harm caused by the invalidation of marriages that take place in the interim would primarily be suffered by the couples whose marriages might be rendered of uncertain legality and by their children—not by the state. On balance, we conclude that the second and third *Nken* factors also support dissolution of the stay.

Finally, we hold that the fourth factor governing issuance or continuance of a stay—the public interest—militates strongly in favor of dissolution of the stay. We repeat: by denying certiorari on October 6, 2014, the Supreme Court has allowed marriages to

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one of its laws is enjoined. *See Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers); *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). No opinion for the Court adopts this view.

proceed in fourteen[2] states across the nation; all circuit courts of appeals to consider same-sex marriage bans have invalidated those prohibitions as unconstitutional; and this court has held that same-sex marriage bans deprive gays and lesbians of their constitutional rights. The public's interest in equality of treatment of persons deprived of important constitutional rights thus also supports dissolution of the stay of the district court's order.

Applying the four *Nken* factors discussed above, we hold that Governor Otter is no longer entitled to a stay of the district court's order and we accordingly dissolve the stay effective October 15, 2014. We decline to deny the plaintiffs their constitutional rights any longer.

Notwithstanding the above, we have determined to exercise our discretion to afford the state a second opportunity to obtain an emergency stay of our order from the Supreme Court, even though we see no possible basis for such a stay. For that reason, our order of October 13, 2014 is not made effective until 9 a.m. PDT (noon EST) on October 15, 2014. Otherwise we have determined that the stay of the district court's order enjoining enforcement of Idaho's same-sex marriage bans shall be dissolved and have entered the order of this court to that effect.

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[2] This figure represents the number of states in circuits directly affected by the Supreme Court's denial on October 6, 2014 of petitions arising from challenges to state bans on same-sex marriage. We note that thirty-three states as well as the District of Columbia either presently allow same-sex marriages or are located in circuits affected by the Supreme Court's denials. This figure includes Idaho and Alaska.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 14-35420 & 13-35421

SUSAN LATTA, et al.,
Plaintiffs-Appellees,

v.

C. L. "BUTCH" OTTER,
Defendant-Appellant,

CHRISTOPHER RICH,
Defendant,

and

STATE OF IDAHO,
Intervenor-Defendant.

DECIDED OCTOBER 7, 2014
(JUDGES STEPHEN REINHARDT, RONALD
GOULD & MARSHA BERZON)

On Appeal from United States District Court
for the District of Idaho
Case No. 1:13-cv-00482-CWD
(Honorable Candy W. Dale, Magistrate Judge)

PETITION OF DEFENDANT-APPELLANT
GOVERNOR C.L. "BUTCH" OTTER
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INTRODUCTION
(And FRAP 35(b)(1) Statement)

Less than twenty years after the ratification of the very Fourteenth Amendment on which the panel relies in this case, the Supreme Court embraced a model of marriage that at the time seemed obvious to everyone: "[N]o legislation," the Court held, "can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth … than that which seeks to establish it on the basis of the idea of the family, *as consisting in and springing from the union for life of one man and one woman in the [] estate of matrimony..." Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) (emphasis added). To be sure, the Court has recently held that the States are free to depart from that model of marriage—and hence from the Court's own expressed view of the compelling governmental interests that underlie it. *See United States v. Windsor*, 133 S. Ct. 2675, 2693-94 (2013). But the Court has been equally emphatic that the States retain the "historic and essential authority to define the marital relation," in part because that authority is "the foundation of the State's broader authority to regulate the subject of domestic relations …" *Id.* at 2692, 2691.

In holding that Idaho's marriage laws violate the Fourteenth Amendment to the extent they limit marriages to man-woman unions, the panel violated these bedrock principles. The panel held that those laws violate that amendment because they: (1) "classify" on the basis of sexual orientation; (2) are subject to the "heightened scrutiny" standard that this Court recently adopted (in *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 484 (9th Cir. 2014), *reh'g en banc denied*, 759 F.3d 990 (9th Cir. 2014)) for

assessing such classifications; and (3) do not satisfy that standard. Opinion at 13-28. In so holding, the panel has resolved three questions of exceptional importance—two of which were not present in the other marriage cases in which the Supreme Court recently denied certiorari—and has done so in a way that departs from controlling authorities of the Supreme Court, this Circuit and others:

1. Did the people of Idaho violate the Fourteenth Amendment when they limited marriage to man-woman unions? The panel's holding on this ultimate issue conflicts directly with the Supreme Court's decision in *Baker v. Nelson*, 409 U.S. 810 (1972), and the Eighth Circuit's decision in *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), and conflicts in principle with *Murphy, Windsor* and a host of other decisions reiterating the States' broad authority over marriage and domestic relations.

2. For Fourteenth Amendment purposes, are classifications based on sexual orientation subject to some form of "heightened scrutiny?" Although the panel's holding on this point followed *SmithKline*, it was incorrect—and in conflict with controlling decisions of the Supreme Court and other courts[1]—for reasons

[1] *See, e.g., Cook v. Gates*, 528 F.3d 42, 61-62 (1st Cir. 2008); *Thomasson v. Perry*, 80 F.3d 915, 927-28 (4th Cir. 1996); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866-67 (8th Cir. 2006); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113 (10th Cir. 2008); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004); *Padula v. Webster*, 822 F.2d 97, 103 (D.C.

explained in Judge O'Scannlain's dissent from denial of rehearing in that case. That holding also imposes additional burdens and risks on Idaho that merit reconsideration here.

3. Assuming SmithKline was correct, can a law like Idaho's marriage law be deemed to "classify" or "facially discriminate" based on sexual orientation merely because it distinguishes between opposite-sex couples and all other types of relationships, including same-sex couples? On this point the panel's decision conflicts with, for example, the decision of the Supreme Court in *International Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc*., 499 U.S. 187, 199 (1991), which holds that facial discrimination depends on "the explicit terms" of the allegedly discriminatory provision.

Each of these is an "exceptional" issue warranting *en banc* review. *See* FRAP 35(b)(1)(B). In addition, as to each issue, consideration by the full Court is necessary to ensure uniformity with this Court's prior decisions as well as decisions of the Supreme Court. *See* FRAP 35(b)(1)(A).

Cir. 1987); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989).

REASONS FOR GRANTING REHEARING EN BANC

I. *En Banc* Review Is Warranted Because Of The Panel's Departure From *Baker* and *Bruning* As Well As The Significant Risks The Panel's Forced Redefinition of Marriage Imposes On Idaho And Its Citizens, Especially Children Of Heterosexuals.

The overriding issue in this case—the validity of Idaho's man-woman marriage laws—is undoubtedly "exceptional" because of the unique and critically important societal norms those laws encourage and promote. *See* Governor Otter's Opening Brief ("OB"), Dkt No. 22-2 at 26-56 (and Excerpts of Record "ER" cited therein).[2] Accordingly, *en banc* review is critical not only because, as a legal matter, the panel decision conflicts with *Baker* and *Bruning*. *See* OB 97-99; Appellants Christopher Rich and State of Idaho's Opening Brief ("Rich Brief"), Dkt No. 21-1, at 10-17, 25-26. This issue is also exceptional because, as a *practical* matter, redefining marriage by judicial fiat will undermine these social norms and likely lead to significant long-term harms to Idaho and its citizens, especially the children of heterosexuals.

1. As Governor Otter repeatedly explained before the district court and the panel, marriage is a complex social institution that pre-exists the law, but which is supported by it in virtually all human societies. OB at 10-11 (citing among others ER 1107-08); Governor Otter's Reply Brief ("Reply Brief"), Dkt No. 157, at 7. And a principal purpose of marriage in virtually all

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[2] For space reasons, references to the parties' briefing should be understood to incorporate also the record materials cited in that briefing.

societies was to ensure, or at least increase the likelihood, that any children born would have a known mother and father with responsibility for caring for them. OB at 9-10. Indeed, Bertrand Russell—no friend of traditional sexual mores—once remarked, "But for children, there would be no need of any institution concerned with sex." *See* Memo in Support of SJ, 13-482-CWD, Dkt No. 57-2, at 35 (D. Idaho Feb. 18, 2014).

As Idaho also explained to the district court and the panel, the man-woman definition of marriage is integral not only to the social institution of marriage that Idaho's marriage laws are intended to support, but also to Idaho's *purposes* in providing that support—which it does at considerable cost. Throughout its history, Idaho has rejected what Justice Alito has aptly called (without any disagreement from other Justices) the relatively but decidedly adult-centric, "consent-based" view of marriage, and has embraced instead the more child-centric, "conjugal" view. *See Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting); *see also* OB at 12. And Idaho has repeatedly implemented that view of marriage by explicitly retaining the man-woman definition despite decisions by other States, acting "as laboratories of democracy," to redefine marriage as the union of any two otherwise qualified "persons."[3]

By itself, the man-woman definition conveys that marriage—as understood in Idaho—is centered on children, which man-woman couples are uniquely capable of producing. OB at 18-19, 26; *see also* Rich Brief, at 21-23, 27, and 31-35. That definition also

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[3] *See, e.g.*, Marriage Equality Act (NY), AB A08354 (June 24, 2011); Civil Marriage Protection Act (MD), House Bill 438 (March 1, 2012).

conveys that one of the purposes of marriage is to provide a structure by which to care for any children that may be created accidentally—an issue that, again, is unique to man-woman couples. *Id*. at 27, 31-35. And most obviously, by requiring a man and a woman, that definition indicates that this structure will ideally have both a "masculine" and a "feminine" aspect.

By implicitly referencing children, accidental procreation, masculinity and femininity, the man-woman definition also "teaches" or reinforces certain child-centered "norms" or expectations. OB at 26, 32-35. Because only man-woman couples are capable of producing children together, either deliberately or accidentally, these norms are directed principally at heterosexuals, and include the following:

- Where possible, every child has a right to be reared by and to bond with her own biological father and mother (the "bonding" norm). OB at 27, 30-32, 35 n.23 (citing ER 112-53); 36-39; ER 750.
- Where possible, every child has a right to be supported financially and emotionally by the man and woman who brought her into the world (the "maintenance" norm). (This norm is reinforced by the State's creating and supporting in its marriage laws a legal structure conducive to the provision of such support). *See* OB at 31; *see also* Memo in Support of SJ at 5 n.2.
- Where possible, a child should be raised by a mother and father, even where she cannot be raised by both her biological parents (the "gender-diversity" norm). OB at 27-28; ER 735,

and at 35. (Note that this norm does not directly speak to parenting by gays and lesbians, who may not realistically have the option of raising their children with the other biological parent.)

- Heterosexual men and women should treat marriage, and fatherhood and motherhood within marriage, as an important expression of their masculinity or femininity (the "marital masculinity" or "femininity" norm). OB at 38-39, 42; ER 112-53.
- In all their decisions, parents should put the long-term interests of their children ahead of their own personal interests (the "child-centricity" norm). OB at 43-47.

The evidence presented below also established that Idaho and its citizens receive enormous benefits when man-woman couples heed these norms associated with the conjugal vision and definition of marriage. Common sense and a wealth of social-science data teach that children do best emotionally, socially, intellectually and economically when reared in an intact home by both biological parents. OB at 27, ER 533. Such arrangements benefit children of opposite-sex couples both by (a) harnessing the biological connections that parents and children naturally feel for each other, and (b) providing what experts have called "gender complementarity" in parenting.[4] OB at

[4] The Supreme Court has itself recognized the inherent benefits of gender complementariness, and the fact that gender is not interchangeable: "Physical differences between men and women … are enduring: '[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.' 'Inherent differences' between men and women, we have come to appreciate, remain cause for

27-28, ER 712, ER 735. Compared with children of opposite-sex couples raised in any other environment, children raised by their two biological parents in a married family are less likely to commit crimes, engage in substance abuse, and suffer from mental illness, and more likely to support themselves and their own children successfully in the future. OB at 29 n. 15, OB at 30. Accordingly, such children pose a lower risk of needing State assistance, and a higher long-term likelihood of contributing to the State's economic and tax base. Rich Brief, Dkt No. 21-1, at 31-35.

Similarly, parents who follow the norms of child-centricity, maintenance and marital masculinity (or femininity) are less likely to engage in the kinds of behaviors—such as child abuse or neglect, or divorce—that typically require State assistance or intervention. OB at 28, 39. And again, each of these norms is closely associated with—and reinforced by—the man-woman definition of marriage.

2. It is thus easy to see why so many informed commentators on both sides of the debate have predicted that redefining marriage to accommodate same-sex couples—which requires removing the man-woman definition—will change the institution of marriage, not just superficially, but profoundly. Writing not long ago, Judge Posner described same-sex marriage as "a radical social policy." Richard A. Posner, Should There Be Homosexual Marriage? And If So, Who Should Decide? 95 Mich. L. Rev. 1578, 1584

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celebration." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)). Replace "community" with "marriage" (for what is marriage but the most foundational community of society?), and the Supreme Court's observation is no less true here.

(1997). And in more measured terms, Oxford's prominent liberal legal philosopher Joseph Raz observed that "the recognition of gay marriage will effect as great a transformation in the nature of marriage as that from polygamous to monogamous or from arranged to unarranged marriage." Gov. Otter's Response Brief, 13-482-CWD, Dkt No. 81, at 9 n. 18.

For heterosexual couples, as Idaho repeatedly explained in the district court and to the panel, the major effect of that "transformation" will be the erosion or elimination of each of the norms that depend upon or are reinforced by the man-woman definition of marriage. For example, as Professors Hawkins and Carroll have explained, the redefinition of marriage puts in place a legal structure in which two women (or two men) can easily raise children together as a married couple, and places the law's authoritative stamp of approval on such child-rearing arrangements. And for heterosexual men—who generally need more encouragement than women—that legal change undermines the "marital masculinity" norm because it suggests that society no longer needs men to form well-functioning families or to raise happy, well-adjusted children. OB at 38-39; ER 122; Otter Reply Brief, Dkt No. 157, at 8; *see generally* Steven L. Nock, *Marriage in Men's Lives* (1998).

For similar reasons, such a redefinition teaches heterosexuals that society no longer values biological connections and gender diversity in parenting—at least to the extent it did before the change. *Id.* And a redefinition weakens the expectation that biological parents will take financial responsibility for any children they participate in creating (since sperm donors and surrogate moms aren't expected to do that), and that parents will put their children's

interests ahead of their own (since the redefinition is being driven largely by a desire to accommodate the interests of adults).

Furthermore, just as those norms benefit the State and society, their removal or weakening can be expected to harm the State's interests and its citizens. For example, as fewer heterosexual parents embrace the norms of biological connection, gender complementary, maintenance and marital masculinity, more children will be raised without a mother or a father—usually a father. That in turn will mean more children being raised in poverty; more children who experience psychological or emotional problems; and more children and young adults committing crimes—all at significant cost to the State. OB at 28-29. Similarly, as fewer heterosexual parents embrace the norm of child-centricity, more will make choices driven by personal interests rather than the interests of their children. Many of these choices will likewise impose substantial costs on the State. Rich Opening Brief, Dkt No. 21-1, at 33-34.

In short, the man-woman definition of marriage is like a critical thread running throughout a hanging tapestry: Remove that thread, and the rest of the tapestry dissolves into a pile of yarn.

3. To its credit, the panel (at 15-28) devotes some thirteen pages in an attempt to rebut some of these points. But the panel simply ignores the principal point, which is that redefining marriage in genderless terms will change the *social institution* of marriage in a way that will adversely affect the behavior of *heterosexuals*—whether or not they choose to get (and stay) "married" under the new genderless-marriage regime. The panel thus does not deny that the specific norms discussed above are part of the marriage

institution as it currently exists in Idaho, that Idaho has a compelling interest in the maintenance of those norms among heterosexuals, or that a redefinition will itself destroy or weaken those norms for that population. Instead, the panel engages in two main diversions.

First, the panel says (at 15-16) that the State's defense of the man-woman definition is based on the idea that "allowing same-sex marriages will adversely affect opposite-sex marriage …." That is false. It's not the existence of same-sex marriages that is of principal concern. It's the redefinition of marriage that such marriages requires—i.e., replacing the man-woman definition with an "any qualified persons" definition—and the resulting impact of that redefinition on the institution of marriage, especially as perceived and understood by the heterosexual population.

This misunderstanding of Idaho's defense is reflected throughout the panel's analysis—as it was in the recent opinions by the Fourth, Seventh and Tenth Circuits.[5] For example, in addressing the possibility

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[5] *See Baskin v. Bogan*, 766 F.3d 648, 666, 668-69 (7th Cir. 2014) *cert. denied*, No. 14-277, 2014 WL 4425162 (U.S. Oct. 6, 2014) and *cert. denied sub nom. Walker v. Wolf*, No. 14-278, 2014 WL 4425163 (U.S. Oct. 6, 2014) (superficially contending that there is no evidence that same-sex marriages are less child-centric compared to the childless marriages of heterosexuals, and noting the State had pointed to no study that showed the deleterious effects of same-sex marriages on man-woman marriage); *Bostic v. Schaefer*, 760 F.3d 352, 381 (4th Cir. 2014) *cert. denied sub nom. Rainey v. Bostic*, No. 14-153, 2014 WL 3924685 (U.S. Oct. 6, 2014) and *cert. denied*, No. 14-225, 2014 WL 4230092 (U.S. Oct. 6, 2014) and *cert. denied sub nom. McQuigg v. Bostic*, No. 14-251, 2014 WL 4354536 (U.S. Oct. 6, 2014) (briefly finding "no reason to think that legalizing same-sex marriage will have a similar destabilizing effect" to no-fault divorce, and contending that "it is

that same-sex marriage will reduce the desire of heterosexual males to marry, the panel summarily dismisses as "crass and callous" the idea that "a father will see a child being raised by two women and deduce that because the state has said it is unnecessary for that child … to have a father, it is also unnecessary for his child to have a father." Opinion at 19 (emphasis added). But according to the evidence submitted in the district court and to the panel, see ER 112-53, it's not the fact that the father "will see a child being raised by two [married] women" that is likely to reduce his enthusiasm for marriage. It's the fact that marriage will have already been redefined—legally and institutionally—in a way that makes his involvement seem less important and valuable than before the redefinition. *See, e.g., Univ. of Alabama v. Garrett*, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring) (noting important role of law as a teacher). And although not all heterosexual fathers or potential fathers will have less interest in marriage as a result of that change, some of them—especially those at the margins of commitment to marriage and fatherhood—will undoubtedly do so. Like the other circuits that have recently ruled the same way, the panel simply has no answer for this dispositive point.

Second, on several points the panel rejects the State's institutional defense because, in its view, that defense "is, fundamentally, … about the suitability of

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more logical" that allowing same-sex couples to marry "will strengthen the institution of marriage"); *Kitchen v. Herbert*, 755 F.3d 1193, 1224 (10th Cir. 2014) *cert. denied*, No. 14-124, 2014 WL 3841263 (U.S. Oct. 6, 2014) (noting in passing that "it is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples").

same-sex couples, married or not, as parents, adoptive or otherwise." Opinion at 27. Not so. While two limited aspects of that defense—the norms of biological connection and gender complementarity—might have some conceivable bearing on policies toward parenting by gay and lesbian citizens, Idaho's point here is different: It's about the impact of removing the man-woman definition on the marriage institution—i.e., the public meaning of marriage—and the impact of that change on heterosexuals. Like the other circuits that have recently invalidated state marriage laws, the panel has no answer to the reality that replacing that definition with an "any qualified persons" definition will (a) weaken or eliminate the norms of biologically connected and gender-diverse parenting (and other norms) that are currently part of Idaho's definition and vision of marriage, and (b) in turn lead at least some heterosexuals to place less value on those norms when making personal decisions about the upbringing of *their* children—and thus lead to more of their children being raised by a single parent. Whatever the outcome of the "gay versus straight parenting" debate, *that* will be an unmitigated tragedy for the children of heterosexuals.

This misunderstanding of Governor Otter's defense is likewise evident in the panel's reaction to the point that "[b]ecause opposite-sex couples can accidentally conceive … marriage is important because it serves to bind such couples together and to their children." Opinion at 21. After acknowledging that this "makes some sense," the panel dismisses the point because (it says) Idaho has "suggest[ed] that marriage's stabilizing and unifying force is unnecessary for same-sex couples …" *Id.* at 21-22. But again, that is not the point. Idaho has never disputed that same-sex couples or their children would benefit from an "any two

persons" redefinition, especially in the short run. Yet Idaho—based on only a decade's worth of information about genderless marriage—cannot responsibly ignore the potential impact of that redefinition on the far larger percentage of the population composed of heterosexuals, or on their children, who (regardless of the definition of marriage) are likely to constitute the vast majority of children born in the foreseeable future. Like many other States, Idaho adopted no-fault divorce without waiting to observe its effects in other jurisdictions. It should not be forced to make the same mistake again.

4. In response to the social risks that would result from removing the man-woman definition (and social understanding) of marriage, the panel cites a single study suggesting that Massachusetts' decision to adopt same-sex marriage in 2004 had no *immediate* impact on marriage or divorce rates in that state. Opinion at 18. But the conclusions of that study have been hotly disputed, and indeed the evidence clearly shows a longer-term increase in divorce in the wake of Massachusetts' decision—and a decrease in marriage rates.[6] Furthermore, a recent study of the Netherlands, which had same-sex marriage before Massachusetts, shows a clear decline in marriage rates among

[6] *See* Centers for Disease Control and Prevention, "Divorce Rates by State," (available at http://www.cdc.gov/nchs/data/dvs/divorce_ rates_90_95_99-11.pdf) (divorce rates in Massachusetts increased 8% from 2003 to 2011, and were the highest in 2011—the last year of available data—in twenty years); Centers for Disease Control and Prevention, "Marriage Rates by State," (available at http://www.cdc.gov/nchs/data/dvs/marriagerates _90_95_99-11.pdf) (marriage rates in Massachusetts were lower in 2011—the last year of available data—than in 2003—the year before same-sex marriage started, and were the lowest in over twenty years).

man-woman couples in urban areas after the passage of same-sex marriage laws.[7]

More important, as discussed by Justice Alito in *Windsor*, any empirical analysis of the effects of redefining marriage calls for "[judicial] caution and humility." 133 S. Ct. at 2715. As he pointed out, same-sex marriage is still far too new—and the institution of marriage too complex—for a redefinition's full impact to have registered in a measurable way. *Id.* at 2715-16. Accordingly, as Justice Kennedy pointed out during oral argument in Perry, redefining marriage is akin to jumping off a cliff—it is impossible to see with complete accuracy all the dangers one might encounter when one arrives at the bottom. *See* Oral Argument at 47:19-24, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2012) (No. 12-144).

5. Based upon the foregoing analysis of the benefits conferred on the State and its citizens by the man-woman definition of marriage, and the harms—or at least risks—the State and its citizens would face by eliminating that definition, Idaho's decision to retain it passes muster under any standard, including strict scrutiny. For there can be no doubt that the man-woman definition substantially advances compelling interests—including Idaho's overall interest in the welfare of the vast majority of its children, that is, those of opposite-sex couples. That is not to say that Idaho is unconcerned with same-sex couples or the children they raise together. But the State cannot responsibly ignore the long-term welfare of the many

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[7] *See* Mircea Trandafir, *The Effect of Same-Sex Marriage Laws on Different-Sex Marriage: Evidence from the Netherlands* at 28-29 (2009) (available at http://www.iza.org/conferencefiles/TAM2010/trandafirm6039.pdf).

when asked to make a major change that will confer a short-term benefit on the few.

The panel responds to Governor Otter's showing on this point, not by disputing the importance of the State's interests, but by claiming that Idaho is pursuing them in a manner that is "grossly over- and under-inclusive …" Opinion at 23. But that argument, also relied upon by the Seventh Circuit, is irrelevant for two reasons.

First, the panel once again ignores the real issue, which is the impact of redefining marriage on the *institution* itself. Idaho can easily allow infertile couples to marry (and avoid invading their privacy) without having to change the existing man-woman definition of marriage and thus lose the benefits that definition and the associated norms provide. *Cf.* Opinion at 24 n. 14. Indeed, allowing infertile and elderly man-woman couples to marry still reinforces the norms of marriage for man-woman couples who can reproduce accidentally. Conversely, taking other measures in pursuit of the State interests underlying the man-woman definition—like "rescind[ing] the right of no-fault divorce, or to divorce altogether" (Opinion at 24)—would not materially reduce the adverse impact on the marriage institution of removing the man-woman definition, or the resulting harm and risks to Idaho's children and the State itself. Again, because many of the norms and social benefits associated with marriage flow from that definition, removing it will have adverse consequences no matter what else Idaho might do in an effort to strengthen the institution of marriage.

Second, like the Fourth and Tenth Circuits (which also applied a form of heightened scrutiny), the panel ignores that the choice Idaho faces with respect to the

definition of marriage is binary: Either preserve the man-woman definition, or replace it with an "any two qualified persons" definition. Idaho can thus *either* preserve the benefits the man-woman definition provides, or it can risk losing those benefits. It cannot do both. Idaho's choice to preserve the man-woman definition is thus narrowly tailored—indeed, perfectly tailored—to its interest in preserving those benefits and in avoiding the enormous societal risks accompanying a genderless-marriage regime. Under a proper means-ends analysis, therefore, the fact that the State might have done things differently in other, related areas of the law is irrelevant—especially given that neither the panel nor the Plaintiffs dispute that the interests Idaho has articulated are compelling, or that the risks to those interests are real. *See, e.g., Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 665–66 (1994) (Kennedy, J., plurality opinion) (noting that "[s]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable," and requiring "substantial deference" to the government decision-maker in such situations, even under heightened scrutiny).

For all these reasons, those risks—to the institution of marriage and consequently to Idaho's children and the State itself—make the issue presented here "exceptionally" important, and thus amply deserving of *en banc* review.

II. *En Banc* Review Is Warranted To Review The Holding Of *SmithKline* In The Context Of Marriage Laws, And In Light Of The Potential Of That Holding To Create Religious Strife.

The panel's decision is also exceptionally important because it is the first decision to apply this Court's *SmithKline* holding—i.e., that sexual orientation is a suspect or quasi-suspect class—in the critical context of State marriage laws. Recognizing that this Court has already denied *en banc* review in *SmithKline* itself, we simply reiterate Judge O'Scannlain's explanation of why *SmithKline*'s holding is both wrong and corrosive, *see* 759 F.3d at 990-91, 994-95 (O'Scannlain, J., dissenting from denial)—and note again that SmithKline widened a 9-2 circuit split on the question it decided. *See supra* note 1.

In addition to those reasons for review, application of *SmithKline*'s heightened scrutiny standard to Idaho's marriage laws marks an unprecedented intrusion by the United States into Idaho's "historic and essential authority to define the marital relation." *Windsor*, 133 S. Ct. at 2692. That intrusion stands in substantial tension (to say the least) with the principle of federalism, on which *Windsor* directly relied, and which affirms that few matters so firmly belong within State authority as laws determining who is eligible to marry—"an area to which States lay claim by right of history and expertise." *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring); accord *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (collecting cases).

Avoiding damage to federalism is one reason the Supreme Court has been especially cautious in adjudicating novel claims under the Fourteenth Amendment. *See, e.g.*, *District Attorney's Office v.*

Osborne, 557 U.S. 52, 72-74 (2009); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 44 (1973). Yet by applying *SmithKline* in the marriage context, the panel has now imposed heightened scrutiny on an area of law—domestic relations—that was previously governed by rational basis review. In this crucial area, then, the panel has thus departed from the standard that is a "paradigm of judicial restraint" under which courts have no "license … to judge the wisdom, fairness, or logic of the legislative choices," *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-14 (1993); *see also Bruning*, 455 F.3d at 867 (because "the institution of marriage has always been, in our federal system, the predominant concern of state government . . . rational-basis review must be particularly deferential" in this context). Replacing that customary deference with heightened scrutiny not only contravenes federalism, but also demeans the "fundamental right" of Idaho voters to decide the question of same-sex marriage for themselves. *Schuette v. BAMN*, 134 S. Ct. 1623, 1637 (2014).

As Judge O'Scannlain pointed out, moreover, *SmithKline*'s "unprecedented application of heightened scrutiny" has "significant implications" not only "for the same-sex marriage debate," but also "for other laws that may give rise to distinctions based on sexual orientation." 759 F.3d at 990-91 (emphasis added). For example, the panel is only partially correct when it states at footnote 17 that "Nevada law currently prohibits discrimination based on sexual orientation in public accommodations, while Idaho law does not." Opinion at 30. In fact, at least ten Idaho cities have adopted local ordinances prohibiting discrimination on the basis of sexual orientation and gender identity. When applied to those statutes—as it likely will be—the panel's call for heightened scrutiny will lead to far-

reaching litigation and additional liability in employment, housing, taxation, inheritance, government benefits and other areas of domestic relations.

In addition, throughout this litigation, Governor Otter has detailed situations in which applying heightened scrutiny to classifications based on sexual orientation would amplify the likelihood of religion-related strife and infringements of religious freedom in a wide variety of foreseeable situations. *See* OB 52-56. Idaho, as explained to both the district court and the panel, has a profound interest in minimizing such strife on issues, like marriage, that the U.S. Constitution does not clearly dictate the outcome. *Cf. Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983) (referring to "the State's compelling interest in the maintenance of domestic peace").

Yet, like the *SmithKline* panel, the panel here fails to grapple with these consequences. Instead it dismisses them, remarking that "[w]hether a Catholic hospital must provide the same health care benefits to its employees' same-sex spouses as it does their opposite-sex spouses, and whether a baker is civilly liable for refusing to make a cake for a same-sex wedding, turn on state public accommodation law, federal anti-discrimination law, and the protections of the First Amendment. These questions are not before us." Opinion at 30. This invitation to litigate such contentious questions invites serious conflicts with religious liberties. And it misses the critical point that Idaho's decision to retain its definition of marriage is justified, in part, by the legitimate purpose of avoiding conflicts between the State's domestic relations law and the First Amendment's guarantee of religious liberty.

III. *En Banc* Review Is Warranted To Review The Panel's Extraordinary Holding That A Classification Based Upon A Couple's Same-Sex Or Opposite-Sex Configuration Ipso Facto Constitutes A Classification Based Upon Sexual Orientation.

Assuming *SmithKline* was correct, the panel's rationale for holding that Idaho's laws trigger heightened scrutiny under that decision independently merits *en banc* review. Idaho has long maintained that, although it has a disparate impact on gays and lesbians, its man-woman definition does not classify or discriminate on the basis of sexual orientation. Indeed, that definition does not even mention sexual orientation, gays, or lesbians. Rather, it simply draws a distinction between opposite-sex couples and every other type of relationship. It follows that gays and lesbians are allowed to marry someone of the opposite sex if they so choose, and heterosexuals (who might have tax or financial reasons for such a choice) are likewise *forbidden* from marrying someone of the same sex. As Judge Posner has noted, under definitions like Idaho's, "[t]here is no legal barrier to homosexuals marrying persons of the opposite sex; in this respect there is already perfect formal equality between homosexuals and heterosexuals." Posner, *Should There Be Homosexual Marriage?* at 1582.

But in a single cursory paragraph, the panel sweeps that point aside. It holds instead that, because Idaho's laws "distinguish on their face between opposite-sex *couples* … and same-sex couples," those laws amount to "classifications on the basis of sexual orientation"—and are *ipso facto* subject to review under *SmithKline*'s heightened scrutiny standard. Opinion at 13, 15, 28, 33. And that holding enables the panel

to avoid the disparate impact branch of equal protection law, with its two-part requirement that, to run afoul of the Fourteenth Amendment, a neutral law must have both a discriminatory effect and a discriminatory purpose.[8] Undoubtedly, the panel was aware that the disparate impact test requiring both of these elements has been reiterated dozens of times across five decades by the Supreme Court,[9] and by every Circuit, including this Court.[10] Indeed, just last

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[8] *See, e.g., Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979) (finding that "even if a neutral law has a disproportionately adverse effect upon a [protected class], it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.") (emphasis added); *Rosenbaum v. City & Cnty. of San Francisco*, 484 F.3d 1142, 1152 (9th Cir. 2007) (holding that "[t]o prevail on its claim under the equal protection clause of the Fourteenth Amendment, a plaintiff must demonstrate that enforcement had a discriminatory effect and the [government was] motivated by a discriminatory purpose.").

[9] *See, e.g., Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (declaring that "[p]roof of [] discriminatory intent or purpose is required to show a violation of the Equal Protection Clause"); *Hernandez v. New York*, 500 U.S. 352, 359-60 (1991) (quoting *Arlington Heights*, 429 U.S. at 264, and finding that "[a] court [undertaking equal protection analysis] must keep in mind the fundamental principle that 'official action will not be held unconstitutional solely because it results in a [] disproportionate impact.'") (emphasis added); *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 372-73 (2001) (noting that "disparate impact …alone is insufficient even where the Fourteenth Amendment subjects state action to strict scrutiny"); *Crawford v. Board of Ed. of Los Angeles*, 458 U.S. 527, 537-38 (1982) (holding that "even when a neutral law has a disproportionately adverse effect on a [suspect class], the Fourteenth Amendment is violated only if a discriminatory purpose can be shown").

[10] *E.g., McLean v. Crabtree*, 173 F.3d 1176, 1185 (9th Cir. 1999), as amended on denial of reh'g and reh'g en banc (Apr. 17,

term Justice Scalia reminded the legal community that "[f]ew equal protection theories have been so squarely and soundly rejected" as "the proposition that a facially neutral law may deny equal protection solely because it has a disparate [] impact." *Schuette*, 134 S. Ct. at 1647 (Scalia, J., concurring in the judgment). The panel also undoubtedly realized that it would be incredible to find that Idaho's marriage laws, stemming from the 1860s, had anything to do with gays and lesbians, much less were animated by animus or a desire to discriminate against them.[11]

But whatever its purpose, the panel's "classification" holding departs from settled law—and in a way that merits review by the *en banc* Court. Specifically,

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1999) (finding that "[p]roof of discriminatory intent is required to show that state action having a disparate impact violates the Equal Protection Clause"); *Martin v. Int'l Olympic Comm.*, 740 F.2d 670, 678 (9th Cir. 1984) ("The disproportionate impact of a statute or regulation alone, however, does not violate the equal protection clause. To succeed on their equal protection claim, the [plaintiffs] must show that the allegedly disproportionate impact of [the law] on [the suspect class] reflects a discriminatory purpose."); *PMG Int'l Div. L.L.C. v. Rumsfeld*, 303 F.3d 1163, 1172-73 (9th Cir. 2002) (holding that "a disparate impact claim challenging a facially neutral-statute requires showing of discriminatory intent"); *Rosenbaum v. City & Cnty. of San Francisco*, 484 F.3d 1142, 1152 (9th Cir. 2007) (noting that "[t]o prevail on its claim under the equal protection clause of the Fourteenth Amendment, a plaintiff must demonstrate that enforcement had a discriminatory effect and the [government was] motivated by a discriminatory purpose").

[11] Judge Holmes noted in his concurrence in *Bishop v. Smith* that most courts have "declined to rely upon animus doctrine in striking down" state laws defining marriage as between a man and a woman, and urged that such a ruling would be highly inappropriate. 760 F.3d 1070, 1096-97 (10th Cir. 2014), *cert. denied*, No. 14-136, 2014 WL 3854318 (U.S. Oct. 6, 2014).

although the panel quotes the Supreme Court's admonition that facial discrimination depends on "the explicit terms" of the provision at issue, *International Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991), the panel's analysis flatly ignores that crucial requirement: Unlike the Supreme Court in *United Auto Workers*, nowhere does the panel examine the "explicit terms" of the pertinent Idaho laws to determine whether they actually "classify" on the basis of sexual orientation.

If those laws said, for example, that "gay men and lesbian women may not marry," that would establish a classification based on sexual orientation. But the pertinent laws say nothing of the kind. For example, Art. III, Section 28 of the Idaho Constitution simply states that "[a] marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state"—without saying anything about the sexual orientation of the participants. By contrast, the fetal-protection policy at issue in United Auto Workers expressly classified based on the employees' sex, thereby warranting the Court's (unanimous) conclusion that it was indeed a "sex-based classification"—and therefore that the plaintiffs there need not establish a disparate impact or a discriminatory purpose. *See* 499 U.S. at 198.[12]

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[12] Other decisions in this Circuit have likewise made clear that, to escape the requirement of showing discriminatory purpose, a plaintiff must establish that the triggering classification is contained in the "explicit terms" of the challenged law or policy. *See, e.g., Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1048 (9th Cir. 2007) (applying United Auto Workers and finding that "[a] facially discriminatory policy is one which on its face applies less favorably to a protected group" and that "[t]he men-only

Moreover, the panel's approach—treating a distinction between man-woman couples and every other sort of relationship as ipso facto "discrimination based on sexual orientation," Opinion at 13—will be highly problematic in future cases. Indeed, as various states within this Circuit begin to accommodate same-sex couples in their domestic relations and other laws, there may be situations in which state or local governments believe they have legitimate reasons, unrelated to sexual orientation, for treating same-sex couples differently from opposite-sex couples. For example, a state might decide to charge lower insurance premiums to an employee married to a same-sex partner (regardless of their sexual orientations) than to an employee married to an opposite-sex partner, given the reduced risk of accidental pregnancy. Under the panel's analysis, such a policy would constitute a "classification based on sexual orientation," and thus automatically subject to heightened scrutiny—even though the state's purpose is to provide a fair financial benefit to same-sex couples.

A recent example from Coeur d'Alene, Idaho illustrates the perils created by the panel's decision. The example involves Donald and Evelyn Knapp, ordained ministers who own and operate "one of the most well-known chapels in the Inland Northwest," but who will not perform same-sex marriages because of their religious beliefs. Coeur d'Alene also has an ordinance that bans sexual orientation discrimination in public accommodations. Coeur d'Alene Code, Chapter 9.56.030.A. Initially a deputy city attorney—echoing the panel's flawed conflation of classifications based on the gender composition of a couple with facial

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policy at Community House is facially discriminatory because it explicitly treats women … different from men")

sexual-orientation discrimination—stated that if the Knapps turn away same-sex couples, they will be in violation of the ordinance, regardless of the purpose of their policy. This week, amid enormous public outcry, the city attorney clarified that Coeur d'Alene will not prosecute nonprofit religious corporations that are legitimately classified as such, which the Hitching Post claims to be. But the city attorney did not disavow the earlier statements by his deputy, apparently in light of the panel's ruling, that the non-discrimination ordinance is "broad enough that it would capture [wedding] activity" and that it views as facially discriminatory a policy that treats opposite-sex pairings differently from every other kind of relationship.[13]

For all these reasons, review by the en banc Court is necessary to ensure uniform adherence to the rule of United Auto Workers, which requires that facial

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[13] *See* Caiti Currey, "Hitching Post Owners Will Close Before Performing Same-Sex Marriages," KXLY.com (May 15, 2014) (available at http:// www.kxly.com/news/north-idaho-news/hitching-post-owners-will-close-before-performing-samesex-marriages/26006066); Scott Maben, "Ministers Diverge in Opinion on Lifting of Idaho's Gay Marriage Ban," The Spokesman Review (May 15, 2014) (available at http://www.spokesman.com/stories/2014/may/15/ministers-diverge-in-opinion-on-lifting-of-idahos/); Scott Maben, "Christian Right Targets Coeur d'Alene Law," The Spokesman-Review (October 21, 2014) (available at http://www.spokesman.com/stories/2014/oct/21/christian-right-targets-coeur-dalene-law/). On October 15, 2015, just two days after the panel lifted its stay of the district court's order in this case, the Knapps were contacted and asked if they would perform a gay marriage ceremony, which they declined on religious grounds. *Knapp v. Coeur d'Alene*, Case 2:14-cv-00441-PEB, Verified Complaint, Document 1, at 2. Absent a religious exemption (which the City apparently is now considering), for every day the Knapps continue to refuse to perform that particular wedding, they could face up to 180 days in jail and a $1,000 fine. *Id.*

discrimination be determined based on "the explicit terms" of the allegedly discriminatory law or policy.

CONCLUSION

The panel's decision appears to be judicial policy-making masquerading as law. But it is bad law, conflicting with numerous decisions of this Court, other circuits and the Supreme Court. And it is even worse policy, creating enormous risks to Idaho's present and future children—including serious risks of increased fatherlessness, reduced parental financial and emotional support, increased crime, and greater psychological problems—with their attendant costs to Idaho and its citizens. For all these reasons, the panel decision merits *en banc* review.

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