Case Nos. 14-35420 & 14-35421

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUSAN LATTA, et al.,
Plaintiffs-Appellees,

vs.

C.L. "BUTCH" OTTER, et al.,
Defendants-Appellants,

and

STATE OF IDAHO,
Defendant-Intervenor-Appellant.

On Appeal from the United States District Court
for the District of Idaho
D.C. No. 1:13-cv-00482-CWD
(Dale, M.J., Presiding)

OPENING BRIEF OF APPELLANTS RICH AND IDAHO

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INTRODUCTION

This is one of many cases filed by plaintiffs around the country challenging a state's right to maintain the traditional definition of civil marriage. Since its territorial days, Idaho's marriage laws have consistently limited civil marriage to its traditional definition: a union between one man and one woman.

Four same-sex couples challenged Idaho's marriage laws. They contend 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.

The Supreme Court has never held that the Constitution requires all States to make this uniform change to their marriage laws to recognize the recent phenomenon of same-sex marriage. Quite the contrary, the Court has consistently recognized that the power to define marriage resides with the States, not the federal government. *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2690-91 (2013). And the only time the Court has decided claims like those plaintiffs advance here, it rejected them. *Baker v. Nelson*, 409 U.S. 810 (1972).

Nonetheless, the district court granted plaintiffs' summary judgment motion, declaring Idaho's marriage laws unconstitutional to the extent that they do not permit or recognize same-sex marriage. The court reached this result by determining that: (1) the Supreme Court's *Baker* decision is no longer good law;

(2) the Due Process Clause gives same-sex couples a fundamental right to civil marriage; and (3) because Idaho has not changed its traditional definition of marriage to include same-sex partners, it discriminates on the basis of sexual orientation in violation of the Equal Protection Clause.

The State of Idaho and Christopher Rich, Ada County's Recorder, respectfully submit that the district court erred on each of the three determinations set forth above. This Court should reverse the district court's judgment, either by enforcing the precedent set by the Supreme Court in *Baker*, or by determining that Idaho's traditional definition of marriage does not offend the Due Process and Equal Protection Clauses.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343. The district court entered judgment on May 14, 2014. ER 67.[1] That same day, all defendants filed notices of appeal. ER 61; 67. The appeals are timely under Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction over the appeals under 28 U.S.C. § 1291.

/ / /

[1] All references to the Excerpts of Record ("ER") are to the ER filed by appellants Rich and Idaho.

STATEMENT OF THE ISSUES

1. Whether the district court erred by refusing to follow the precedent established by the Supreme Court in *Baker v. Nelson*, 409 U.S. 810 (1972): Neither the Equal Protection Clause nor the Due Process Clause of the Fourteenth Amendment requires a State to alter the traditional definition of civil marriage to include same-sex couples.

2. Whether the district court erred by concluding that Idaho's marriage laws violate the Due Process Clause because same-sex couples enjoy a fundamental right to marry.

3. Whether the district court erred by concluding that Idaho's marriage laws violate the Equal Protection Clause because traditional marriage laws discriminate on the basis of sexual orientation and that such laws are subject to "heightened" scrutiny, which they cannot withstand.

Idaho and Rich raised all these issues in their briefing on their motions to dismiss and plaintiffs' summary judgment motion. *See* Dist. Ct. Dkt. 30-1, 41-1, 73, 75. This Court's review of these issues is *de novo*.

ADDENDUM OF PERTINENT AUTHORITIES

Pursuant to Fed. R. App. P. 28(f) and Ninth Circuit Rule 28-2.7, Idaho and Rich have set forth pertinent constitutional provisions and statutes in an addendum to this brief.

STATEMENT OF THE CASE

Plaintiffs filed their complaint challenging the constitutionality of Idaho's marriage laws on November 8, 2013. Dist. Ct. Dkt. 1. Plaintiffs 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). Plaintiffs contended that these laws violate the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment. *Id.*

Plaintiffs named Idaho's governor, C.L. "Butch" Otter, and Ada County Recorder Christopher Rich as defendants. The district court granted Idaho leave to intervene to defend its laws on January 21, 2014. ER 417.

Defendant Rich filed a Rule 12(b)(6) motion to dismiss on January 9, 2014. ER 604. The State of Idaho joined the motion. ER 414. The motion to dismiss asserted that the Supreme Court's decision in *Baker v. Nelson*, 409 U.S. 810 (1972), required dismissal of plaintiffs' claims. It also argued that even in the absence of *Baker*, Idaho's marriage laws satisfy the rational basis standard, which should govern plaintiffs' equal protection and due process claims. Dist. Ct. Dkt. 30-1.

Governor Otter and plaintiffs filed cross-motions for summary judgment. ER 209; 376. Governor Otter advanced a number of additional justifications for Idaho's laws, which he contended satisfy not only the rational basis test, but also heightened scrutiny. Dist. Ct. Dkt. 57-2. Plaintiffs sought a declaration that Idaho's laws violate the Equal Protection and Due Process Clauses, as well as injunctive relief prohibiting defendants from enforcing the laws. ER 377-78.

The district court held oral argument on the dispositive motions on May 5, 2014. Dist. Ct. Dkt. 96. On May 13, 2014, the court issued a Memorandum Decision and Order granting plaintiffs' motion. ER 1. The district court held that the right to same-sex marriage is a fundamental right protected by the Due Process Clause and that, therefore, laws prohibiting such marriage are subject to strict scrutiny. ER 19-28. It also held that discrimination on the basis of sexual orientation affects a suspect class and is therefore subject to heightened scrutiny. ER 28-36. The court then found the justification proffered by Recorder Rich and Idaho, as well as the justifications proffered by Governor Otter, for the laws insufficient under the applicable review standards. Given these determinations, it declared Idaho's marriage laws unconstitutional and permanently enjoined their enforcement. ER 57.

On May 14, 2014, the district court denied Governor Otter's motion for a stay pending appeal. Dist. Ct. Dkt. 100. That same day, the court entered

judgment in plaintiffs' favor consistent with its May 13, 2014 memorandum decision and order. ER 67.

All defendants filed notices of appeal on May 14, 2014. ER 61; 64. They also filed emergency motions with this Court seeking a stay of the district court's judgment pending appeal. Dkt. 2-1, 3-1. Governor Otter filed an amended notice of appeal on May 19, 2014. ER 58. On the following day, this Court granted the emergency motions and entered a stay. Dkt. 11. This Court entered an order consolidating the appeals on June 2, 2014. Dkt. 17.

STATEMENT OF FACTS

Since its territorial days in 1864, Idaho's marriage laws have always defined civil marriage as a union between one man and one woman. ER 92 ¶ 1. *See also* 1864 Idaho Terr. Sess. L. 613; 1889 Idaho Terr. Sess. L. 40; 1901 Civ. Code Ann. § 1990; Idaho Code § 32-202. Civil marriage between members of the same sex has never been authorized under Idaho territorial or state law. *See id.*

Idaho Code § 32-202, which was last amended in 1981, and which plaintiffs have not challenged in this lawsuit, 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 traditional man-woman 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."

In 1996, 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. Section 32-209 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.

Ten years later, 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 constitutional amendment in November 2006. The constitutional amendment

affirmed 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."

Plaintiffs are four same-sex couples who reside in Idaho. ER 390-93 ¶¶ 15, 17, 19, 20. Two of the couples allege that they wish to marry in Idaho. ER 392-93 ¶¶ 19, 20. The other two couples allege that they were married in other States while they were Idaho residents. ER 92 ¶ 2. They wish to have their out-of-state marriages recognized in Idaho. ER 411 ¶ D.

SUMMARY OF ARGUMENT

The Supreme Court's decision in *Baker v. Nelson*, 409 U.S. 810 (1972), established that neither the Equal Protection Clause nor the Due Process Clause requires a State to alter its traditional definition of civil marriage to include same-sex couples. Lower courts are bound by *Baker* unless and until the Supreme Court instructs them otherwise. The district court, like a number of other district courts, rejected *Baker* based on a misreading of the Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013). *Windsor* did not overrule or even undermine *Baker*; in fact, *Windsor* is consistent with the principle underlying *Baker*. The definition of civil marriage is a matter to be determined by State, not federal, law.

Even in the absence of *Baker*, Idaho's marriage laws satisfy the rational basis test, the appropriate standard by which to judge those laws. The rational basis standard applies to plaintiffs' due process claim because same-sex marriage cannot be a fundamental right under *Washington v. Glucksberg*, 521 U.S. 702 (1997). Same-sex marriage is a new phenomenon, not "deeply rooted in this Nation's history and tradition," as *Glucksberg* requires.

Similarly, the rational basis test should govern plaintiffs' equal protection claim. Contrary to the district court's conclusion, this Court's decision in *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471 (9th Cir. 2014), does not require the application of heightened scrutiny to Idaho's marriage laws. *SmithKline* read *Windsor* to require some heightened level of scrutiny to apply to the intentionally discriminatory act of striking a juror solely because he was gay. The discrimination in *SmithKline* was based on a false stereotype: an assumption that the juror could not impartially evaluate the case because of his sexual orientation. Thus, the discrimination in *SmithKline* was akin to the animus or bare desire to harm an unpopular group decried in *Windsor*.

Idaho's marriage laws present a very different issue. The laws do not classify based on sexual orientation. Nor are they the product of animus or false stereotypes. Idaho's marriage laws have consistently maintained the traditional man-woman definition for 150 years. There is no evidence that Idaho's adoption

of the traditional definition of marriage was intended to discriminate against anyone based on sexual orientation. And the decision to provide civil marriage benefits to opposite-sex couples, but not same-sex couples, is based on biological realities, not false stereotypes.

The traditional rational basis standard applies here, and Idaho's marriage laws satisfy it. The laws are reasonably related to a legitimate government purpose. Idaho has an undeniable interest in promoting the welfare of children. The State has chosen to do so by focusing its limited resources on promoting stable relationships between opposite-sex couples, whose biological ability to procreate makes them parents of virtually all children in Idaho.

ARGUMENT

I. Standard of Review

This Court reviews "*de novo* a district court's grant or denial of summary judgment." *Lopez-Valenzuela v. County of Maricopa*, 719 F.3d 1054, 1059 (9th Cir. 2013).

II. *Baker v. Nelson* Forecloses Plaintiffs' Claims

Plaintiffs contend that the Equal Protection and Due Process Clauses require every State to expand the traditional definition of marriage to include same-sex couples. The Supreme Court rejected these very arguments in *Baker v. Nelson*,

409 U.S. 810 (1972). *Baker* is the only case in which the Supreme Court has addressed those issues.

In *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed for want of substantial federal question*, 409 U.S. 810 (1972), Minnesota interpreted its marriage statute to prohibit same-sex marriage. A same-sex couple challenged the constitutionality of the statute as applied. They argued, among other things, that they were deprived of due process and equal protection guaranteed by the Fourteenth Amendment. *Id.* at 186. The Minnesota Supreme Court rejected these arguments. It held that there is no fundamental right to marry without regard to the sex of the parties. *Id.* at 186-87. The court also held that limiting marriage to opposite-sex couples did not violate the Equal Protection Clause. *Id.* at 187.

The plaintiffs appealed to the United States Supreme Court, which dismissed the appeal for want of a substantial federal question. 409 U.S. 810. The Supreme Court's summary dismissal constituted a decision on the merits. *Hicks v. Miranda*, 422 U.S. 332, 343-44 (1975). As such, "lower courts are bound by summary decisions by [the Supreme] Court until such time as the Court informs [them] that [they] are not." *Id*. at 344-45 (internal quotation marks omitted); *see also Wright v. Lane County Dist. Ct.*, 647 F.2d 940, 941 (9th Cir. 1981) ("[s]ummary dismissals for want of a substantial federal question are decisions on the merits that bind lower courts until subsequent decisions of the Supreme Court suggest otherwise").

The core, and dispositive, question here is whether the Supreme Court has "inform[ed]" the lower courts that *Baker* is no longer binding. It has not.

"Summary . . . dismissals for want of a substantial federal question . . . reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do 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). The jurisdictional statements presented to the United States Supreme Court in *Baker* were:

> 1. Whether appellee's refusal to sanctify appellants' marriage deprives appellants of their liberty to marry and of their property without due process of law under the Fourteenth Amendment.
>
> 2. Whether appellee's refusal, pursuant to Minnesota marriage statutes, to sanctify appellants' marriage because both are of the male sex violates their rights under the equal protection clause of the Fourteenth Amendment.
>
> 3. Whether appellee's refusal to sanctify appellants' marriage deprives appellants of their right to privacy under the Ninth and Fourteenth Amendments.

In re Kandu, 315 B.R. 123, 137 (Bankr. W.D. Wash. 2004). The first two issues presented in the jurisdictional statement in *Baker* are identical to the issues plaintiffs raise in their claims challenging Idaho's laws that limit marriage to a union between a man and a woman—*i.e.*, whether the State's refusal to permit same-sex marriage violates the Fourteenth Amendment's Due Process and Equal

Protection Clauses. Accordingly, *Baker* required the district court to dismiss plaintiffs' claims.

Instead, the district court accepted plaintiffs' invitation to reject *Baker*. In so doing, the court improperly ignored Supreme Court precedent. As the Supreme Court has instructed:

> We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

Agostini v. Felton, 521 U.S. 203, 237-38 (1997) (quoting *Rodriquez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)). Even a summary disposition such as *Baker* remains controlling precedent "unless and until re-examined by [the Supreme] Court." *Tully v. Griffin*, 429 U.S. 68, 74 (1976).

The district court acknowledged that, prior to *Windsor*, courts were "reluctant" to depart from the precedent the Supreme Court set in *Baker*. ER 18. To the extent that the district court read *Windsor* to have somehow overruled *Baker*, the court erred by reading *Windsor* far too broadly. Nothing in *Windsor* undermines *Baker*.

The Supreme Court has addressed substantive due process and equal protection claims involving sexual orientation three times since *Baker*: *Romer v.*

Evans, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); and *Windsor*. Of the three, only *Windsor* has true relevance, and its analysis supports the proposition that the Court is reserving to itself the question whether the Constitution has changed to now require all States to abandon the traditional definition of marriage.

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 expressly applied the rational basis standard in reaching its holding. *Id.* at 631 ("if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end"); *id.* at 635 ("a law must bear a rational relationship to a legitimate governmental purpose, . . . and Amendment 2 does not") (*citing Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 462 (1988)). The Court's opinion makes no mention of same-sex marriage or *Baker*.

In *Lawrence*, the Court held that a Texas statute forbidding persons of the same sex to engage in intimate sexual conduct violated the Due Process Clause. The Court noted that the case did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." 539 U.S. at 578. The decision instead focused on the right of "two adults who,

with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle . . . without intervention of the government." *Id.* Here, plaintiffs seek such intervention to secure access to certain governmental benefits through "formal recognition" of their private relationship through marriage.

In *Windsor*, the Court held that a federal statute, section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, was "unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution." 133 S. Ct. at 2695. DOMA's section 3 provided a federal definition of "marriage" and "spouse" that applied to all federal laws. It provided that "the word 'marriage' means only a legal union between one man and one woman as husband and wife." *Id.* at 2683. The Court noted that the "definition and regulation of marriage" is "within the authority and realm of the separate States," *id.* at 2689-90; certain States have chosen to recognize same-sex marriage; and section 3 of DOMA impermissibly deprived same-sex couples married in those States of the "rights and responsibilities" that should have come along with their State-sanctioned same-sex marriages. *Id.* at 2694; *see also id.* at 2693-94 ("[t]he Act's demonstrated purpose is to ensure that *if* any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law") (emphasis added).

Windsor did not mention *Baker*. It also did not hold that all States are required constitutionally to permit or recognize same-sex marriage. Quite the contrary, the Court went out of its way to make clear that the flaw in section 3 was Congress' failure to give effect to a State's—there, New York's—determination as to who is eligible to enter into the marriage relationship. It neither held nor suggested that States have no choice in the exceptionally sensitive area of whether marriage should be limited to opposite-sex couples. *Windsor* reiterated the States' primacy in determining the contours of civil marriage and rebuffed Congress' attempt to interfere with that primacy. It is thus ironic indeed to draw from *Windsor*—as did the district court in concluding that it implicitly overruled *Baker* (ER 18-19)—the rule that a State's choice to recognize a quite recent social and political phenomenon—same-sex civil marriage—enjoys protection from congressional override but that another State's determination to maintain in place the historical limitation of civil marriage to opposite-sex couples may be disregarded. Whatever else *Windsor* may stand for, it did not alter *Baker*'s control over the issues in this case.

Following its decision in *Windsor*, the Supreme Court sent another signal indicating that *Baker* remains good law. The Court granted the application filed by Utah's governor and attorney general to stay enforcement of a district court's injunction determining that Utah's marriage laws are unconstitutional. *Herbert v.*

Kitchen, 134 S. Ct. 893 (2014) (mem.). The stay request had been denied by the district court (*Kitchen v. Herbert*, No. 2:13-cv-217, 2013 WL 6834634 (D. Utah Dec. 23, 2013)) and by the Tenth Circuit Court of Appeals (*Kitchen v. Herbert*, No. 13-4178 (10th Cir. Dec. 24, 2013)). In granting the stay, the Supreme Court necessarily concluded that eventual certiorari review is likely, and that there is a significant possibility the Court will uphold Utah's marriage laws. *See, e.g.*, *Packwood v. Select Comm. on Ethics*, 510 U.S. 1319 (1994) (Rehnquist, J., in chambers) ("The criteria for deciding whether to grant a stay are well established. An applicant must demonstrate: (1) a reasonable probability that four Justices would vote to grant certiorari; (2) a significant possibility that the Court would reverse the judgment below; and (3) a likelihood of irreparable harm, assuming the correctness of the applicant's position, if the judgment is not stayed. . . . Because this matter is pending before the Court of Appeals, and because the Court of Appeals denied his motion for a stay, applicant has an especially heavy burden.") (citation omitted). The Supreme Court's extraordinary determination to issue a stay indicates that the Court recognizes the need for *it* to resolve the issues in this and related litigation and to maintain the status quo until *it* speaks.

III. Even in the Absence of *Baker*, Idaho's Marriage Laws Satisfy the Rational Basis Test, Which Governs Plaintiffs' Claims

Even if *Baker* did not require dismissal of plaintiffs' claims, Idaho's marriage laws would satisfy the rational basis standard. Under the doctrine of

substantive due process, state laws that do not implicate a fundamental right are subject to rational basis review. *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997). Similarly, the rational basis test applies to equal protection challenges unless the challenged law burdens a fundamental right or targets a suspect class. *Romer*, 517 U.S. at 630. Idaho's marriage laws neither deny plaintiffs a fundamental right nor target a suspect class.

A. The Rational Basis Test Governs Plaintiffs' Due Process Claim Because Same-Sex Marriage Is Not a Fundamental Right

Neither the Supreme Court, this Court, nor any other federal appellate court has ever held that same-sex couples have a fundamental right to civil marriage. Indeed, to declare same-sex marriage a fundamental right would require a court to overrule or ignore well-established Supreme Court authority requiring that the right at issue be "objectively, deeply rooted in this Nation's history and tradition." *Glucksberg*, 521 U.S. at 720-21 (internal quotation omitted). The district court refused to follow "[t]he restraint exercised in *Glucksberg*." ER 22. That refusal was error and should be reversed.

The doctrine of substantive due process is not favored in the law. "[B]ecause guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended," courts should be "reluctant to expand the concept of

substantive due process." *Glucksberg*, 521 U.S. at 720. As the Supreme Court has explained:

> By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.

Id. (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992), and citing *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977)). Before a court will recognize a right as fundamental, it must undertake a careful, two-step analysis.

First, in order to warrant heightened protection, a right or interest must be, "objectively, 'deeply rooted in this Nation's history and tradition.'" *Glucksberg*, 521 U.S. at 720-21. It must be "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if [it was] sacrificed." *Id*. at 721. *Second*, the fundamental liberty interest at stake must also be subject to a "careful description." *Id*. The "crucial 'guideposts for responsible decision-making'" in evaluating the existence of a fundamental right are the nation's "history, legal traditions, and practices." *Id*. The question is whether the right is "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Commonwealth*, 291 U.S. 97, 105 (1934).

The district court accepted plaintiffs' argument that they do not seek to establish a new right, but rather seek to extend to same-sex partners the right to

marry the Supreme Court has found to exist between opposite-sex partners. *See* ER 25-27. That conclusion ignores a basic tenet of Supreme Court substantive due process jurisprudence. The alleged fundamental interest at stake must be subject to a "careful description." *Glucksberg*, 521 U.S. at 721. In view of the Supreme Court's direction that courts should be "reluctant to expand the concept of substantive due process," *id.* at 721, the district court erred by accepting plaintiffs' request to expand the right to civil marriage. It additionally bears emphasis that nothing precludes States from eliminating civil marriage, and it makes no sense to argue that a right whose very existence is subject to legislative grace is fundamental. *Cf. Windsor*, 133 S. Ct. at 2691 ("The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.' . . . '[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce.'") (citation omitted).[2]

[2] Reliance on *Turner v. Safely*, 482 U.S. 75 (1987), and *Zablocki v. Redhail*, 434 U.S. 374 (1978), for the proposition that civil marriage is a fundamental right misses the point. In each of those cases, as well as in *Loving v. Virginia*, 388 U.S. 1 (1967), the challenged statute or regulation conditioned access to civil marriage for persons otherwise entitled to marry because of a specific status. *Turner*, 482 U.S. at 82 (prison warden approval required for inmates to marry non-

B. The Rational Basis Test Governs Plaintiffs' Equal Protection Claim Because Idaho's Marriage Laws Do Not Classify on the Basis of Sexual Orientation and Are Not the Product of Intentional and Irrational Discrimination

Based on this Court's decision in *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471 (9th Cir. 2014), the district court held that Idaho's marriage laws would be subject to heightened scrutiny, even in the absence of a fundamental right to marry. ER 35-36. The heightened scrutiny applied in *SmithKline* does not apply here.

SmithKline held that heightened scrutiny applied to an act of intentional discrimination: a peremptory challenge of a prospective juror because he was gay. Abbott's counsel provided no valid justification for his strike, 740 F.3d. at 477, and the evidence of discriminatory motive was "unrefuted." *Id*. at 479. In the absence

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inmates); *Zablocki*, 434 U.S. at 375 (judicial approval to marry required for non-custodial parents with child support obligations). The lesson of these decisions is not that civil marriage itself is a fundamental right but that the decision to enter into an otherwise lawful civil marriage cannot be encumbered by an individual's status, at least in a non-prison context, "unless [the encumbrance] is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Id.* at 388; *see Turner*, 482 U.S. at 97-98 (although "[n]o doubt legitimate security concerns may require placing reasonable restrictions upon an inmate's right to marry, and may justify requiring approval of the superintendent[,] . . . the Missouri regulation . . . represents an exaggerated response to such security objectives"). However, neither of these decisions affects a State's right to determine what *constitutes* civil marriage or gives credence to the argument that any such determination is subject to heightened scrutiny. Plaintiffs have no fundamental right under the Due Process Clause to redefine marriage to their liking. They can, and do, challenge their exclusion from Idaho's definition, but that exclusion raises potential equal protection concerns that are entirely discrete from substantive due process-based privacy rights.

of any valid explanation for the strike, the court concluded that it was the result of a false stereotype: a discriminatory assumption that the juror could not impartially evaluate the case because of his sexual orientation. *Id*. at 478.

Prior to *SmithKline*, this Court did not apply heightened scrutiny to sexual orientation discrimination claims. *See id*. at 480 ("We have in the past applied rational basis review to classifications based on sexual orientation"). The *SmithKline* court determined that *Windsor* justified departure from this rule. Although the Supreme Court did not state that it was applying heightened scrutiny in *Windsor*, the *SmithKline* court examined the analysis in *Windsor* and concluded that it required application of heightened scrutiny "to classifications based on sexual orientation." *Id.* at 483.

The intentional and irrational discrimination in *SmithKline* was similar to the animus and bare desire to harm an unpopular group noted by the Supreme Court in *Windsor*, 133 S. Ct. at 2693, *Romer*, 517 U.S. at 634-35, and *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973). Idaho's marriage laws present a completely different case. Idaho's marriage laws do not classify on the basis of sexual orientation. Idaho has defined marriage as a union between a man and a woman not based on a false stereotype or discriminatory assumption, but on irrefutable biological facts. It confers the benefits of civil marriage on opposite-sex couples because they are biologically able to procreate and responsible for

virtually all children being raised in Idaho households, not because of their sexual orientation. And 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 on legitimate and longstanding legislative choices, not irrational stereotypes or animus. Accordingly, plaintiffs' equal protection challenge of Idaho's marriage laws should be reviewed under the rational basis standard, not *SmithKline's* heightened scrutiny.

As the Supreme Court has explained:

> [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) ("To fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it.").

C. Rational Basis Review Is a Deferential Standard That Is Satisfied As Long as the Challenged Law Is Reasonably Related to a Legitimate Governmental Objective.

Rational basis review 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. *Tutor-Saliba Corp. v. City of Hailey*, 452 F.3d 1055, 1061 (9th Cir. 2006). The Supreme 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)); *accord Wright v. Incline Vill. Gen. Improvement Dist.*, 665 F.3d 1128, 1142 n.8 (9th Cir. 2011).

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 factfinding." *Heller v. Doe*, 509 U.S. 312, 320 (1993). It is thus "entirely 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). The rational basis test, in short, is a relatively relaxed standard reflecting the awareness that the drawing of lines that create distinctions is primarily a task of the legislative branch. *Silveira v. Lockyer*, 312 F.3d 1052, 1088 (9th Cir. 2002).

Courts have repeatedly held that rational bases validly support marriage laws that limit marriage to opposite-sex couples. *See, e.g., Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 867-68 (8th Cir. 2006); *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1014-18 (D. Nev. 2012), *appeal pending*, No. 12-17668 (9th Cir.); *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1111-16 (D. Haw. 2012), *appeals pending*, Nos. 12-16995 & 12-16998 (9th Cir.); *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).[3]

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[3] Post-*Windsor* decisions invalidating state laws that restrict marriage to opposite-sex couples often have applied "heightened" or non-traditional rational basis review. The district court below did so. ER 36-55; *see also, e.g.*, *Wolf v. Walker*, No. 14-cv-64-bbc, 2014 WL 255844, at *29 (W.D. Wis. June 6, 2014) (applying "intermediate scrutiny" standard to sexual orientation discrimination). Others, however, have concluded that such restrictions do not satisfy the traditional rational basis test. *E.g.*, *DeLeon v. Perry*, 975 F. Supp. 2d 632, 652-56 (W.D. Tex. 2014); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 482 (E.D. Va. 2014); *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1288-96 (N.D. Okla. 2014); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 991-95 (S.D. Ohio 2013); *Kitchen*, 961 F. Supp. 2d at 1211-15. The pre- and post-*Windsor* divide makes little sense because the traditional rational basis standard has remained unchanged. *See*

The Court of Appeals for the Eighth Circuit summarized some of the valid rational bases for opposite-sex marriage laws in *Bruning*:

> By affording legal recognition and a basket of rights and benefits to married heterosexual couples, such laws "encourage procreation to take place within the socially recognized unit that is best situated for raising children." . . . The argument is based in part on the traditional notion that two committed heterosexuals are the optimal partnership for raising children . . . . But it is also based on a "responsible procreation" theory that justifies conferring the inducements of marital recognition and benefits on opposite-sex couples, who can otherwise produce children by accident, but not on same-sex couples, who cannot.
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> [U]nder rational-basis review, "Even if the classification . . . is to some extent both underinclusive and overinclusive, and hence the line drawn . . . imperfect, it is nevertheless the rule that . . . perfection is by no means required." . . . Legislatures are permitted to use generalizations so long as "the question is at least debatable." . . . The package of government benefits and restrictions that accompany the institution of formal marriage serve a variety of other purposes. The legislature-or the people through the initiative process-may rationally choose not to expand in wholesale fashion the groups entitled to those benefits. "We accept such imperfection because it is in turn rationally related to the secondary objective of legislative convenience."

455 F.3d at 867-68 (citations omitted). As discussed below, moreover, "[t]he package of government benefits" are not cost-free, and States therefore may

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SmithKline, 740 F.3d at 480-84 (distinguishing the heightened scrutiny deemed applied in *Windsor* from traditional rational basis review). One may question whether the post-*Windsor* cases faithfully adhere to the minimal requirements of rational basis review. So, for example, one court held an *evidentiary* hearing and made factual findings before holding that no rational basis existed. *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 770-75 (E.D. Mich. 2014).

rationally elect to direct their resources to those relationships that account for nearly all children in their jurisdiction.

D. Idaho's Interest in Furthering The Stability of Family Structures Through Benefits Targeted at Couples Possessing Biological Procreative Capacity Is Substantial and Satisfies the Rational Basis Standard

Until the Hawaii Supreme Court's construction of its State's equal protection provision in *Baehr v. Lewin*, 852 P.2d 44, 56 (Haw. 1993), the notion of same-sex marriage would have been deemed oxymoronic. The reason is obvious: Marriage has served traditionally as the primary societal basis for ordering conjugal relationships whose purpose or practical effect lie in the *creation* of new human life. As the Supreme Court recognized in *Maynard v. Hill*, 125 U.S. 190 (1888), "[i]t is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress." *Id.* at 211. The Court reiterated this fundamental proposition in *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), with the observation that "[m]arriage and procreation are fundamental to the very existence and survival of the race." *Id.* at 541.

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This is not to say that the *only* purpose for civil marriage laws lay in encouraging family stability for rearing the couple's biological offspring;[4] it is to say, however, that such stability furthers a core and uncontested public interest in the child's wellbeing. Civil marriage is simply another arrow in a quiver of statutory mechanisms used to advance that interest. The question here is whether Idaho's determination—which dates back to the first Territorial code (1864 Idaho Terr. Sess. L. 613)—to target its finite resources on fostering long-lived opposite-sex relationships through the availability of marital status benefits is rational when those relationships produce almost all children and also account for a sizable majority of family households in the state. That determination plainly is rational.

1. Relevant Idaho Demographic Data. Several demographic facts inform Idaho's marriage policy choice. *First*, 2010 Census data reflect that husband-wife households in Idaho constituted 55.3 percent of all households—the second highest of any state. ER 591. Idaho also ranked second at 24 percent as to husband–wife households with their own children under 18 years of age, or 73.4 percent of all family households with such children. *Id.* The national averages were 20.2 and 68 percent respectively. *Id.* *Second*, these percentages are unsurprising because the Idaho marriage rate in 2011 was 8.6 percent—the third

[4] *See Turner v. Safley*, 482 U.S. 78, 96 (1987) (recognizing that marriages "are expressions of emotional support and public commitment" to which "spiritual significance" and governmental benefits may be attached).

highest of any State in the nation if the matrimonial destination outliers of Hawaii and Nevada are excluded (ER 580)—and its 2012 preliminary data birth rate was 14.4 percent—the fifth highest State in the nation (ER 572). *Third*, the "preferred percentages" derived from the 2010 Census reflect that same-sex couples account for .4 percent of all households in Idaho. ER 597. Given these data, one may conclude reasonably that a minute fraction, presumably less than .2 percent of total households, of same-sex couples in Idaho have resident children under the age of 18.[5]

The distinguishing characteristics of opposite-sex and same-sex couples for marriage purposes are the procreative capacity of the former and the statistically minute fraction of the latter, 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 tangible legislative benefits of marriage to opposite-sex couples would further the state's interest in encouraging stable families for child-rearing purposes and that extending such benefits to same-sex couples was not warranted in light of the miniscule number of households affected

[5] The United States Census Bureau estimated "[a]bout 0.1 percent of all households in the United States in 2010 . . . [were] same-sex partner households with own children of the householder present." ER 590. That percentage, if applied to Idaho, equals 579 households. ER 591.

and the corresponding *de minimis* likely impact on the public interest.[6] No reason existed to change over a century of pre-statehood and post-statehood practice by making civil marriage available to individuals who desire to access the governmental benefits of such status but who lack the capacity to procreate with one another.[7]

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[6] Census Bureau data indicate a national increase in the "preferred estimate" of same-sex couples from .03 percent in the 2000 Census to .06 percent in the 2010 Census. ER 596. Thus, although the number of same-sex couples roughly doubled between the 2000 and 2010 Census counts, it remained a miniscule portion of all family households generally and, as explained above, an even smaller portion of those households with children under 18.

[7] The fact that not all opposite-sex couples may desire to have children or may be capable of having them does not negate the reasonableness of Idaho's policy choice. Any inquiry into the issue of why two persons, other than minors, wish to marry or whether they intend to raise a family would be precluded by substantive due process-based privacy rights. *See, e.g.*, *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) ("[c]hoices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' . . . rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect") (citation omitted); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-40 (1974) ("[t]his Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment"). The recent decision in *Wolf v. Walker*, No. 14-cv-64-bbc, 2014 WL 2558444 (W.D. Wis. June 6, 2014), thus goes seriously astray in suggesting that a "state could require . . . applicants for a marriage license to certify that they have the intent to procreate and are not aware of any impediments to their doing so." *Id.*, at *36. "The very idea is repulsive to the notions of privacy surrounding the marriage relationship." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *see also Jackson*, 884 F. Supp. 2d at 1113. Predicating the distinction on broad biological distinctions rationally attempts to walk between Scylla—the constitutional privacy right—and Charybdis—the objective of encouraging stable families composed of fathers, mothers, and their biological children. *See*

2. Focusing Governmental Resources to Encourage Stable Biological Parent Households. Key to resolution of plaintiffs' substantive due process and equal protection claims is a single clearly reasonable, if not uncontested, proposition: Children generally thrive best in intact family structures where their biological parents are married. A recent report from the Institute for American Values, National Marriage Project, stated:

> **Children are less likely to thrive in cohabiting households, compared to intact, married families.** On many social, educational, and psychological outcomes, children in cohabiting households do significantly worse than children in intact, married families, and about as poorly as children living in single-parent families. And when it comes to abuse, recent federal data indicate that children in cohabiting households are markedly more likely to be physically, sexually, and emotionally abused than children in both intact, married families and single-parent families. . . . Only in the economic domain do children in cohabiting households fare consistently better than children in single-parent families.

W. Bradford Wilcox *et al.*, *Why Marriage Matters: Thirty Conclusions from Social Sciences* at 7 (3d ed. 2011) (ER 511, 516). Others have concluded that "[r]esearch findings linking family structure and parents' marital status with children's well-being are very consistent" and that "it is not simply the presence of two parents, . . . but the presence of two biological parents that seems to support

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Dandridge v. Williams, 397 U.S. 471, 485 (1970) ("In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'").

children's development." Kristen Anderson Moore *et al.*, *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do About It?*, Child Research Brief at 1-2 (June 2002) (ER 501-02). Even if some details of the proposition remain open for further analysis, its central premise is plainly plausible. *See* Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation*, 15 Future of Children No. 2 at 79 (Fall 2005) ("Amato") ("If cohabiting parents marry after the birth of a child, is the child at any greater risk than if the parents marry before having the child? Correspondingly, do children benefit when their cohabiting parents get married? To the extent that marriage increases union stability and binds fathers more strongly to their children, marriage among cohabiting parents may improve children's long-term well-being. Few studies, however, have addressed this issue.") (ER 477, 481).

Correlative to this core proposition is the keen interest that States have in encouraging marriage between opposite-sex partners. As Professor Amato observed, "[s]ince social science research shows so clearly the advantages enjoyed by children raised by continuously married parents, it is no wonder that policymakers and practitioners are interested in programs to strengthen marriage and increase the proportion of children who grow up in such families." Amato, 15 Future of Children No. 2 at 85 (ER 487). He estimated that "if the share of

adolescents living with two biological parents increased to its 1960 level, the share of adolescents repeating a grade would fall to 21 percent"—or approximately 750,000 fewer repeaters. ER 489, 490; see also ER 492 ("interventions that increase the share of children growing up with two continuously married biological parents will have modest effects on the *percentage* of U.S. children experiencing various problems, but could have substantial effects on the *number* of children experiencing them"). Another set of researchers has concluded that "[r]educing nonmarital childbearing and promoting marriage among unmarried parents remain important goals of federal and state policies and programs designed to improve the well-being of children and to reduce their reliance on public assistance." Elizabeth Wildsmith *et al.*, *Childbearing Outside of Marriage: Estimates and Trends in the United States*, Child Research Brief at 5 (Nov. 2011) (ER 470, 474).

A third study has concluded that "[r]esearch suggests that many of the social problems and disadvantages addressed by federal and state government programs occur more frequently among children born to and/or raised by single parents than among children whose parents get and stay married" and "leads to higher costs to taxpayers through higher spending on antipoverty programs and throughout the justice and educational systems, as well as losses to government coffers in foregone tax revenues." Benjamin Scafide, Principal Investigator, *The Taxpayer Costs of Divorce and Unwed Childbearing: First Ever Estimate for the Nation and*

All Fifty States at 9 (2008) (ER 425, 433). The study conservatively estimated family fragmentation costs to be at least $112 billion each year for the nation as a whole. ER 429. Family fragmentation not only imposes these very substantial burdens on the public fisc, but also forces government policymakers to make difficult, cost-based choices that may run counter to affected children's best interests. *See Bowen v. Gilliard*, 483 U.S. 587, 615 (1987) (Brennan, J., dissenting) ("[t]he Government's insistence that a child living with an AFDC mother relinquish its child support deeply intrudes on the father-child relationship, for child support is a crucial means of sustaining the bond between a child and its father outside the home").

There is no dispute that Idaho and other States expend substantial resources to subsidize the institution of civil marriage. Married couples have the ability to elect between joint and single tax income return filing and, as such, to employ that filing route that results in the lesser tax liability. *See generally* Saby Ghoshray, *Dual Rationality of Same-Sex Marriage: Creation of New Rights in the Shadow of Incomplete Contract Paradigm*, 28 New Eng. Roundtable Symp. L.J. 59, 82 (2007) ("When two individuals get married, the total tax payment, in general is less than the sum of the taxes paid as individuals. This redistribution of tax is seen as an economic benefit to the marriage and can be seen as a cost to society."). They also have access to the judicial system for the purpose of dissolving their marriages—

access that necessarily imposes economic costs upon the system far beyond filing or other administrative fees. That access and the related costs will necessarily expand if civil marriage is extended to same-sex couples. *See generally* Ellen Shapiro, *'Til Death Do Us Part: The Difficulties of Obtaining a Same-Sex Divorce*, 8 NW J. L. & Soc. Pol'y 208, 226 (2013) ("Although few advocates for same-sex marriage want to talk about divorce, with such a high divorce rate, same-sex marriage advocates *should* be thinking about divorce, especially if same-sex marriage continues to be acknowledged in some states and not others. The right to marry typically carries with it the right to divorce.").[8]

[8] Plaintiffs have criticized "Defendants [for] never articulat[ing] what they mean by the State's 'limited resources.'" Dist. Ct. Dkt. 61 at 28 n.8. They added that "even if Defendants could demonstrate that allowing same-sex couples to marry would negatively affect state expenditures or resources in other ways—something they have not even attempted to do—that still would not justify conserving resources by singling out a disfavored set of citizens for unequal treatment." *Id.* However, the rational basis standard did not require Rich and the State to "demonstrate" the precise extent of the fiscal impact of extending marital status eligibility to same-sex couples; it is enough that such an impact is plausible—as plaintiffs themselves effectively conceded in their amended complaint. ER 397-400 ¶ 37. That standard also does not require Idaho to "justify" the differential treatment accorded opposite-sex and same-sex couples; it imposes on plaintiffs the burden to negate every conceivable rational basis for the discriminatory treatment. Here, however, demographic data reflecting the statistically insignificant number of same-sex households with children affected by the unavailability of marital status more than adequately "justify" Idaho's determination to cabin its expenditure or loss of governmental resources by addressing those relationships between individuals whose differing sexes are prerequisites to procreation. *See* Dist. Ct. Dkt. 30-1 at 12-13 & n.5; Dist. Ct. Dkt. 34.

3. Application of the Rational Basis Standard to Article III, Section 28 and § 32-201. Marriage's relationship to fostering stable environments for childrearing by biological parents constitutes a rational basis for Idaho's determination to limit the availability of marital status to opposite-sex couples. *See Jackson*, 884 F. Supp. 2d at 1072 ("the legislature could rationally conclude that defining marriage as a union between a man and woman provides an inducement for opposite-sex couples to marry, thereby decreasing the percentage of children accidentally conceived outside of a stable, long-term relationship"). Heterosexual couples possess the unique ability to create new life and, with that ability, the responsibility for raising the offspring of their conjugal relationship. Although same-sex partners may have a child in their household biologically attributable to one member, they cannot have a child attributable to both. Distinguishing between opposite and same-sex couples under this rationale relates not to their sexual orientation but to their procreative capacity. Idaho cannot be faulted for selecting opposite-sex couples for marital status given its function as a gateway to various governmental benefits and an incentive for those couples to create long-lived familial environments where both biological parents reside and which account for a large percentage of such households.

Plaintiffs ironically proffered facts that underscore the reasonableness of Idaho's choice through the declaration of Michael E. Lamb, Ph.D. ER 211. Dr.

Lamb's thesis is uncomplicated: Current social science research has reached a consensus that several factors "predict healthy development and adjustment" of children and adolescents. ER 216-17 ¶ 18. The factors include the quality of the children's relationship with their parents or "parent figures[,]" the quality of the relationships between parents or "significant adults," and "the availability of adequate economic and social resources." *Id.* The research "demonstrate[s] that the correlates of children's or adolescents' adjustment . . . are important regardless of whether children and adolescents are raised in traditional family settings or nontraditional families" and that "it has been well established that children and adolescents can adjust just as well in nontraditional settings as in traditional settings." ER 219 ¶ 23.[9] This research further "demonstrate[s] that the adjustment of children and adolescents of same-sex parents is determined by the quality of the youths' relationships with parents, the quality of the relationship between the parents, and resources available to the families." ER 223 ¶ 33.

Dr. Lamb completes his basic analysis with the conclusion that the presence or absence of the adjustment correlates is unaffected by same-sex status of the parent or parent figures. ER 215-16 ¶ 14. He further states that "[t]he children and

[9] The "traditional" family setting consists of a "middle-class family with a bread-winning father and a stay-at-home mother, married to each other and raising their biological children." ER 218 ¶ 21. A "nontraditional" family is "any kind of variation from this pattern." *Id.*

adolescents of same-sex parents are as emotionally healthy, and as educationally and socially successful, as children raised by different-sex parents." ER 223 ¶ 34; *see also* ER 215 ¶ 13 ("[c]hildren and adolescents raised by same-sex parents are as likely to be well-adjusted as children raised by different same-sex parents, including biological parents"). These conclusions derive from "approximately 30 years of scholarship and . . . more than 50 peer-reviewed reports." ER 222 ¶ 32. Dr. Lamb completes the declaration by opining that "even if children in same-sex parent families had poorer outcomes on average (which, as discussed above, they do not), that would be a reason to encourage—not bar—marriage by same-sex couples" given the fact that "marriage offers families important resources and support." ER 232 ¶ 49.

In essence, therefore, Dr. Lamb sees no credible social science support for the proposition that children or adolescents in opposite-sex families with married parents adjust better than their counterparts in same-sex families with unmarried partners. Marital status may have certain benefits—"resources and support"—but absence of those benefits, according to Dr. Lamb's analysis, has not affected the comparable adolescent-adjustment found in same-sex families whose parents have not had, until quite recently, the option of civil marriage. This conclusion is double-edged because, on one hand, it discredits the contention that opposite-sex households represent the model for "optimal" childrearing but, on the other, it is

incompatible with the contention that a legislative determination not to spend additional governmental resources by expanding civil marriage to same-sex couples is unreasonable. Simply put, same-sex households are doing as well as opposite-sex households without access to civil marriage. Plaintiffs have no response that solves this dilemma posed by Dr. Lamb's declaration.

4. The District Court's Rejection of the State's Justification Does Not Withstand Scrutiny Under Traditional Equal Protection Standards. The district court held that, under "heightened scrutiny," Idaho's justification failed because "defending the State's fiscal resources is not an actual purpose of any law challenged in this case" and that "[e]ven 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." ER 49. On the latter point, it reasoned that those laws did not "create new rights for naturally procreative couples" or deny their benefits to non-procreative or unstable heterosexual marriages." They instead "arbitrarily withhold benefits from a 'statistically insignificant' class of households with children." *Id.*

a. Idaho's restriction of civil marriage to man-woman couples is not a new phenomenon; it has always been such. The restriction's roots lie not in animus against same-sex couples but in the tight nexus between marriage, procreation, and childrearing. That nexus does not exist for same-sex couples in

the same form—since procreation is impossible—or to the same extent—since the number of same-sex couples with children is so small however measured. This is not to say that same-sex couples' children do not "count." It is to say that Idaho's refusal to radically reconfigure the very concept of civil marriage and to assume the attendant social costs falls squarely within sovereign power left unembarrassed by the Fourteenth Amendment.

State legislatures and, on occasion, electorates must draw lines. Here, Idaho's chose not to expend governmental resources by expanding the definition of civil marriage to include same-sex couples who, by definition, are biologically incapable of *inter sese* procreation. The fact that opposite-sex couples incapable of procreation or not desiring children remain eligible does not compromise the line-drawing's validity. The rational basis standard does not require a legislature to address social and economic issues—which include providing incentives for family structures conducive to children's thriving—in the most comprehensive manner so long as the approach selected is reasonably calculated to achieve the desired end. *See Skinner*, 348 U.S. at 489 ("the reform may take one step at a time, addressing itself to the phase of the problem which seems the most acute to the legislative mind"). Here, it is "fairly debatable" that the *de minimis* presence of same-sex households with children does not warrant extending the marital status incentive to those couples—especially when plaintiffs' own expert has opined that children

raised in same-sex households adjust equally well as children in traditional two-parent homes. *See South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 190 (1938) ("[w]hen the action of a Legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom, and propriety are not for the determination of courts, but for the legislative body, on which rests the duty and responsibility of decision").

b. The district court relied upon *Plyler v. Doe*, 457 U.S. 202 (1982), for the proposition that "[e]ven 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." ER 49. It also pointed to *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011), as exemplifying an Equal Protection Clause "constitutional problem" when a State's "attempts to cut costs [fall] on an *arbitrarily* selected group." *Id.* (emphasis added). The court extrapolated far too much from these decisions.

Plyler arose from the denial of a public education to the children of undocumented aliens and the consequential imposition of "a lifetime hardship on a discrete class of children not accountable for their disabling status," 457 U.S. at 223, despite their being "'basically indistinguishable' from legally resident alien children." *Id.* at 229. It does not stand for the broad principle that States may not choose to allocate governmental benefits to some and not others on the basis of

otherwise legitimate grounds. Idaho's grounds are legitimate. It distinguishes not because of sexual orientation—as to which Idaho marriage laws are indifferent—but on the unquestioned inability of same-sex couples to procreate and thereby to implicate a prime rationale for civil marriage. Under these circumstances, the four-Justice dissent in *Plyler* has more relevance. *See id.* at 243 (Burger, C.J., dissenting) ("[t]he dispositive issue in these cases . . . is whether, for purposes of allocating its finite resources, a state has a legitimate reason to differentiate between persons").

Diaz, a preliminary injunction appeal, turned on the trial court's *factual* determination that excluding lesbian and gay domestic partners from state health insurance coverage would have "'only negligible costs.'" *Collins v. Brewer*, 727 F. Supp. 2d 797, 805 (D. Ariz. 2010), *aff'd*, 656 F.3d 1008 (9th Cir.), *reh'g denied*, 676 F.3d 823 (9th Cir. 2012). That finding has no binding significance here. Even were fact-finding proper in the rational basis context (it is not, *Beach Commc'ns*, 476 U.S. at 315), plaintiffs made no such showing below. It is a plainly plausible, indeed an indisputable, assumption that extending marital status-related benefits to same-sex couples will require not only additional governmental expenditures but also the loss of potential governmental revenue. The precise amount is immaterial for rational-basis analysis purposes. What controls is the legislative determination that one of the principal purposes for creating the

institution of civil marriage—incentivizing stable legal relationships between individuals with procreative capacity—is absent with respect to same-sex couples.[10]

5. The Full Faith and Credit Clause Provides Additional Justification for Section 32-209. Section 32-209 provides that Idaho will not recognize out-of-state marriages that "violate the public policy" of Idaho. Such marriages are defined to include, without limitation, "same-sex marriages, and marriages entered into under the laws of another state or country with the intent to evade" Idaho's laws. The district court concluded that the purpose of section 32-209 "was to buttress Idaho's traditional definition of marriage against changes in other states' marriage laws." ER 40.

Section 32-209 merely complements Idaho's traditional definition of marriage. It therefore is based on the same legitimate purposes as section 32-201

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[10] Any suggestion that Article III, Section 28 or §§ 32-201 and -209 embody "a classification of persons undertaken for its own sake" (*Romer*, 517 U.S. at 635) ignores their historical lineage. Idaho has *always* limited marriage to opposite-sex couples and, in so doing, acted within settled constitutional boundaries until, as the district court would apparently have it, *Windsor*. *See* ER 18 ("[a]lthough courts formerly were reluctant to find these developments sufficient to overcome *Baker*, . . . much has changed in just the last year"). As such, this is not a situation where "a bare . . . desire to harm a politically unpopular group" (*Moreno*, 413 U.S. at 534) forms the basis for the challenged legislation. Marriage laws serve various concededly legitimate purposes, and States retain the discretion to weigh the relative importance of those purposes in determining whether to extend civil marriage to new groups and thereby assume the additional burden on the public fisc.

and should be upheld along with that statute. Otherwise, Idaho residents could circumvent the limitation of marriage to opposite-sex couples by simply marrying in another state. That simple workaround, in turn, would undermine and potentially eviscerate the objective of focusing civil marriage benefits on couples with procreative capacity. It would also eviscerate "the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next." *Windsor*, 133 S. Ct. at 2692; *see also In re Duncan*, 83 Idaho 254, 259-60, 360 P.2d 987, 990 (1961) (States possess "the power to regulate the qualifications of the contracting parties and the proceedings essential to constitute a marriage").

Idaho's enactment of section 32-209 is consistent with the Supreme Court's interpretation of the Full Faith and Credit Clause. U.S. Const. Art. IV, § 1. "[T]he Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." *Nevada v. Hall*, 440 U.S. 410, 422 (1979). It is not unusual for state marriage laws to refuse to recognize out-of-state marriages that violate public policy, particularly when a resident leaves the state to marry with the intent to evade its laws. *See, e.g., Restatement (Second) of Conflict of Laws* § 283 (out-of-state marriages not valid if they violate strong public policy of a state with most significant relationship to parties).

The four plaintiffs in this case who challenge section 32-209 were Idaho residents who traveled to other states to marry to evade Idaho's traditional definition of marriage. *See* ER 92 ¶ 2. Needless to say, to allow this form of evasion effectively negates the fundamental policy choice made by not only the State legislature but also Idaho's electorate. Only by uniformly enforcing the non-recognition provision in § 32-209 can Idaho vindicate its policy choice to limit marriage to opposite-sex couples. Idaho's prohibition of plaintiffs' evasive marriages is consistent with settled law and satisfies the rational basis test.

CONCLUSION

This Court should reverse the district court's judgment.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, appellants are aware of the following related cases pending in this Court:

1. *Sevcik v. Sandoval*, No. 12-17668
2. *Jackson v. Abercrombie*, Nos. 12-16995 & 12-16998
3. *Geiger v. Kitzhaber*, No. 14-35427

CERTIFICATE OF COMPLIANCE

PURSUANT TO CIRCUIT RULE 32-1

I certify that:

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By: */s/W. Scott Zanzig*

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ADDENDUM OF PERTINENT AUTHORITIES

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U.S. Const. amend. XIV, § 1

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

Idaho Const. art. III, § 28

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

Idaho Code § 32-201

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

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

Idaho Code § 32-202

Any unmarried male of the age of eighteen (18) years or older, and any unmarried female of the age of eighteen (18) years or older, and not otherwise disqualified, are capable of consenting to and consummating marriage. Provided that if the male party to the contract is under the age of eighteen (18) and not less than sixteen (16) years of age, or if the female party to the contract is under the age of eighteen (18) and not less than sixteen (16) years of age, the license shall not be issued except

upon the consent in writing duly acknowledged and sworn to by the father, mother or guardian of any such person if there be either, and provided further, that no such license may be issued, if the male be under eighteen (18) years of age and the female under eighteen (18) years of age, unless each party to the contract submits to the county recorder his or her original birth certificate, or certified copy thereof or other proof of age acceptable to the county recorder. Provided further, that where the female is under the age of sixteen (16), or the male is under the age of sixteen (16), the license shall not issue except upon the consent in writing duly acknowledged or sworn to by the father, mother or guardian of such person if there be any such, and upon order of the court. Such order shall be secured upon petition of any interested party which petition shall show that the female minor under the age of sixteen (16), or the male minor under the age of sixteen (16), is physically and/or mentally so far developed as to assume full marital and parental duties, and/or that it is to the best interest of society that the marriage be permitted. A hearing shall be had on such petition forthwith or at such time and upon such notice as the court may designate. The judge shall secure from a physician his opinion as an expert as to whether said person is sufficiently developed mentally and physically to assume full marital duties. If said court is satisfied from the evidence that such person is capable of assuming full marital duties and/or that it is to the best interest of society, said court shall make an order to that effect, and a certified copy of said order shall be filed with the county recorder preliminary to the issuance of a marriage license for the marriage of such person and said order of the court shall be the authority for the county recorder to issue such license.

Idaho Code § 32-209

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

LAWS

OF THE

TERRITORY OF IDAHO,

FIRST SESSION;

CONVENED THE 7TH DAY OF DECEMBER, 1863, AND ADJOURNED ON THE 4TH DAY OF FEBRUARY, 1864, AT

LEWISTON.

ALSO, CONTAINING THE

TERRITORIAL ORGANIC ACT,

DECLARATION OF INDEPENDENCE, THE FEDERAL CONSTITUTION, THE PRE-EMPTION, AND NATURALIZATION LAWS, ETC., ETC.

LEWISTON:

JAMES A. GLASCOCK, TERRITORIAL PRINTER.

1864.

SEC. 41. This act shall take effect and be in force from and after its approval by the governor.

APPROVED, January 22, 1864.

MARRIAGES AND DIVORCES.

AN ACT regulating Marriages and Divorces.

Be it enacted by the Legislative Assembly of the Territory of Idaho as follows:

SECTION 1. Marriage, so far as its validity in law is concerned, is a civil contract, to which the consent of the parties capable in law of contracting is essential.

SEC. 2. Every male person who shall have attained the full age of eighteen years, and every female who shall have attained the full age of sixteen years, shall be capable in law of contracting marriage, if otherwise competent: *Provided, however*, That nothing in this act shall be construed so as to make the issue of any marriage illegitimate, if the persons contracting said marriage, or either of them, shall not have been of lawful age at the time of the birth of said issue: and *Provided, further*, That all minors who shall have attained the age provided in this act for the contracting of marriage, shall be deemed in law to have attained their majority upon entering into the bonds of matrimony.

SEC. 3. No marriage shall be contracted while either of the parties shall have a husband or wife living, nor between parties who are nearer of kin than second cousins, computing by the rules of the civil law, whether by the half or the whole blood.

SEC. 4. Marriages may be solemnized by any justice of the peace in the county or judicial district in and for which he is elected or appointed, and they may be solemnized throughout the territory by any judge of a court of record, by any minister of the gospel, and by the governor of the territory.

SEC. 5. If any person intending to marry shall be under the age of twenty-one, if a male, or under the age of twenty years if a female, and shall not have had a former wife or husband, the consent in person, or in writing, of the parent or guardian having the custody of such minor, if he or she have

either a parent or guardian living in this territory, shall be given to the person solemnizing the marriage before such marriage shall take place.

SEC. 6. In the solemnization of marriage, no particular form shall be required, except that the parties shall declare in the presence of the judge, minister, or magistrate, and the attending witnesses, that they take each other as husband and wife, and in every case there shall be at least two witnesses present, besides the person performing the ceremony.

SEC. 7. When a marriage shall have been solemnized, the person solemnizing the same shall give to each of the parties, if required, a certificate thereof, specifying therein the names and residences of the parties, and of at least two witnesses present, and of the time and place of such marriage, and when the consent of the parent or guardian is necessary, stating that the same was duly given.

SEC. 8. Every person solemnizing a marriage shall make a record thereof, and within three months after such marriage shall make and deliver to the recorder of deeds, of the county where the marriage took place, a certificate under his hand containing the particulars mentioned in the preceding section. The certificate may be in the following form:

Territory of Idaho, } ss:
County of ———. }

This is to certify that the undersigned, a justice of the peace of said county (minister of the gospel, or judge, etc., as the case may be), did on the ——— day of ———, A. D. 18—, join in lawful wedlock A. B. and C. D., with their mutual consent, in presence of E. F. and G. H., witnesses. J. P., Justice of the peace.

SEC. 9. All such certificates shall be filed and recorded by the said recorder, in a book to be kept by him for that purpose; and he shall receive a fee of one dollar from the person solemnizing the marriage, who shall be entitled to receive the same from the parties before the marriage.

SEC. 10. Every person solemnizing a marriage who shall neglect to make and deliver to the recorder a certificate thereof, within the time above specified, shall forfeit for such neglect a sum not less than twenty, nor more than fifty dollars; and every recorder who shall neglect to record such certificate, so delivered, shall forfeit the like penalty.

SEC. 11. If any person shall wilfully make out a false certificate of any marriage or pretended marriage, he shall forfeit for every such offence a sum not exceeding five hundred dollars, or may be imprisoned in the territorial prison not exceeding one year, or by both such fine and imprisonment.

SEC. 12. If any person shall undertake to join others in marriage, knowing that he is not by law fully authorized so to do, or knowing to any legal impediment to the proposed marriage, he shall on conviction be fined in any sum not exceeding five hundred dollars, and be imprisoned in the territorial prison until such fine is paid.

SEC. 13. No marriage solemnized before any person professing to be a judge, justice, or minister, shall be deemed or regarded to be void, nor shall the validity thereof be in any way affected on account of any want of jurisdiction or authority, provided it be consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage.

SEC. 14. The original certificate and record of marriage, made by the judge, justice, or minister, as prescribed in this act, and the record thereof by the recorder of the county, or a copy of such record, duly certified by such recorder, shall be received in all courts and places as presumptive evidence of the fact of such marriage.

SEC. 15. Illegitimate children shall become legitimatized by the subsequent marriage of their parents with each other.

SEC. 16. All fines and forfeitures arising in consequence of a breach of this act, shall be paid into the county treasury for the use of common schools; and in all cases when a violation of the provisions of this act is not declared a misdemeanor, said fines and forfeitures shall be recovered by a civil action, to be brought by any person aggrieved, or by the county treasurer.

SEC. 17. All marriages solemnized among the people called Friends or Quakers, in the form heretofore practiced and in use in their meetings, shall be good and valid.

DIVORCE AND ALIMONY.

SEC. 18. All marriages which are prohibited by law on account of consanguinity between the parties, or on account of either of them having a former husband or wife then living, shall, if solemnized within this territory, be absolutely void, without any decree of divorce, or other legal proceedings.

SEC. 19. When either of the parties to a marriage, for want of age or understanding, shall be incapable of assenting thereto, or when fraud shall have been proved, and there shall have been no subsequent voluntary cohabitation of the parties, the marriage shall be void from the time its nullity shall be declared by a court of competent authority.

GENERAL LAWS

OF THE

TERRITORY OF IDAHO,

PASSED AT THE

FIFTEENTH SESSION

OF THE

TERRITORIAL LEGISLATURE,

CONVENED ON THE

TENTH DAY OF DECEMBER, A. D. 1888, AND ADJOURNED ON THE SEVENTH DAY OF FEBRUARY, A. D. 1889.

AT

BOISE CITY.

Published by Authority.

JAMES A. PINNEY, TERRITORIAL PRINTER.
1889.

MARRIAGE.

AN ACT

TO AMEND SECTIONS 2421, 2434, 2435, 2437 AND 2440 OF THE REVISED STATUTES OF IDAHO, RELATING TO THE CONTRACT OF MARRIAGE.

Be it enacted by the Legislative Assembly of the Territory of Idaho:

SECTION 1. That Sections 2421, 2434, 2435, 2437 and 2440 be amended to read as follows:

SEC. 2421. Any unmarried male of the age of eighteen years or upwards, and any unmarried female of the age of eighteen years or upwards, and not otherwise disqualified, are capable of consenting to and consummating marriage.

SEC. 2434. Every person solemnizing a marriage must make a record thereof, and within thirty days after such marriage, make and deliver to the Probate Judge of the county where the marriage took place a certificate under his hand, containing the names and residences of the parties, and of at least two witnesses present, and of the time and place of such marriage; and when the consent of the parent or guardian is necessary, stating that the same is duly given.

SEC. 2435. All such certificates must be filed and recorded, in the office of the Probate Judge, in a book to be kept by him for that purpose; and he may receive a fee of one dollar from the person solemnizing the marriage, who may demand the same from the parties before the marriage.

SEC. 2437. Every person solemnizing a marriage, who neglects to make and deliver to the Probate Judge a certificate thereof within the time specified, forfeits and must pay for such neglect, the sum of twenty dollars; and every Probate Judge who neglects to record such certificate so delivered, forfeits the like penalty.

SEC. 2440. The original certificate, and record of marriage made by the Judge, Justice or Minister, as prescribed in this Chapter, and the record thereof by the Probate Judge of the county, or a copy of such record duly certified by such Probate Judge, must be received in all courts and places as presumptive evidence of the fact of such marriage.

SEC. 2. This act shall be in force and take effect from and after its passage and approval.

Approved February 7, 1889.

CIVIL CODE

OF

STATE OF IDAHO,

1901.

a person of unsound mind can make no conveyance or other contract, nor delegate any power or waive any right until his restoration to capacity. But a certificate from the medical superintendent or resident physician of the insane asylum to which such person may have been committed, showing that such person has been discharged therefrom, cured and restored to reason, shall establish the presumption of legal capacity in such person from the time of such discharge.

1887 R. S. Sec. 2412.

A sale of personal property made by one not having the mental capacity to contract, does not transfer the title and is void both as against the vendee and subsequent purchaser from him.—Harris v. Harris, 64 Cal. 108, 28 Pac. 83.

CHAPTER LXXVI.

MARRIAGE.

Section 1989. What Constitutes a Marriage: Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization or by a mutual assumption of marital rights, duties or obligations.

1887 R. S. Sec. 2420; 1877, 9th Sess. p. 34.

A marriage to be sufficient upon which to base a charge of bigamy, need not be a regular solemnization and authenticated marriage, but it is sufficient if there is a consent to the marriage followed by a mutual assumption of marital rights, duties, and obligations.—People v. Beevers, 99 Cal. 286, 33 Pac. 844; People v. Lehmann, 104 Cal. 634, 38 Pac. 422.

A mutual agreement of the parties to live together in the professed relation of husband and wife is essential to create a contract of marriage, and the contract when made imposes upon the parties to it, the obligation to do so.—Kilburn v. Kilburn, 89 Cal. 46, 26 Pac. 636. See Hinckley v. Ayres, 105 Cal. 357, 38 Pac. 735.

Consent alone will not constitute marriage, it must be followed by a solemnization or by a mutual assumption of marital rights, duties, or obligations. Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345.

Living together as man and wife is not marriage, nor is an agreement so to live a contract of marriage.—Letters v. Cady, 10 Cal. 533; cited 70 Cal. 564, 11 Pac. 853.

Marriage is a civil contract as well as a religious vow which, while it is invalidated by want of consent, is, if valid obligatory upon the parties during their joint lives, and cannot be cast off at pleasure.—Fornshill v. Murray (Md.), 18 Am. Dec. 344. Marriage is a civil contract and may be avoided, like other contracts, for want of sufficient mental capacity in the parties. If at the time of attempting to contract, the mind is unsound, it is incapable of that consent which is necessary to the validity of the contract. Mental unsoundness to avoid a marriage contract must be clearly shown, and must be sufficient in degree, as it is not every unsound-

ness that will avoid the contract. The general test, is the fitness of the person to be trusted with the management of himself and his own concerns.—Cole v. Cole (Tenn.), 70 Am. Dec. 275.

Section 1990. Age of Persons Contracting Marriage: Any unmarried male of the age of eighteen years or upwards, and Any unmarried female of the age of eighteen years or upwards, and not otherwise disqualified, are capable of consenting to and consummating marriage.

1887 R. S. Sec. 2421, amended 1889, 15th Sess. p. 40.

Section 1991. Marriage, How Manifested and Proved: Consent to and subsequent consummation of marriage may be manifested in any form, and may be proved under the same general rules of evidence as facts in other cases.

1887 R. S. Sec. 2422.

PROOF OF MARRIAGE ADMISSIBILITY IN GENERAL.: Assumption by the parties to the contract for present marriage, subsequent to the contract, of the rights and duties of the marital relations, with the intention of executing the contract, constitutes the necessary present consent.—In re Ruffino's estate, 116 Cal. 304, 48 Pac. 127. A contract of present marriage, followed at any time by the parties assuming the rights and duties of the marital relations, both understanding and intending thereby to consummate the marriage contract, make a valid marriage.—In re Ruffino's estate, supra.

Except in cases of seduction, marriage may be proved in civil cases by reputation, declaration, and conduct of the parties.—Clayton v. Clayton, 4 Colo. 410. On trial for seduction under promise of marriage, evidence that prior to the day which was set for the marriage, and while no marriage previous to said day was contemplated, defendant, without objection from plaintiff, introduced her as his wife, and occupied the same room with her at a hotel, where the alleged offense was committed, does not show the "mutual assumption of marriage rights, duties or obligations," which, in addition to consent, is necessary to constitute a valid marriage.—People v. Lehmann, 104 Cal. 631, 38 Pac. 422.

In an action against a railway company for injuries causing death, declarations of decedent, contained in a letter shown to have been written by him, are competent to prove his marriage.—Kans. Pac. Ry. Co. v. Miller, 2 Colo. 442.

A common law marriage is not shown by irregular cohabitation and partial reputation.—Taylor v. Taylor (Colo. App.), 50 Pac. 1049. Nor is a common law marriage established by the proof of cohabitation alone where the parties do not hold each other out as husband and wife.—Stone v. Bailey, 9 Wash. 115, 37 Pac. 316.

Section 1992. Marriage, When Voidable: If either party to a marriage, be incapable from physical causes of entering into the marriage state, or if the consent of either be obtained by fraud or force, the marriage is voidable.

1887 R. S. Sec. 2423; 1877, 9th Sess. p. 26.

Where marriage is between persons, one of whom has no capacity to contract marriage at all, the marriage is void absolutely, and may be inquired of in any court. Under such a marriage, no civil rights can be acquired.—Gathings v. Williams (N. C.), 44 Am. Dec. 49.

A marriage procured by duress is voidable.—Willard v. Willard (Tenn.), 32 Am. Rep. 529. A marriage procured by fraud is voidable at the suit of the injured party, independent of any provisions of the divorce law.—Henneger v. Lomas (Ind.), 32 L. R. A. 848, 44 N. E. 462. But a court of equity has no inherent jurisdiction to annul a marriage in the absence of fraud or duress.—Ridgely v. Ridgely, 78 Md. 298, 25 L. R. A. 800, 29 Atl. 597.

Section 1993. Incestuous Marriages: Marriages between parents and children, ancestors and descendants of every degree, and between brother and sisters of the half as well as the whole blood, and between uncles and nieces, or aunts and nephews are incestuous,

and void from the beginning, whether the relationship is legitimate or illegitimate.

1887 R. S. Sec. 2424; 1877, 9th Sess. p. 25.

PENALTY FOR VIOLATION OF SECTION: Penal Code, Sec. 4701. A husband is not related by affinity to his wife's brother's wife, so as to make sexual intercourse between them incestuous.—China v. State (Ohio), 11 L. R. A. 630, 26 N. E. 986.

See People v. Harnes, 2 Idaho, 148, 9 Pac. 532.

Section 1994. Certain Marriages Illegal: All marriages of white persons with negroes or mulattoes are illegal and void.

1887 R. S. Sec. 2425.

Section 1995. Second Marriage, When Illegal and Void: A subsequent marriage contracted by any person during the life of the former husband and wife of such person, with any person other than such former husband and wife, is illegal and void from the beginning unless:

1. The former marriage has been annulled or dissolved;

2. Unless such former husband or wife was absent, and not known to such person to be living for the space of five successive years immediately preceding, or was generally reputed and was believed by such person to be dead at the time such subsequent marriage was contracted; in either of which cases the subsequent marriage is valid until its nullity is adjudged by a competent tribunal.

1887 R. S. Sec. 2426; 1877, 9th Sess. p. 25.

PRESUMPTION OF DEATH: In most of the states, statutes provide that where a party has been absent, unheard of or beyond seas for five or seven years, the other party shall not be punishable for marrying again.—See Barber v. State, 50 Md. 161; Eubanks v. Banks, 34 Ga. 407. But such statutes do not apply to cases where the party marries a second time knowing the absent party is living.—Com. v. Johnson, 10 Allen (Mass.), 196; 1 Bish. M. and D. Sec. 596. Nor do they render the second marriage valid if the first really existed still.—Glass v. Glass, 114 Mass. 563. A marriage between parties, one of whom has a husband or wife living, is absolutely void, and no rights of the other party are affected thereby. This is not altered by the fact that the statute provides for actions to annul such marriages.—Drummond v. Irish, 52 Iowa, 41, 2 N. W. 622.

A wife who was married to and living with her husband in Australia, afterwards left him, and went to live with her parents who also resided in Australia. The husband then removed to California where he married again eight years afterwards. Held, that the first wife was "absent" from her husband within the statute which provides that the second marriage during the life of the former spouse is valid until legally annulled where the former spouse is absent and not "known to such person to be living for the space of five successive years immediately preceding such subsequent marriage." Jackson v. Jackson (Cal.), 29 Pac. 957.

Section 1996. Release from Contract for Unchastity: Neither party to a contract to marry is bound by a promise made in ignorance of the other's want of personal chastity, and either is released therefrom by unchaste conduct on the part of the other, unless both parties participate therein.

1887 R. S. Sec. 2427.

Section 1997. Foreign Marriages Valid: All 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.

1887 R. S. Sec. 2428; 1877, 9th Sess. p. 25.

VALIDITY OF MARRIAGE: The validity of marriage has to be tested by

the law of the place where it is celebrated. If valid there, it is valid everywhere. A marriage contract without the state, which is valid by the law of the place where contracted is valid in this state if the parties subsequently removed here, even though the marriage would have been invalid by the laws of this state if contracted here.—Pierson v. Pierson, 51 Cal. 120; Medway v. Needham (Mass.), 16 Am. Dec. 181; Fornshill v. Murray (Md.), 18 Am. Dec. 344; Harding v. Alden (Me.), 23 Am. Dec. 549.

Marriages between white persons and negroes are unlawful, but when a white person and a negro leave the state, never intending to return and are married in a state where the law permits of such marriages and afterwards do return to the state, the marriage is not void.—State v. Ross (N. C.), 22 Am. Rep. 678.

But when the parties leave the state to be married for the purpose of evading the law, and are married in a state not prohibiting such marriages and return to this state, their marriage is void.—State v. Kennedy (N. C.), 22 Am. Rep. 683.

Section 1998. Marriages, How Solemnized: Marriage must be solemnized, authenticated, and recorded as provided in this chapter, but non-compliance with its provisions does not invalidate any lawful marriage.

1887 R. S. Sec. 2429; 1877, 9th Sess. p. 25.

A marriage without a license is not invalid, though the parties participating in the ceremony may be criminally liable.—Connors v. Connors (Wyo.), 40 Pac. 966; proof of a marriage ceremony performed in a church by a minister authorized to perform such ceremony, and that this was followed by a cohabitation of the parties, is sufficient proof of a legal marriage, without it being shown that a license was obtained and a certificate returned by the minister, as required by statute.—State v. McGilvery (Wash.), 55 Pac. 115; People v. Schoomaker (Mich.), 79 N. W. 438.

Section 1999. Marriage License, Form of: The county recorder of any county in this state shall have authority to issue marriage licenses to any parties applying for the same who may be entitled under the laws of this state to contract matrimony, authorizing the marriage of such parties, which licenses shall be substantially in the following form:

Know all men by this certificate that any regularly ordained minister of the gospel, authorized by the rites and usages of the church or denomination of Christians, Hebrews, or religious body of which he may be a member, or any judge or justice of the peace or competent officer to whom this may come, he not knowing of any lawful impediment thereto, is hereby authorized and empowered to solemnize the rites of matrimony between ....., of ..... of the couty of ....., and ....., of ..... of the county of ....., and to certify the same to said parties or either of them, under his hand and seal, in his ministerial or official capacity, and thereupon he is required to return his certificate in form following, as heretofore annexed.

In testimony whereof I have hereunto set my hand and affixed the seal of said county, at ....., this..... day of..... A. D. 19..

.....
Recorder

1899, 5th Sess. p. 273, Sec. 1.

Section 2000. Certificate of Marriage, Form of: The form of certificate annexed to said license, and therein referred to, shall be as follows:

I, ..., a ....., residing at ....., in the county of..... in the State of Idaho, do certify that, in accordance with the authority on me conferred by the above license, I did on this.....day of....., in the year A. D. 19.., at ....., in the county of..... in the State of Idaho, solemnize the rites of matrimony between....., of....., in the county of.....of the....., and....., of ....., of the county of....., of the ....., in the presence of ..... and .....

Witness my hand and seal at the county aforesaid, this .....day of....., A. D. 19..

In the presence of

.....

....[SEAL.]

The license and certificate, duly executed by the minister or officer who shall have solemnized the marriage authorized, shall be returned by him to the office of the recorder who issued the same, within thirty days from the date of solemnizing the marriage therein authorized.

1899, 5th Sess. p. 278, Sec. 2. Penalty for wilfully making false return: Penal Code, Sec. 4631. Penalty for neglect to make return: Penal Code, Sec. 4722.

Section 9001. When Recorder to Issue License: Every county recorder who shall have personal knowledge of the competency of the parties for whose marriage a license is applied for shall issue such license upon payment or tender to him of his legal fee therefor; and, if such recorder does not know of his own knowledge that the parties are competent under the laws of this state to contract matrimony, he shall take the affidavit in writing of the person or persons applying for such license, and of other persons as he may see proper, and of any persons whose testimony may be offered; and if it appear from the affidavit so taken that the parties for whose marriage the license in question is demanded, are legally competent to marry, the recorder shall issue such license, and the affidavits so taken shall be his warrant against any fine or forfeiture for issuing such license.

1899, 5th Sess. p. 279, Sec. 3. Penalty for issuing license illegally: Penal Code, Sec. 4649.

Section 9002. Recorder May Administer Oaths: The county recorder shall have power to administer all oaths required or provided for in this Chapter.

1899, 5th Sess. p. 279, Sec. 4. Penalty for false swearing Penal Code, Sec. 4648.

Section 9003. Who May Solemnize Marriage: Any authorized minister or officer to whom any such license, duly issued, may come, not having personal knowledge of the incompetency of either party therein named to contract matrimony, may lawfully solemnize matrimony between them.

1899, 5th Sess. p. 279, Sec. 5. See Sec. 2013 as to validity of marriage solemnized by unauthorized person. Penalty of solemnizing marriage without license: Penal Code, Sec. 4724.

Section 2004. Record of Licenses. Penalty for Neglect: The recorder shall record all such returns of marriage licenses in a book to be kept for that purpose, within one month after receiving the same. If any recorder shall neglect or refuse to record within the said time any return to him made, he shall forfeit one hundred dollars, to be recovered, with costs, by any person who will prosecute for the same.

1889, 5th Sess. p. 279, Sec. 7.

Section 2005. Fees of Recorder: The recorder of each county in this state shall be entitled to a fee of one dollar for each license issued, which fee he shall demand and receive from the person applying for the same, and he may refuse to issue any such license until such fee is paid to him. Said fee shall also include the payment for the service of recording the license upon its return by the minister or officer solemnnizing the marriage for which it was issued.

1899, 5th Sess. p. 279, Sec. 8.

Section 2006. Books of Marriage as Evidence: The original certificate and the books of marriages and copies of entries therein, certified by the recorder under his official seal, shall be evidence in all courts.

1887 R. S. Sec. 2440 as amended, 1899, 5th Sess. p. 280, Sec. 9.

Section 2007. Duty of Person Solemnizing Marriage: All persons herein authorized to solemnize marriages must ascertain and be assured of:

First. The identity of the parties;

Second. Their real and full names and places of residence;

Third. That they are of sufficient age to be capable of contracting marriage;

Fourth. If under the age of eighteen, the consent of the father, mother, or guardian, if any such, is given, or that such non-aged person has been previously but is not at the time married; and that the parties applying for the rites of marriage, and making such contract, have a legal right so to do.

1887 R. S. Sec. 2430, amended 1889, 15th Sess. p. 40 by amendment of Sec. 2421, R. S.

Section 2008. Persons Authorized to Solemnize Marriage: Marriage may be solemnized by either a justice of the supreme court, district or probate judge, the governor, a justice of the peace, mayor, priest or minister of the gospel of any denomination.

1887 R. S. Sec. 2431; 1877, 9th Sess. p. 25.

Section 2009. Manner of Solemnizing Marriage: No particular form for the ceremony of marriage is required, but the parties must declare, in the presence of the person solemnizing the marriage, that they take each other as husband and wife.

1887 R. S. Sec. 2432; 1877, 9th Sess. p. 25.

Section 2010. Proof of Qualifications: The person solemnizing the marriage may administer oaths and examine the

parties and witnesses for the purposes of satisfying himself that the contracting parties are qualified under the requirements of this Chapter.

1887 R. S. Sec. 2433: 1877, 9th Sess. p. 26.

Section 2011. Parties Entitled to Certificate: When a marriage has been solemnized, the person solemnizing the same must give to each of the parties, if required, a certificate thereof.

1887 R. S. Sec. 2436; 1877, 9th Sess. p. 26.

Section 2012. Fee For Solemnizing Marriage: The person solemnizing a marriage is for such service entitled to receive from the parties married the sum of five dollars, but may receive any other greater sum voluntarily given by the parties to such marriage.

1887 R. S. Sec. 2438; 1877, 9th Sess. p. 26.

Section 2013. Validity of Marriage: No marriage solemnized by any person professing to be a judge, justice, or minister, is deemed or regarded void, nor is the validity thereof to be in any way affected on account of any want of jurisdiction or authority: *Provided*, It be consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage.

1887 R. S. Sec. 2439; 1877, 9th Sess. p. 26.

Penalty for falsely presuming to join in marriage: Penal Code, Sec. 4726.

CHAPTER LXXVII.

DIVORCE.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 19, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/W. Scott Zanzig
W. SCOTT ZANZIG