Nos. 14-35420, 14-35421

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUSAN LATTA, et al.,
Plaintiffs-Appellees,
v.

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
No. 1:13-cv-00482-CWD (The Honorable Candy W. Dale)

BRIEF OF PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellees Susan Latta and Traci Ehlers, Lori Watsen and Sharene Watsen, Shelia Robertson and Andrea Altmayer, and Amber Beierle and Rachel Robertson are all individuals; none is a corporation or a subsidiary or affiliate of a publicly-owned corporation.

No publicly-traded corporation has a financial interest in the outcome of this appeal.

DATED: July 18, 2014

/s/ Deborah A. Ferguson

Attorney for Plaintiffs-Appellees

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INTRODUCTION

The Plaintiffs in this case are four couples who have deep roots in Idaho, who have built their lives and families there, and who have worked hard to support themselves and their communities. They wish their relationships to be accorded the same dignity, respect, and security as the relationships of other married couples. But because of Idaho's marriage ban for same-sex couples, they are denied not only the substantial protections that flow from civil marriage, but also the common vocabulary of family life and belonging that other Idahoans may take for granted. By barring Plaintiffs and other same-sex couples from marriage, Idaho's marriage ban excludes them from what, for many, is life's most important relationship, leaving them with no way to publicly express or formalize their commitment to one another or assume "the duties and responsibilities that are an essential part of married life and that they . . . would be honored to accept." *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013).

The harms inflicted on Plaintiffs and other same-sex couples by that exclusion touch on virtually every aspect of life, from "the mundane to the profound." *Id.* at 2694. The marriage ban denies same-sex couples the vast array of protections that enable married couples to join their lives together, care for one another in times of illness and crisis, be recognized as a surviving spouse in the event of the other partner's death, provide for one another financially, make

important joint decisions, and have their relationship acknowledged and respected by the government and third parties. No matter how deeply they care for one another or how long they have stood by one another, the marriage ban treats Plaintiffs and other same-sex couples as legal strangers to one another. It communicates to them and to all the world that their relationships are not as real, valuable, or worthy as those of opposite-sex couples; that they are worthy of no recognition at all; and that they are not, and never can be, true families.

Defendant-Appellant Governor C.L. "Butch" Otter, Defendant-Appellant Ada County Recorder Christopher Rich, and Defendant-Appellant-Intervenor State of Idaho offer various *post hoc* rationalizations for Idaho's discriminatory marriage ban. Indeed, the Defendants, all of whom purport to represent the state's interests in this appeal, do not even agree among themselves about what hypothetical governmental interests the marriage ban advances. In any event, none of those justifications can satisfy even the rational basis standard, let alone the heightened scrutiny required in this case, which requires this Court to "examine [the marriage ban's] *actual* purposes and carefully consider the resulting inequality to ensure that our most fundamental institutions neither send nor reinforce messages of stigma or second-class status." *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 483 (9th Cir. 2014) (emphasis added).

Defendants seek to justify the stigma and injury inflicted on same-sex couples' families based on bare speculation that treating same-sex couples equally might somehow lessen the desire of opposite-sex couples to marry and have children. When presented with similar hypothetical arguments from those defending the federal Defense of Marriage Act ("DOMA") in *Windsor*, the Supreme Court focused on the need to protect *existing* families and *existing* children. The Court found that DOMA "humiliate[d] . . . children now being raised by same-sex couples," making it "even more difficult for children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." 133 S. Ct. at 2694. Idaho's marriage ban inflicts similar harms on the children now being raised by same-sex parents in that state. As the Tenth Circuit recently held, "it is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples." *Kitchen v. Herbert*, No. 13-4178, 2014 WL 2868044, *27 (10th Cir. June 25, 2014).

Because the marriage ban demeans and stigmatizes an entire class of Idaho citizens without furthering any compelling, important, or even legitimate purpose, Plaintiffs ask this Court to affirm the District Court's decision that the ban, including Idaho's refusal to recognize same-sex couples who legally married in other states, violates the requirements of due process and equal protection.

STATEMENT OF THE CASE

This is an appeal from the District Court's judgment enjoining the enforcement of Article III, section 28 of the Idaho Constitution, Idaho Code sections 32-201 and 32-209, and "any other laws or regulations to the extent they do not recognize same-sex marriages validly contracted outside Idaho or prohibit otherwise qualified same-sex couples from marrying in Idaho." ER 67-68.[1]

STATEMENT OF FACTS

At its core, this case is about two committed couples who wish to be married in their home state of Idaho and two married couples whom Idaho refuses to recognize as married. These individuals are productive members of society, with diverse backgrounds, educations and professions. They are a teacher of deaf children, a professional artist who is also a university instructor, a physician's assistant, a small business owner, a clinical social worker, a warehouse manager, a certified massage therapist, and a historian. They have formed families, contributed to their professions and communities, and chosen Idaho as their home. Yet,

[1] All references to the Excerpts of Record ("ER") refer to the Excerpts of Record filed by Defendants-Appellants Christopher Rich and the State of Idaho. References to the additional Excerpts of Record filed by Defendant-Appellant Governor C.L. "Butch" Otter are abbreviated "Gov. ER __." References to the Supplemental Excerpts of Record filed by Plaintiffs-Appellees are abbreviated "SER __."

because they are of the same sex, and for no other reason, Idaho law bars them from getting married or from having their out-of-state marriages recognized.

A. The Plaintiffs/Appellees

1. Susan Latta and Traci Ehlers

Susan Latta is 48 years old and has lived in Idaho for 22 years, where she is a professional artist and serves as an adjunct faculty member at Boise State University. SER 2. She has two grown children and two grandchildren. SER 2, 4. Her spouse, Traci Ehlers, is 50 years old, has lived in Idaho for 38 years, and co-owns a small business. SER 13.

Sue and Traci began a relationship in 2003 and married in California in 2008. SER 2, 3, 14, 15. Idaho's refusal to recognize their marriage is demeaning to them and has harmed them in myriad ways. For example, they must file separate state income tax returns under the fiction that they are single, while filing their federal incomes taxes as married. SER 5, 16. Unlike other married couples in Idaho, the property they have acquired together since their marriage is not community property. SER 15, 16. And, as Traci and Sue grow older, they are increasingly concerned with the legal and personal ramifications of Idaho's refusal to recognize their marriage. SER at 6, 17. These concerns implicate many issues, including taxes, inheritance, social security benefits, hospital visitation rights, and medical decision-making. SER 6, 17.

Further, Idaho law does not recognize Traci as the grandparent of their grandchildren, and instead considers her a legal stranger to them. SER 16. It is painful for both Traci and Sue that the state they love, the place they have made their home, where they vote and pay taxes, own businesses, volunteer, and donate, treats them as second-class citizens. SER 6, 17.

2. Lori and Sharene Watsen

Lori Watsen, a 40 year old Licensed Clinical Social Worker, and Sharene Watsen, a physician's assistant who is 34, were married in October 2011 in New York City. SER 19, 23, 37, 39. In 2013, Sharene gave birth to their child, a boy. SER 24, 40. During Sharene's pregnancy, Sharene and Lori decided to merge their last names to create a new family name that they could share with their son. SER 25, 41.

Lori and Sharene have a carefully planned and loving family, but they have suffered many indignities, large and small, because Idaho law does not recognize their marriage. SER 27. For instance, filling out the birth certificate form at the hospital after the birth of their son was frustrating to Lori and Sharene, as the form allowed only one line for "mother" and a second line for "father." SER 26, 40. They wrote in the margins that Lori should also be listed as a parent, but the birth certificate arrived in the mail with only Sharene's name on it. SER 26, 40.

Lori and Sharene hired an attorney to assist them with an adoption petition, so that Lori could legally adopt their son. SER 26, 41. A state magistrate judge dismissed the petition summarily, holding that Lori did not have legal standing to adopt their child because Lori and Sharene were not considered to be married under Idaho law. SER 26, 41. Only recently, and after the Watsens' petition was rejected, has the Idaho Supreme Court determined that sexual orientation of a potential parent is not a relevant consideration for adoption. *In re Doe*, 326 P.3d 347 (Idaho 2014). After *Doe*, the Watsens then re-filed their petition in the magistrate court, and it was finally approved.

Married couples in Idaho are not required to go through the time-consuming, stressful, and expensive process of adoption in order to establish a legally protected parental relationship with their own children. Additionally, if Idaho respected the Watsens' marriage, the couple's original adoption petition would have allowed Lori to adopt as a stepparent, avoiding the need for a costly home study that is typically required for other adoptions. SER 27, 42. Yet even now, when both Lori and Sharene are the legal parents of their son, he is denied the additional protection and security of having his parents recognized as married. SER 27, 42-43.

3. Andrea Altmayer and Shelia Robertson

Andrea Altmayer is a 45-year-old certified massage therapist who lives in Boise with Shelia Robertson, her life partner. SER 60. Shelia is a 44 year old

teacher of the deaf in the Meridian, Idaho public schools. SER 65-66. Shelia and Andrea have been in a committed, exclusive relationship for over 16 years. SER 61. They want to spend the rest of their lives together, and wish to marry in Idaho. SER 61, 67.

In 2009, Andrea gave birth to their child, a boy. SER 61, 67-68. Because Idaho law excludes them from marriage, they and their son are denied the security, recognition and protection that Idaho law provides to married opposite-sex couples and their children. SER 62, 68. Had Shelia and Andrea been permitted to be married prior to their son's birth, Shelia would have been presumed one of their son's parents. SER 62, 68. Instead, Shelia is not recognized as a legal parent of their son. SER 62, 68. This has sweeping ramifications in legal, educational, and medical settings, and it is detrimental to him and them as a family. Although recent developments in Idaho law now permit Shelia to petition to adopt their son, they would not be required to undertake this burdensome process if they could marry, but could instead use the more streamlined process to permit Shelia to adopt as a stepparent. In addition, "Robertson and Altmayer worry their son will not have the security and stability afforded by two legal parents. Both are deeply concerned their son will grow up believing there is something wrong with his family because his parents cannot marry." *Latta v. Otter*, No. 1:13-CV-00482-CWD, 2014 WL 1909999, *5 (D. Idaho May 13, 2014); SER 68.

Not having the right to marry one another negatively affects their family in many additional ways. Neither their son nor Andrea can obtain health insurance coverage through Shelia's employer. SER 62, 70. Nor do they have the right to visit one another, or direct one another's care, if either needs medical care and becomes incapacitated. SER 63. They cannot file their taxes jointly, and the property they have acquired together is not considered community property. SER 63, 70.

On November 6, 2013, Shelia and Andrea went to the Ada County Recorder's Office to apply for a marriage license, but they were turned away. SER 63, 70.

4. Amber Beierle and Rachael Robertson

Amber Beierle is 33 years old and has lived in Idaho since her birth. She has a graduate degree in applied historical research, and served as Boise's first city historian. SER 73, 74. Since 2009, she has been a program director at the Old Idaho Penitentiary, an Idaho historic site. SER 74.

Rachael Robertson[2] is 31 years old and lives in Boise with Amber, where she manages a plumbing wholesale warehouse. SER 80. Rachael is a combat veteran, and from June 2004 to November 2005 she served in a platoon in Iraq,

[2] Earlier this year, Rachael Robertson legally changed her name to Rachael Beierle, to reflect the permanence of their commitment to one another with a shared surname. To avoid confusion, it remains as Robertson in the briefing.

where she drove a Humvee in a convoy that provided personal security for a brigadier general. SER 80-81. This convoy came under enemy fire, after which she received the Army Combat Metal. SER 81. She was also awarded a Soldier Good Conduct Medal, and she was honorably discharged from the military. SER 81.

Amber and Rachael have been in a committed, exclusive relationship since Valentine's Day 2011. SER 75, 82. They want to spend the rest of their lives together, and wish to marry in Idaho. SER 76. Amber and Rachel have started planning their family. SER 76, 83. Both deeply wish to experience the unique bond of marriage, as well as the safety net of benefits and responsibilities that allow legally married couples to take care of one another and function as a recognized family. SER 76.

Amber and Rachael bought a house together, but could not get a joint loan from the Veterans Administration. SER 77, 83. Instead, they took out a traditional loan in Amber's name, and she then filed a quitclaim deed transferring the property to both of them. SER 77, 83. They would like the property they have acquired together to be community property, to file joint tax returns, to be considered as one another's spouse for medical visitation and decision-making purposes. SER 77, 84. Should Rachael die, she wants Amber to receive spousal veteran benefits and to be buried together at the Idaho Veterans Cemetery. SER 84. The cemetery currently refuses this right to veterans married to a same-sex spouse. SER 84.

On November 6, 2013, Rachael and Amber went to the Ada County Recorder's Office in Boise to apply for a marriage license, but they were turned away. SER 77, 84.

B. Idaho's Ban on Marriage for Same-Sex Couples

From its earliest history as a state, Idaho defined marriage as "a personal relation arising out of a civil contract, to which the consent of the parties capable of making it is necessary," requiring either a solemnization ceremony or, until 1996, when Idaho abolished common law marriage, "a mutual assumption of marital rights, duties or obligations." Idaho Rev. Stat. § 2420; Idaho Code § 32-201 (1995). Idaho has long had a strong public policy favoring marriage, see *Huff v. Huff*, 118 P. 1080, 1082 (Idaho 1911), and that policy continues today, see *Matter of Yee's Estate*, 559 P.2d 763, 764 (Idaho 1977).

Apart from its recent enactment of measures to deny recognition to the marriages of same-sex couples who legally married in another state, Idaho has always recognized legal marriages from other jurisdictions, even if the marriage could not have been validly entered into in Idaho. *See* former Idaho Code § 32-209 (repealed 1996) (providing that "marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, are valid in this state"). During the era in which Idaho and many other states barred interracial marriages, Idaho Code § 32-206 (repealed 1959), Idaho recognized

interracial marriages from other states. *See* James R. Browning, *Anti-Miscegenation Laws in the U.S.*, 1 Duke B.J. 26, 27, 35 (1951) (describing Idaho's practice of recognizing valid interracial marriages from other states).

After 1993, many states, including Idaho, reacted defensively when the Hawaii Supreme Court held that Hawaii's denial of marriage to same-sex couples violated that state's constitution, absent a compelling state interest. *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993) (superseded by constitutional amendment, Haw. Const. art. I, § 23 (1998)). The Idaho legislature amended Idaho Code § 32-201, effective January 1, 1996, to expressly limit marriage to opposite-sex couples. 1995 Idaho Sess. Laws ch. 104, § 3.

For the first time in its history, Idaho also created an express, categorical exception to its longstanding tradition of liberally recognizing lawful marriages from other jurisdictions by amending Idaho Code § 32-209. 1996 Idaho Sess. Laws ch. 331, § 1. While maintaining the rule that Idaho generally recognizes out-of-state marriages that were valid where contracted, the statute carved out an exception for marriages that "violate the public policy of this state," which are defined to include "same-sex marriages, and marriages entered into under the laws of another state or country with the intent to evade the prohibitions of the marriage laws of this state." Idaho Code § 32-209.

In 2006, the Idaho legislature passed House Joint Resolution 2, which placed on the ballot a proposed constitutional amendment to bar same-sex couples from marriage, in addition to the existing statutory ban. H. Journal, 58th Leg., 2d Sess., at 30-31 (Idaho 2006). The Statement of Purpose was to "protect marriage" and to block any attempt to confer legal status or "the legal benefits of marriage to civil unions, domestic partnerships, or any other relationship that attempts to approximate marriage." H.R.J. Res. 2, 58th Leg., 2d Sess. (Idaho 2006). The Resolution passed, and the Idaho Constitution was amended to read that "[a] marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state." Idaho Const. art. III, § 28.

C. Procedural History

Appellees challenged Idaho's statutory and constitutional marriage ban and anti-recognition laws under 42 U.S.C. § 1983, alleging that they violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. On May 13, 2014, the District Court granted Plaintiffs' motion for summary judgment and denied Defendants' motion to dismiss and motion for summary judgment.

The District Court rejected Defendants' argument that *Baker v. Nelson*, 409 U.S. 810 (1972), prevented lower courts from reaching the merits of the constitutional issues presented, concluding that doctrinal developments since *Baker* had deprived it of precedential force. ER 18-19.

The District Court held that the freedom to marry the person of one's choice is a fundamental liberty interest guaranteed by the Due Process Clause of the Fourteenth Amendment, and that the challenged laws impermissibly deprived Plaintiffs of that right. ER 20-28. The District Court also held that Idaho's marriage ban and refusal to recognize legally married same-sex couples discriminates on the basis of sexual orientation and deprives Plaintiffs of equal protection of the laws. ER 55.

The District Court found that "[e]ach of these laws unambiguously expresses a singular purpose—to exclude same-sex couples from civil marriage in Idaho." ER 38. It concluded that the laws failed under a heightened scrutiny, as required by this Court's holding in *SmithKline*, 740 F.3d at 484, and also under the less stringent rational basis standard. ER at 55. The District Court analyzed each of Defendants' stated rationales, including promoting child welfare, focusing resources on couples with biological procreative capacity, federalism, and accommodating religious concerns. The court concluded that none of those interests saved the laws from constitutional infirmity. ER 43-55.

The District Court permanently enjoined the enforcement of all Idaho laws and regulations "to the extent they do not recognize same-sex marriages validly

contracted outside Idaho or prohibit otherwise qualified same-sex couples from marrying in Idaho." ER 57, 67-68.[3] Defendants appealed.

SUMMARY OF ARGUMENT

Idaho's refusal to permit Plaintiffs to marry, or to recognize their existing marriages, denies them the stability, security, and protections that other married couples and their children enjoy. Idaho's treatment of Plaintiffs and other same-sex couples as strangers to one another, rather than families, demeans their deepest relationships and stigmatizes their children by communicating that their families are second class. *See Windsor*, 133 S. Ct. at 2694.

Idaho's marriage ban violates Plaintiffs' right to due process of law by infringing upon their fundamental right to marry. The Supreme Court has consistently recognized the freedom to marry as "one of the vital personal rights essential to the orderly pursue of happiness by free" persons. *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *see also Zablocki v. Redhail*, 434 U.S. 374, 384 (1978). Contrary to Defendants' arguments, Plaintiffs do not seek a new right to same-sex marriage, but the same freedom to marry enjoyed by other Idaho

[3] Defendants erroneously assert that Plaintiffs have not challenged Idaho Code § 32-202. Def. Rich Br. at 6; Gov. Br. at 12 n.4. Plaintiffs' amended complaint challenged *all* Idaho laws that purport to deny same-sex couples the right to marry or to withhold state recognition from the existing marriages of same-sex couples, ER 545-46, and the District Court enjoined the enforcement of all such Idaho laws. ER 57, 67-68.

citizens. Like any fundamental right, the freedom to marry is defined by the substance of the right at issue, and not the identities of the persons asserting it.

Idaho's marriage ban violates Plaintiffs' right to equal protection of the laws because it discriminates based on sexual orientation and sex. As both the Supreme Court and this Court have held, laws that target same-sex couples discriminate based on sexual orientation. *See, e.g., Windsor*, 133 S. Ct. at 2693; *Diaz v. Brewer*, 656 F.3d 1008, 1014-15 (9th Cir. 2011). In this Circuit, laws that discriminate based on sexual orientation require heightened scrutiny. *SmithKline*, 740 F.3d at 484.

The marriage ban also warrants heightened scrutiny under the Equal Protection Clause because it discriminates based on sex. Idaho law prohibits the unmarried Plaintiffs from marrying the person each wishes to marry solely because that person is a woman, not a man. Idaho law also imposes government-enforced gender stereotypes that are antithetical to Idaho's current marriage laws, which treat spouses equally regardless of their sex.

Idaho's marriage ban cannot survive the heightened scrutiny that applies to this discrimination. Indeed, the ban cannot withstand *any* level of constitutional scrutiny because the exclusion of same-sex couples from marriage is irrational and fails to further any legitimate governmental interest. As numerous courts have found, there is no rational connection between excluding same-sex couples from

marriage and Defendants' asserted interests in procreation or parenting. These laws do nothing to encourage opposite-sex couples to marry or have children. They serve only to stigmatize and harm same-sex couples and their children. Nor do any of Defendants' other asserted interests bear any rational relationship to excluding same-sex couples from marriage.

Idaho's laws denying recognition to the marriages of same-sex couples violate equal protection and due process for all of the same reasons that the marriage ban violates those rights, and for additional reasons that independently require their invalidation. Idaho's anti-recognition laws represent an unprecedented departure from the state's longstanding practice of recognizing valid marriages from other states, even if those marriages could not have been entered into within Idaho. By refusing to treat the marriages of same-sex couples with the same respect and protection given to other married couples, Idaho's anti-recognition laws violate "basic due process and equal protection principles" just as the federal Defense of Marriage Act (DOMA) violated those principles. *Windsor*, 133 S. Ct. at 2693.

Defendants are incorrect that the Supreme Court's summary dismissal in *Baker v. Nelson*, 409 U.S. 810 (1972), bars this Court from considering the merits of Plaintiffs' claims. *Baker* does not control this case as it did not decide the precise issues now before this Court. Moreover, as numerous courts have

concluded, in the more than 40 years since *Baker* was decided, there have been myriad developments in the Supreme Court's due process and equal protection jurisprudence. Lower courts are no longer bound by the Supreme Court's summary decision that no substantial federal question was presented in *Baker*. *See, e.g.*, *Kitchen*, 2014 WL 2868044, *10; *Windsor v. United States*, 699 F.3d 169, 178-79 (2d Cir. 2012) (same), *aff'd*, 133 S. Ct. 2675 (2013).

STANDARD OF REVIEW

This Court "review[s] the district court's grant of summary judgment de novo," *Bravo v. City of Santa Maria*, 665 F.3d 1076, 1083 (9th Cir. 2011), and "may affirm summary judgment on any ground supported by the record." *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 956 (9th Cir. 2009) (internal quotation omitted). Summary judgment is appropriate where there is "no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *see also* Fed. R. Civ. P. 56(c). Here, there are no disputes regarding material facts in connection with the parties' motions for summary judgment.

ARGUMENT

I. IDAHO'S MARRIAGE BAN VIOLATES DUE PROCESS.

Plaintiffs seek the same fundamental freedom to marry that others enjoy. "The right to marry and to enjoy marriage are unquestionably liberty interests

protected by the Due Process Clause." *Ching v. Mayorkas*, 725 F.3d 1149, 1157 (9th Cir. 2013). *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."); *Turner v. Safley*, 482 U.S. 78, 95 (1987) ("[T]he decision to marry is a fundamental right."); *Zablocki*, 434 U.S. at 384 ("The right to marry is of fundamental importance for all individuals.").

A law abridging a fundamental right "will be subject to strict scrutiny and . . . invalidated unless it is 'narrowly tailored to serve a compelling state interest.'" *U.S. v. Juvenile Male*, 670 F.3d 999, 1012 (9th Cir. 2012) (citing *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997). Idaho's marriage ban requires, and cannot survive, this test. It intentionally excludes an entire group of people from the freedom to marry, not to further a compelling or even legitimate goal, but simply in order to treat them unequally. Such a severe and unjustified infringement on a fundamental liberty cannot stand.

A. Same-Sex Couples Share Equally in the Fundamental Right to Marry.

Defendants contend that Plaintiffs seek a new "right to same-sex marriage." (Gov. Br. at 70; Rich. Br. at 5).[4] Plaintiffs, however, do not seek a "new" right.

[4] References to the brief filed by Defendant-Appellant Governor Otter are abbreviated as "Gov. Br." References to the brief filed by Defendant-Appellant Christopher Rich and Defendant-Appellant-Intervenor State of Idaho are abbreviated as "Rich Br."

Rather, as equal citizens of this country, they seek the same "freedom of personal choice in matters of marriage and family life" protected for others. *Cleveland Bd. Of Educ. v. LaFleur*, 414 U.S. 632, 639 (1974).

Defendants offer no *substantive* reason why Plaintiffs are unfit to exercise this freedom or should be excluded from this fundamental right. Instead, Defendants argue formalistically that because the right to marry has not been understood to include same-sex couples in the past, it must exclude them now—or, in what amounts to the same circular contention, that Plaintiffs seek to redefine marriage rather than participate in an existing right. Plaintiffs' fundamental liberty interests cannot be sidestepped in this manner. "To claim that marriage, by definition, excludes certain couples is simply to insist that those couples may not marry because they have historically been denied the right to do so." *Kitchen v. Herbert*, No. 13-4178, 2014 WL 2868044, at *19 (10th Cir. June 25, 2014).

The notion that fundamental rights are protected for some groups and not others is anathema to our Constitution. "Fundamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights." *In re Marriage Cases*, 183 P.3d 384, 430 (Cal. 2008) (internal quotation marks and alterations omitted). To suggest that the freedom to marry is inherently restricted to opposite-sex couples (and that permitting same-sex couples to marry therefore requires the recognition of a "new"

right), tautologically begs the very question to be answered in this case. "To define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of those to whom it never has been accessible, is conclusory and bypasses the core question . . . ." *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 972-73 (Mass. 2003) (Greaney, J., concurring). When an excluded group seeks access to a fundamental right, "the challenged classification cannot itself define the scope of the right at issue." *Kitchen*, 2014 WL 2868044, at *20.

The Supreme Court has not limited the fundamental right to marry based on historical patterns of discrimination. In *Loving*, the Court did not defer to the historical exclusion of mixed-race couples from marriage. "[N]either history nor tradition could save a law prohibiting miscegenation from constitutional attack." *Lawrence v. Texas*, 539 U.S. 558, 577-578 (2003) (internal quotation marks and citation omitted). "Instead, the Court recognized that race restrictions, despite their historical prevalence, stood in stark contrast to the concepts of liberty and choice inherent in the right to marry." *Perry v. Schwarzenegger,* 704 F. Supp. 2d 921, 992 (N.D. Cal. 2010), *appeal dismissed sub nom. Perry v. Brown,* 725 F.3d 1140 (9th Cir. 2013). *See also Planned Parenthood v. Casey*, 505 U.S. 833, 847-48 (1992) ("[I]nterracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state

interference by the substantive component of the Due Process Clause").

Decisions after *Loving* have "confirm[ed] that the right to marry is of fundamental importance for all individuals." *Zablocki*, 434 U.S. at 384. As the Tenth Circuit observed in its recent decision striking down Utah's marriage ban, "the Supreme Court has traditionally described the right to marry in broad terms independent of the persons exercising it." *Kitchen*, 2014 WL 2868044 at *18. The Supreme Court's decisions address the fundamental right to marry, *see Loving*, 388 U.S. at 12, *Turner*, 482 U.S. at 94-96, *Zablocki*, 434 U.S. at 383-86, not "the right to interracial marriage," "the right to inmate marriage," or "the right of people owing child support to marry," *Latta*, 2014 WL 1909999, at *12. "The message of these cases is unmistakable—all individuals have a fundamental right to marry." *Id.*[5]

The position urged by Defendants—that Plaintiffs seek not the same right to marry as others, but a new right to "same-sex marriage"—repeats the analytical error made in *Bowers v. Hardwick*, 478 U.S. 186 (1986). In *Bowers*, the Court framed the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." *Id.* at 190. As the Supreme Court explained when it overruled *Bowers* seventeen years later, that statement

[5] Because the right to marry has already been established as fundamental, the analysis set forth in *Glucksberg*, 521 U.S. at 720-21, for recognizing a new right does not apply. *Id*. at *11-13; *see also Kitchen*, 2014 WL 2868044 at *11, *18.

"disclose[d] the Court's own failure to appreciate the extent of the liberty at stake." *Lawrence*, 539 U.S. at 567. Similarly here, Plaintiffs do not seek a new right specific only to gay and lesbian persons, but the same right to marry enjoyed by all other adult citizens. "Just as it was improper to ask whether there is a right to engage in homosexual sex, we do not ask whether there is a right to participate in same-sex marriage." *Kitchen*, 2014 WL 2868044, at *20. Rather, "the right to marry is an individual right, belonging to all." *Latta*, 2014 WL 1909999, at *13.

B. Plaintiffs Have the Same Liberty Interests in Choosing Their Spouses and the Same Ability to Form Constitutionally Protected Marriages as Others.

Idaho's marriage ban deprives Plaintiffs of fundamental interests in dignity and autonomy, including "the freedom to choose one's spouse," *Kitchen*, 2014 WL 2868044, at *15, that they share with all other adults. The intimate relationships a person forms, and the decision whether to formalize those relationships through marriage, implicate deeply held personal beliefs and values. Permitting the government, rather than the individual, to make these intensely personal decisions would intolerably burden individual dignity and self-determination. *Loving*, 388 U.S. at 12 ("Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State."); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984) ("[T]he Constitution

undoubtedly imposes constraints on the State's power to control the selection of one's spouse. . . .").

Idaho's marriage ban denies Plaintiffs the freedom to marry the person with whom each has forged enduring bonds of love and commitment and who, to each of them, is irreplaceable. As the California Supreme Court recognized in 1946 when it became the first state supreme court to strike down a ban on marriage by interracial couples, people are not "interchangeable." *Perez v. Lippold* (*Perez v. Sharp*), 198 P.2d 17, 25 (Cal. 1948). Barring Plaintiffs from marriage demeans and stigmatizes their relationships; it deprives them of the dignity of choosing the person with whom they wish to form a legally protected family.

Defendants seek to justify that deprivation by arguing that marriage is protected only because it is linked to procreation. Gov. Br. at 26-32, Rich Br. at 27-43. But the Supreme Court has expressly rejected that argument, holding both that married couples have a fundamental right not to procreate, *see Griswold v. Connecticut*, 381 U.S. 479, 485 (1965), and that the freedom to marry includes those who are unable to procreate, *see Turner*, 482 U.S. at 95-96. In *Turner*, the Court held that incarcerated prisoners with no right to conjugal visits have a fundamental right to marry. As the Court explained, "[m]any important attributes of marriage remain . . . after taking into account the limitations imposed by prison life . . . [including] expressions of emotional support and public commitment," the

"exercise of religious faith," the "expression of personal dedication," and access to legal benefits, which "are an important and significant aspect of the marital relationship." *Id*. at 95-96. The same is true here: Plaintiffs are no less capable of participating in, and benefitting from, the constitutionally protected attributes of marriage than others.

Indeed, in light of *Lawrence* and *Windsor*, it is clear that same-sex couples are like other couples with respect to "the inner attributes of marriage that form the core justifications for why the Constitution protects this fundamental human right." *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1200 (D. Utah 2013). In *Lawrence*, the Supreme Court explained that decisions about marriage and relationships "'involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy,'" and held that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Lawrence*, 539 U.S. at 574. In *Windsor*, the Court reaffirmed the "equal dignity" of same-sex couples' relationships in the context of federal recognition of marriages, noting that the right to intimacy recognized in *Lawrence* "can form 'but one element in a personal bond that is more enduring.'" *Windsor*, 133 S. Ct. at 2693, 2692 (quoting *Lawrence*, 539 U.S. at 567).

These teachings are fully applicable in this case. Each of the Plaintiff couples has demonstrated their commitment to one another, built a stable family

together, and contributed to their communities. They seek to be treated as equal, respected, and participating members of society who—like other adults—are able to marry the person of their choice.

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

By excluding same-sex couples from marriage, Idaho's marriage ban discriminates based on sexual orientation and sex. Under the Supreme Court's and this Court's precedents, such laws require heightened scrutiny under the Fourteenth Amendment's Equal Protection Clause and must be invalidated unless they have an "exceedingly persuasive justification." *United States v. Virginia*, 518 U.S. 515, 531 (1996) (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)); *see also SmithKline*, 740 F.3d at 483; *Windsor*, 133 S. Ct. at 2692. Idaho's marriage ban not only fails this exacting scrutiny, but cannot survive even the more lenient rational basis test.

A. Idaho's Marriage Ban Requires Heightened Scrutiny Because It Discriminates on the Basis of Sexual Orientation.

This Court has held that the Supreme Court's decision in *United States v. Windsor* "requires that heightened scrutiny be applied to equal protection claims involving sexual orientation." *SmithKline*, 740 F.3d at 481. As the District Court correctly concluded, Appellants' attempts to distinguish that binding precedent, which they reiterate here, are unpersuasive. The holding in *SmithKline* is

"unqualified" and "establishes a broadly applicable equal protection principle that is not limited to the jury selection context" nor to "instances of proven animus or irrational stereotyping." *Latta*, 2014 WL 1909999, at *17.

In *SmithKline*, this Court carefully examined the Supreme Court's decision in *Windsor* and concluded that it requires application of heightened scrutiny to laws that discriminate based on sexual orientation: "*Windsor* requires that when state action discriminates on the basis of sexual orientation, [courts] must examine its actual purposes and carefully consider the resulting inequality to ensure that our most fundamental institutions neither send nor reinforce messages of stigma or second-class status." *SmithKline*, 740 F.3d at 483. The Court held that "earlier [Ninth Circuit] cases applying rational basis review to classifications based on sexual orientation cannot be reconciled with *Windsor*." *Id.* Rather, because "we are required by *Windsor* to apply heightened scrutiny to classifications based on sexual orientation for purposes of equal protection . . . . there can no longer be any question that gays and lesbians are no longer a group or class of individuals normally subject to rational basis review." *Id.* at 484 (internal quotation marks omitted). That holding is controlling here and requires heightened scrutiny, and invalidation, of Idaho's express discrimination against same-sex couples.[6]

[6] Defendants Ida County Recorder Rich and the State of Idaho contend that Idaho's marriage ban does not discriminate based on sexual orientation because a gay man is free to marry a woman and a lesbian is free to marry a man. (Rich Br. at

Defendants argue that *Windsor*'s analysis, and consequently, the heightened scrutiny required by *SmithKline*, "appl[y] only to laws whose only basis is animus." (Gov. Br. at 86; *see also* Rich Br. at 9-10). In fact, *SmithKline* expressly cautioned against such a restriction, noting that impermissible discrimination based on sexual orientation, like that based on gender and other protected classifications, need not reflect "malice or hostile animus," but "may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." 740 F.3d at 486 (quoting *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring)).[7]

22-23.) As the District Court correctly noted, that argument erroneously suggests that "gays and lesbians can switch off their sexual orientation and choose to be content with the universe of opposite-sex partners approved by the State." *Latta*, 2014 WL 1909999, at *13. In any event, both the Supreme Court and this Court have already concluded that laws that target same-sex couples discriminate based on sexual orientation. *See Windsor*, 133 S. Ct. at 2693 (noting that DOMA's discrimination against married same-sex couples reflects "'disapproval of homosexuality'") (quoting H.R. Rep. No. 104-664, at 12-13 (1996)); *Lawrence*, 539 U.S. at 575 (law criminalizing same-sex intimacy targets "homosexual persons"); *Christian Legal Society v. Martinez*, 561 U.S. 661, 130 S. Ct. 2971, 2990 (2010) (rule excluding individuals from group membership based on same-sex intimacy discriminates on the basis of sexual orientation); *Diaz v. Brewer*, 656 F.3d 1008, 1014-15 (9th Cir. 2011) (denial of benefits to same-sex partners constituted impermissible discrimination based on sexual orientation); *see also In re Levenson*, 587 F.3d 925, 929 (9th Cir. 2009) (EDR Plan admin. decision) (Reinhardt, J.).

[7] In addition, Defendants misapprehend the meaning of "animus" as used by the Supreme Court in *Windsor* and other equal protection cases as a constitutional term of art. "Animus" does not refer to subjective hostility or ill-will, as Defendants

In *Windsor*, the Supreme Court closely scrutinized the purposes for which DOMA was enacted and its harmful effects on married same-sex couples and their children. Based on its review of the text, operation, and legislative history of DOMA, the Court concluded that the statute's "principal effect is to identify a subset of state-sanctioned marriages and make them unequal" and that its "principal purpose is to impose inequality." *Windsor*, 133 S. Ct. at 2694. The Court observed that "[u]nder DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways . . . . from the mundane to the profound." *Id.* In addition to economic and other practical harms, the Court found that DOMA also inflicted severe stigma and dignitary harms, "demean[ing] the couple, whose moral and sexual choices the Constitution protects," and "humiliate[ing] tens of thousands of children now being raised by same-sex couples." *Id.* By excluding families headed by same-sex couples from legal protection or respect, DOMA "ma[de] it even more difficult for the children

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erroneously suggest, but to the improper purpose of enacting a law that disadvantages a particular group without advancing an independent, legitimate purpose—that is, to the improper purpose of intentionally "impos[ing] inequality" on a group, *Windsor*, 133 S. Ct. at 2694, as Idaho's marriage ban does here. While animus, properly understood, is present here, Plaintiffs arguments do not hinge on that claim: *SmithKline* requires heightened scrutiny independent of any showing of animus and, in any event, Idaho's marriage ban fails under any level of constitutional review because its exclusion of same-sex couples from marriage does not rationally further an independent goal.

to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Id.*

The Supreme Court held that Section 3 of DOMA was invalid because "no legitimate purpose overcomes the purpose and effect to disparage and to injure" married same-sex couples. *Id.* at 2696. The same analysis applies here: Idaho's marriage ban stigmatizes these families and causes them serious and continuing harms, and no legitimate purpose overcomes that injurious purpose and effect.

As with DOMA, the "essence" of Idaho's marriage ban is to "impose inequality" on same-sex couples and their families. *Windsor*, 133 S. Ct. at 2693, 2694. Both the text of the marriage ban and the legislative record demonstrate that Idaho's statutory and constitutional exclusions of same-sex couples were enacted for the express purpose and have the practical effect of imposing legal disadvantages on same-sex couples. As the District Court found, "it is obvious that Idaho's Marriage Laws purposefully discriminate on the basis of sexual orientation" and "their history demonstrates that moral disapproval of homosexuality was an underlying, animating factor." *Latta*, 2014 WL 1909999, at *21. That discriminatory purpose is apparent on the face of these measures, which explicitly single out same-sex couples for exclusion from marriage and bar any legal recognition of same-sex couples who married in other jurisdictions. Idaho's statutory and constitutional marriage bans are not neutral measures enacted for a

legitimate purpose that incidentally adversely impacted same-sex couples and their families. Rather, as the District Court found, these extraordinary measures were aimed specifically at preventing same-sex couples from marrying or from having their out-of-state marriages recognized. *Id.*; *cf. Windsor*, 133 S. Ct. at 2693 (examining historical context of DOMA).

The Governor argues that this case is distinguishable from *Windsor* because historically states have regulated marriage, unlike DOMA's federal regulation. (Gov. Br. at 84-85). As a general matter, the regulation of marriage is primarily left to the states. However, the enactment of Idaho's statutory and constitutional prohibitions to specifically exclude an entire class of citizens from the protections and obligations of marriage, is most certainly a "[d]iscrimination[] of an unusual character." *Windsor*, 133 S. Ct. at 2692 (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)). Indeed, the rapid enactment across the country of state statutes and constitutional amendments designed expressly to discriminate and prevent an entire segment of society—same-sex couples and their families—from obtaining the protections of civil marriage is a highly unusual and dark chapter in our nation's history.

Idaho's state constitutional amendment prohibiting marriage for same-sex couples also represents a "[d]iscrimination of an unusual character" for a second reason. *Id.* That amendment not only banned marriage for same-sex couples, but

also stripped the legislature of any power to establish "civil unions, domestic partnerships, or any other relationship that attempts to approximate marriage." H.R.J. Res. 2, 58th Leg., 2d Sess. (Idaho 2006). The measure therefore did not simply reinforce and strengthen an existing marriage restriction, but went much further, purposefully imposing on same-sex couples "a broad and undifferentiated disability" on their ability to obtain any legal recognition or protection for their relationships. *Romer,* 517 U.S. at 632. Just as the measure invalidated in *Romer* broadly prohibited Colorado from enacting antidiscrimination protections for gay and lesbian people, so too Idaho's constitutional marriage ban broadly prohibits legal recognition for same-sex couples, whether through marriage, domestic partnership, or any other type of legal union. Indeed, Idaho's amendment is the only constitutional marriage ban of any state in this Circuit that creates such a pervasive prohibition.

Carefully examining the heightened scrutiny analysis required in this case, the District Court accurately summarized the relevant considerations:

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

Latta, 2014 WL 1909999, at *18. As the District Court correctly concluded, Idaho's exclusion of same-sex couples from marriage cannot survive any faithful application of these principles.

B. Idaho's Marriage Ban Also Requires Heightened Scrutiny Because It Discriminates on the Basis of Sex.

Idaho's marriage ban also warrants heightened equal protection scrutiny because it classifies on the basis of sex. Each Plaintiff would be permitted to marry her partner (or, in the case of the married Plaintiffs, would be recognized as a spouse) if her partner were male. Such a law "involves sex-based classifications because it prohibits a man from marrying another man, but does not prohibit that man from marrying a woman." *Kitchen*, 961 F. Supp. 2d at 1206; *see also Perry*, 704 F. Supp. 2d at 996; *Levenson*, 560 F.3d at 1147.

When the Supreme Court in 2013 was considering whether California's exclusion of same-sex couples from marriage could "be treated as a gender-based classification," Justice Kennedy stated: "It's a difficult question that I've been trying to wrestle with . . . ." Tr. of Oral Argument at 13, lines 18-19, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144), *available at* www.supremecourt.gov/oral_arguments/argument_transcripts/12-144_5if6.pdf. Moreover, when counsel defending California's measure argued that the Supreme Court's summary affirmance in *Baker v. Nelson* controlled the case, Justice Ginsburg responded: "*Baker v. Nelson* was 1971. The Supreme Court hadn't even

decided that *gender-based classifications* get any kind of heightened scrutiny." *Id.* at 12, lines 17-20 (emphasis added). The comments by Justices Kennedy and Ginsburg, while not binding, indicate the seriousness of Plaintiffs' gender discrimination claim that heightened scrutiny applies to Idaho's marriage ban because it imposes inequality on same-sex couples on the basis of their sex.

Defendants argue that the marriage bans do not discriminate based on sex because they apply equally to men and women as groups. Gov. Br. at 79. But the relevant inquiry under the Equal Protection Clause is whether the law treats an *individual* differently because of his or her sex. "The neutral phrasing of the Equal Protection Clause, extending its guarantee to 'any person,' reveals its concern with rights of individuals, not groups (though group disabilities are sometimes the mechanism by which the State violates the individual right in question)." *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring in the judgment).

In *Loving,* the Supreme Court rejected Virginia's argument that its ban on interracial marriage did not discriminate because it imposed its restrictions "equally" on members of different races. 388 U.S. at 8; *see also Perez*, 198 P.2d at 20 ("The decisive question . . . is not whether different races, each considered as a group, are equally treated. The right to marry is the right of individuals, not of racial groups."). Similarly, in *Powers v. Ohio*, 499 U.S. 400, 410 (1991), the Court

held that "that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree" and that race-based peremptory challenges are invalid even though they affect all races.

That same reasoning applies to sex-based classifications. *See J.E.B.*, 511 U.S. at 140-41 (holding that peremptory challenges based on a person's sex are unconstitutional even though they affect both male and female jurors). For example, a law that permitted individuals to enter into a business partnership only with a person of the opposite sex would plainly discriminate based on sex, even though such a law would affect men and women "equally" as groups. The same is true of Idaho's express, sex-based restriction on marriage. From the perspective of each individual Plaintiff, the marriage ban penalizes each Plaintiff because of her sex.

In defending that sex-based restriction, the Governor has relied strongly, both in the District Court and again here, on the premise that men and women have different roles in marriage and, in particular, in relation to the raising of children. *See, e.g.*, Gov. Br. at 18 ("The man-woman meaning at the core of the marriage institution, reinforced by the law, has always . . . made normative the uniting and complementary roles of 'mother' and 'father' and their uniting complementary roles in raising their offspring"); *id*. at 27 (arguing that the marriage ban reinforces "the value of gender complementarity in parenting"); and *passim* (contrasting

"man-woman" marriage with "genderless marriage"). The Governor's express reliance on these gendered expectations and roles carries with it "'the baggage of gender stereotypes,'" which the Supreme Court has repeatedly held to be an impermissible basis for sex-based laws. *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (quoting *Orr v. Orr*, 440 U.S. 268, 283 (1979)).

The Governor's reliance on gendered roles also conflicts with Idaho's current laws, which (apart from the challenged restrictions in this case) do not treat spouses differently based on their sex. As in other states, men and women in Idaho now have the same marital rights and obligations, including with respect to children. As such, there is no rational foundation for requiring spouses to be of different genders. Today, that requirement, and the Governor's argument, are vestiges of the outdated notion—long rejected in other respects by the Idaho Legislature and the courts—that a person's gender is relevant to his or her qualifications for marriage or role as a spouse.[8]

[8] In the past, Idaho's laws presumed wives to be legally, socially, and financially dependent upon husbands. *See, e.g.*, *Wilson v. Wilson*, 57 P. 708, 709 (Idaho 1899) (noting that the "husband has the management and control of the community [marital] property"); *Loomis v. Gray*, 90 P.2d 529, 536 (Idaho 1939) (holding that a married woman could not enter into binding contracts with respect to her own separate property), *overruled by Williams v. Paxton*, 559 P.2d 1123, 1132 (Idaho 1976). Today, Idaho spouses have the same rights and obligations regardless of their gender. *See, e.g.*, *Murphey v. Murphey*, 653 P.2d 441, 443-44 (Idaho 1982) (holding that a statute allowing alimony awards only to women is unconstitutional and extending the benefits of alimony to needy husbands); *Suter v. Suter*, 546 P.2d 1169, 1175 (Idaho 1976) (invalidating a statute that resulted in

The Supreme Court has recognized "the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of 'archaic and overbroad' generalizations about gender." *J.E.B.*, 511 U.S. at 135 (citing *Schlesinger v. Bellard*, 419 U.S. 498, 506-07 (1975)). Idaho's marriage ban uses a sex-based classification not to further an important governmental interest, but rather to reinforce the gendered expectation that marriage "properly" should include a man and a woman. While that expectation may hold true for some people, it does not hold true for the Plaintiffs and other persons in same-sex relationships, who yearn to be married to the person of their choice.

III. IDAHO'S MARRIAGE BAN IS UNCONSTITUTIONAL UNDER ANY STANDARD OF REVIEW BECAUSE IT DOES NOT RATIONALLY ADVANCE A LEGITIMATE GOVERNMENTAL INTEREST.

Idaho's marriage ban warrants, and fails, heightened scrutiny. The ban deprives same-sex couples of the fundamental right to marry and discriminates on the basis of sexual orientation and sex. None of Defendants' asserted justifications for Idaho's marriage ban can satisfy the heightened scrutiny required by such a law, just as the proffered justifications for DOMA failed to overcome that statute's

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"unequal treatment for a husband and wife as regards their individual earnings after a separation").

purpose and effect of harming same-sex couples and their children. *See Windsor*, 133 S. Ct. at 2696.

Idaho's marriage ban is also unconstitutional, however, for an even more basic reason: Preventing same-sex couples from marrying does not rationally advance any legitimate governmental interest. Even assuming that the governmental interests proffered by Defendants are legitimate, there simply is no rational connection between any of those asserted objectives and prohibiting same-sex couples from sharing in the protections and obligations of civil marriage. Idaho's marriage ban therefore also fails under rational basis review, the lowest level of due process and equal protection scrutiny.

Rational basis review is not "toothless" and does not permit a court to accept any asserted rationale at face value, without a meaningful inquiry. *Mathews v. de Castro*, 429 U.S. 181, 185 (1976) (*quoting Mathews v. Lucas*, 427 U.S. 495, 510 (1976)). The asserted rationale for a law must be based on a "reasonably conceivable state of facts." *F.C.C. v. Beach Communc'ns, Inc.,* 508 U.S. 307, 313 (1993). In addition, there must be a rational relationship "between the classification adopted and the object to be attained." *Romer v. Evans*, 517 U.S. 620, 632-33 (1996). "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, [courts] ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Id.* at

633. Interests based on tradition or moral disapproval of a group do not suffice, as they simply restate the classification without providing an independent justification. *Lawrence*, 539 U.S. at 577-78, 583.

None of Defendants' asserted justifications for Idaho's marriage ban meets these basic tests.

A. There Is No Rational Connection Between Idaho's Marriage Ban and Defendants' Asserted Interest in the Welfare of Children.

As numerous courts around the country have held—including the Tenth Circuit and every other court to consider these federal claims since *Windsor*—there is a complete logical disconnect between excluding same-sex couples from marriage and advancing any legitimate government purpose related to the welfare of children. The Governor's argument that barring same-sex couples from marriage somehow benefits children has no footing in any reasonably conceivable state of facts. As the District Court found, "the Governor's child welfare rationales disregard the welfare of children with same-sex parents." *Latta*, 2014 WL 1909999, at *24. Rather than furthering an interest in protecting children, Idaho's marriage ban "withhold[s] legal, financial, and social benefits from the very group they purportedly protect—children." *Id*. "These children are also worthy of the State's protection, yet [the challenged law] harms them for the same reasons that the Supreme Court found that DOMA harmed the children of same-sex couples." *Kitchen*, 961 F. Supp. 2d at 1212.

The Governor asserts that Idaho's marriage ban is justified by a claimed interest in preferring the families it considers to be ideal—namely, those consisting of opposite-sex parents. (Gov. Br. at 26-28, 34, *passim.*) Although states may encourage and promote family stability, marriage, and healthy childrearing, the purported interest the Governor advances—an interest in preferring some families with children over other families with children—is not legitimate. It is, instead, the very thing the Equal Protection Clause prohibits. For example, although being raised in an affluent household may confer important advantages on children, the state has no legitimate interest in giving special preference to rich families by barring poor people from marriage. Such a statute would violate the most basic principle of equal protection that the law "neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Even if the State believes that only married biological opposite-sex parents "provide the gold standard," *see* Gov. Br. at 27 (internal citation omitted), it has no legitimate interest in expressing that view by punishing same-sex couples and their children through its exclusionary marriage laws.

Moreover, even if it were permissible for the State to ignore the welfare of same-sex couples' children, there is no legal, factual, or logical reason to believe that "allowing same-sex marriages will have any effect on when, how, or why opposite sex-couples choose to marry," *Latta*, 2014 WL 1909999, at *23, or on

their decisions to parent or the quality of their parenting. As the Tenth Circuit recently held: "We cannot imagine a scenario under which recognizing same-sex marriages would affect the decision of a member of an opposite-sex couple to have a child, to marry or stay married to a partner, or to make personal sacrifices for a child." *Kitchen*, 2014 WL 2868044, at *27. Such arguments are "wholly illogical." *Id*. at *25-26.[9]

Rather than causing more children to be raised by opposite-sex parents, the only impact of the ban is to harm the many Idaho children who are being raised by same-sex parents. Idaho's marriage ban needlessly "humiliates . . . children now being raised by same-sex couples" and "brings [them] financial harm." *Windsor*, 133 S. Ct. at 2694-95. Far from protecting children, "[t]he only effect the bans have on children's well-being is harming the children of same-sex couples who are denied the protection and stability of having parents who are legally married." *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 994-95 (S.D. Ohio 2013).[10]

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[9] *Cf. Massachusetts v. United States Dep't of Health & Human Servs.*, 682 F.3d 1, 15 (1st Cir. 2012) ("This is not merely a matter of poor fit of remedy to perceived problem, but a lack of any demonstrated connection between DOMA's treatment of same-sex couples and its asserted goal of strengthening the bonds and benefits to society of heterosexual marriage.") (internal citation omitted); *Windsor*, 699 F.3d at 188 ("Incentives for opposite-sex couples to marry and procreate (or not) were the same after DOMA was enacted as they were before.").

[10] Defendants Rich and the State of Idaho argue that the declaration of Plaintiffs' expert, Dr. Michael Lamb, a renowned child development expert, supports the rationality of Idaho's marriage ban because it shows that "same-sex

That result is particularly irrational because Idaho has already determined that "'sexual orientation [is] wholly irrelevant'" to a person's fitness and ability to adopt. *Latta*, 2014 WL 1909999, at *23 (citing *In re Adoption of Doe*, 2014 WL 527144, at *6 (Idaho Feb. 10, 2014)). In light of that law, Defendants cannot rationally seek to justify the marriage ban based on concerns about the fitness of same-sex parents. "In a state where the privilege of becoming a child's adoptive parent does not hinge on a person's sexual orientation, it is impossible to fathom how hypothetical concerns about the same person's parental fitness could possibly relate to civil marriage." *Latta*, 2014 WL 1909999, at *23.

Idaho's adoption law is consistent with the scientific consensus of national organizations charged with the welfare of children[11]—based on a significant and well-respected body of current research—that sexual orientation is irrelevant to

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households are doing as well as opposite-sex households without access to civil marriage." Def. Rich Br. at 39. That argument misses the point entirely. As Dr. Lamb testified, the important legal, economic, and social benefits of marriage "are equally advantageous for children and adolescents in families headed by same-sex and different-sex couples." *Latta*, 2014 WL 1909999 at *24 (citing ER 366(Expert Declaration of Dr. Michael E. Lamb ("Lamb Decl.") ¶ 48). Idaho's marriage ban deprives the children of same-sex couples of these protections.

[11] These organizations include: the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, the American Psychiatric Association, the American Psychological Association, the American Psychoanalytic Association, the American Sociological Association, the National Association of Social Workers, the American Medical Association, and the Child Welfare League of America.

parental ability. *See* Brief of American Psychological Association, et al. as Amici Curiae on the Merits in Support of Affirmance, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 871958.[12] In light of that consensus, as well as Idaho's own law, the Governor's reliance on pure speculation and fear about the fitness of same-sex parents lacks a rational foundation.

But even if that scientific consensus did not exist, Idaho's marriage ban would fail rational basis review for a more basic reason. Apart from same-sex couples, Idaho does not penalize any other class of potentially "non-optimal" parents (or their children) by barring them from marriage. "Idaho does not withhold marriage licenses from heterosexual couples who might be, or are, non-optimal parents." *Latta*, 2014 WL 1909999, at *23. "Instead, every same-sex couple, regardless of parenting style, is barred from marriage and every opposite-sex couple, irrespective of parenting style, is permitted to marry." *Kitchen*, 2014 WL 2868044, at *28. Even under rational basis review, a law that is so grossly under inclusive and "riddled with exceptions" cannot stand. *Eisenstadt v. Baird*, 405 U.S. 438, 448-49 (1972). *See also Bishop v. Smith*, Nos. 14-5003, 14-5006, slip op. at 17 (10th Cir. July 18, 2014) ("As the Court explained in *Eisenstadt* . . . ,

[12] The articles cited by the Governor—which address the challenges faced by children raised by single parents, divorced parents, and step-parents—do not address and have no bearing on the wellbeing of children raised by same-sex parents, except to confirm that they would benefit from married parents, just as other children do. (Gov. Br. at 28-31.)

if 'the evil, as perceived by the State, would be identical' with respect to two classes, the state may not impinge upon the exercise of a fundamental right as to only one class because 'the underinclusion would be invidious.'") (citation omitted).

Similarly, because Idaho does not condition the right to marry on procreative ability, it cannot selectively rely on this only when it comes to same-sex couples, as Defendant Rich argues, while declining to impose such a requirement on opposite-sex couples seeking to marry. "Idaho does not condition marriage licenses or marital benefits on heterosexual couples' ability or desire to have children." *Latta*, 2014 WL 1909999, at *23. As Justice Scalia's dissenting opinion in *Lawrence* acknowledged, "the encouragement of procreation" cannot "possibly" be a justification for barring same-sex couples from marriage "since the sterile and the elderly are allowed to marry." *Lawrence*, 539 U.S. at 604-05 (Scalia, J., dissenting).

Marriage is not only about raising children, but about a couple's commitment to share the joys and sorrows of life together, to care for one another in sickness and in health, and to remain each other's partner and companion into old age, long after any children are grown. Defendants' reliance on procreation to justify the marriage ban is incompatible with the Supreme Court's express recognition that the Constitution protects all of these aspects of marriage,

regardless of whether the spouses are able to have and raise children together. *See Turner*, 482 U.S. 95-96; *Kitchen*, 2014 WL 2868044, at *15.

B. There Is No Rational Connection Between Idaho's Marriage Ban and Any of the Other Governmental Interests on Which Defendants Rely.

In addition to relying on purported governmental interests relating to procreation, parenting and children, Defendants also assert various other interests that they contend justify the harms the marriage ban inflicts on same-sex couples and their children. None of these asserted justifications can withstand even rational basis review, let alone the heightened scrutiny applicable in this case.

The Governor asserts that the marriage ban is justified by the state's interest in "preserving democratic legitimacy and a broad consensus for its marriage institution, as well as accommodating religious freedom and reducing the potential for civic strife." (Gov. Br. at 48.) As the Tenth Circuit held in rejecting this precise argument, "the Supreme Court has repeatedly held that public opposition cannot provide cover for a violation of fundamental rights." *Kitchen*, 2014 WL 2868044, at *30 (citing *Palmer v. Thompson*, 403 U.S. 217, 226 (1971) ("Citizens may not be compelled to forgo their constitutional rights because officials fear public hostility . . . ."); *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963) (rejecting city's claim that "community confusion and turmoil" permitted it to delay desegregation of its public parks)). Furthermore, even under rational basis

review, "the electorate as a whole, whether by referendum or otherwise, could not order [government] action violative of the Equal Protection Clause, and the [government] may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (internal citation omitted).

Similarly, in rejecting the assertion that striking down state marriage bans will lead to infringements of religious freedom, the Tenth Circuit correctly noted that "religious institutions remain as free as they always have been to practice their sacraments and traditions as they see fit. . . . [W]e continue to recognize the right of the various religions to define marriage according to their moral, historical, and ethical precepts." *Kitchen*, 2014 WL 2868044, at *30.

In addition, as the District Court noted, "not all religions share the view that opposite-sex marriage is a theological imperative." *Latta*, 2014 WL 1909999, at *27. Faiths that "recognize and support [Plaintiffs'] unions" also have a right to "religious liberty" that must be equally respected. *Id*.

With respect to Defendants' suggestion "that religious institutions might be subject to hypothetical lawsuits under various scenarios," the Tenth Circuit correctly observed that "such lawsuits would be a function of antidiscrimination law, not legal recognition of same-sex marriage." *Kitchen*, 2014 WL 2868044, at

*30 n.13. This Court should reject these purported governmental interests for the same reasons.

Defendants Rich and the State of Idaho argue that it is rational for the state to penalize same-sex couples and their children by excluding them from marriage because those families represent a "miniscule number of households affected." (Rich Br. at 29.) Defendants' assertion that the relatively small number of same-sex couples in Idaho justifies government-imposed inequality, stigma, and harm on those couples and their children is offensive. It is also repugnant to the very idea of constitutional government.

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

Moreover, when laws draw distinctions based on "some unpopular trait or affiliation," as Idaho's marriage laws do, they "create or reflect [a] special likelihood of bias on the part of the ruling majority." *New York City Transit Auth.*

v. Beazer, 440 U.S. 568, 593 (1979). Because those characteristics "are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others." *Cleburne*, 473 U.S. at 440. "Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that *each person* is to be judged individually and is entitled to equal justice under the law." *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982) (emphasis added).

Defendants Rich and the State of Idaho also contend that the state may rationally exclude same-sex couples from marriage in order "to target its finite resources on fostering long-lived opposite sex relationships"—in other words, to save money. (Def. Rich Br. at 28.) But even under the rational basis standard, states may not cite cost savings as a justification unless the exclusion of the particular group at issue rationally advances an independent governmental interest. *See Plyler*, 457 U.S. at 229; *Diaz*, 656 F.3d at 1013.

Finally, Defendants' attempted reliance on federalism to justify Idaho's discrimination against same-sex couples disregards that federalism is "not just a bulwark against federal government overreach," but "also an essential check on state power." *Latta*, 2014 WL 1909999, at *26. As *Windsor* made clear, state laws defining and regulating marriage "must respect the constitutional rights of

persons." *Windsor*, 133 S. Ct. at 2691 (citing *Loving*, 388 U.S. 1). "[J]ust as in Loving, Idaho's right to regulate domestic relations is subject to the paramount rights of its citizens." *Latta*, 2014 WL 1909999, at *26.

In sum, Idaho's marriage ban fails even the test of minimal rationality, let alone the heightened scrutiny required under Circuit and Supreme Court precedent. Excluding same-sex couples from marriage does not advance any permissible aim of government in any reasonably conceivable way.

IV. IDAHO'S ANTI-RECOGNITION LAWS VIOLATE THE MARRIED PLAINTIFFS' CONSTITUTIONAL RIGHT TO REMAIN MARRIED AND TO HAVE THEIR MARRIAGES TREATED EQUALLY.

In addition to the reasons stated above, Idaho's laws denying recognition to legally married same-sex couples violate the married Plaintiffs' rights to due process and equal protection for additional reasons that independently require the invalidation of those laws.

A. Idaho's Anti-Recognition Laws Represent an Unprecedented Categorical Exception to Longstanding Law Providing That the State Will Recognize Valid Marriages from Other States.

Idaho's anti-recognition laws—Idaho Const. art. III, § 28 and Idaho Code § 32-209, both enacted within the past two decades—represent a stark departure from the state's longstanding practice of recognizing valid marriages from other states even if such marriages could not have been entered into within Idaho. From territorial days until 1996, Idaho law provided that "marriages contracted without

this state, which would be valid by the laws of the country in which the same were contracted, are valid in this state." Idaho Code Ann. § 32-209 (1983); *see also* 1867 Territory of Idaho Sess. Laws 71, § 5; Idaho Rev. Stat. § 2428; *Morrison v. Sunshine Mining Co.*, 127 P.2d 766, 769 (Idaho 1942) ("Having assumed and entered into the marital relation with appellant in Montana, the status thus established followed Morrison to Idaho and could not be shed like a garment on entering this state.").

This rule—known as the "place of celebration rule"—is recognized in every state and is a defining element of our federal system and American family law. As one court recently explained, in a case striking down Ohio's refusal to recognize same-sex spouses, "the concept that a marriage that has legal force where it was celebrated also has legal force throughout the country has been a longstanding general rule in every state." *Obergefell*, 962 F. Supp. 2d at 978. Indeed, the "policy of the civilized world[] is to sustain marriages, not to upset them." *Madewell v. United States*, 84 F. Supp. 329, 332 (E.D. Tenn. 1949); *see also In re Lenherr's Estate*, 314 A.2d 255, 258 (Pa. 1974) ("In an age of widespread travel and ease of mobility, it would create inordinate confusion and defy the reasonable expectations of citizens whose marriage is valid in one state to hold that marriage invalid elsewhere.").

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

This firmly rooted doctrine comports with the reasonable expectations of married couples that, in our highly mobile society, they may travel throughout the country secure in the knowledge that their marriage will be respected in every state and that the simple act of crossing a state line will not divest them of their marital status. *See Obergefell*, 962 F. Supp. 2d at 979 ("Couples moving from state to state have an expectation that their marriage and, more concretely, the property interests involved with it—including bank accounts, inheritance rights, property, and other rights and benefits associated with marriage—will follow them.").

In 1996, the Idaho legislature amended Idaho Code § 32-209 to create a statutory exception to the place of celebration rule for the marriages of same-sex couples. *See* 1996 Idaho Sess. Laws 1126 (codified as Idaho Code Ann. § 32-209).

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

Against this background, Idaho's anti-recognition laws represent a stark departure from its past and current treatment of out-of-state marriages. For the reasons explained below, Idaho's refusal to recognize the marriages of an entire category of persons who validly married in other states, solely to exclude a disfavored group from the ordinary legal protections and responsibilities they would otherwise enjoy, and despite the severe, harmful impact of that refusal, cannot withstand constitutional scrutiny.

B. Idaho's Anti-Recognition Laws Violate the Fundamental Right to Stay Married.

Windsor held that Section 3 of DOMA violated the due process rights of married same-sex couples by refusing to give them the same respect and protections given to other married couples under federal law. 133 S. Ct. at 2695-

96. For similar reasons, Idaho's anti-recognition laws violate the due process rights of same-sex spouses by refusing to give them the same respect and protections given to other married couples under Idaho law. In both cases, the denial of recognition interferes with existing marital relationships and "touches many aspects of married and family life, from the mundane to the profound," and "no legitimate purpose overcomes" the infliction of those substantial harms. *Id.* at 2694, 2696.

Windsor held that legally married same-sex couples have a protected due process liberty interest in their existing marriages, which was violated by the federal government's refusal to respect them. *Id.* at 2695. That holding is consistent with cases stretching back for decades in which the Supreme Court has held that spousal relationships, like parent-child relationships, are among the intimate family bonds whose "preservation" must be afforded "a substantial measure of sanctuary from unjustified interference by the State." *Roberts*, 468 U.S. at 618.

The right to privacy and respect for an existing marital relationship is, in itself, a distinct fundamental right, independent of an individual's right to marry in the first instance. *See Zablocki*, 434 U.S. at 397 n.1 (Powell, J., concurring) (noting difference between "a sphere of privacy or autonomy surrounding an existing marital relationship into which the State may not lightly intrude" and "regulation

of the conditions of entry into . . . the marital bond"); *Griswold*, 381 U.S. at 485 (holding that marriage is "a relationship lying within the zone of privacy created by . . . fundamental constitutional guarantees"); *Glucksberg*, 521 U.S. at 720 (recognizing "marital privacy" as a fundamental liberty interest); *Loving*, 388 U.S. at 12 (striking down Virginia law denying recognition to an interracial couple who legally married in the District of Columbia).

Following *Windsor*, federal courts considering the question, including the Tenth Circuit, have held "the fundamental right to marry necessarily includes the right to remain married." *Kitchen*, 2014 WL 2868044, at *16. Accordingly, "once you get married lawfully in one state, another state cannot summarily take your marriage away." *Obergefell*, 962 F. Supp. 2d at 973; *see also Henry v. Himes*, No. 1:14-cv-129, 2014 WL 1418395, *9 (S.D. Ohio Apr. 14, 2014). "[T]he Supreme Court has established that *existing* marital, family, and intimate relationships are areas into which the government should generally not intrude without substantial justification." *Obergefell*, 962 F. Supp. 2d at 978 (citing *Roberts*, 468 U.S. at 618; *Lawrence*, 539 U.S. at 578) (emphasis in original). "When a state effectively terminates the marriage of a same-sex couple married in another jurisdiction, it intrudes into the realm of private marital, family, and intimate relations specifically protected by the Supreme Court." *Id.* at 979; *Henry*, 2014 WL 1418395, at *9; *Bourke v. Beshear*, 2014 WL 556729, at *5 n.13 (W.D. Ky. Feb. 12, 2014).

The married Plaintiff couples have the same interests as other married couples in the liberty, autonomy, and privacy afforded by the fundamental right to marry—and to stay married.

C. Idaho's Anti-Recognition Laws Violate the Married Plaintiffs' Right to Equal Protection of the Laws.

In addition to the reasons set forth in Section I, Idaho's anti-recognition laws deprive the married Plaintiffs of equal protection for reasons similar to those that led the Supreme Court to invalidate Section 3 of DOMA.

In *Windsor*, the Supreme Court held that DOMA's targeting of married same-sex couples required "careful consideration" for two reasons. First, the statute departed from the federal government's longstanding practice of deferring to the states to determine marital status. Second, it did so in order to subject a particular group of married couples to unequal treatment. 133 S. Ct. at 2693; *see also id.* at 269 (holding that "DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal").

The same equal protection analysis applies here. Like DOMA, Idaho's anti-recognition laws are unusual. They constitute an unprecedented departure from this state's longstanding practice and law of recognizing valid marriages from other states, even where the marriage would have been prohibited under Idaho law. Further, like DOMA, Idaho's anti-recognition laws target married same-sex couples and were not enacted for any reason independent of excluding married

those couples from recognition. "The principal purpose is to impose inequality . . . ." *Id.* at 2694. Such a law fails the requirement of equal protection in the most basic way. *Id.* at 2693.

Idaho's anti-recognition laws violate equal protection for the same reasons that DOMA and other similar state anti-recognition laws that have been struck down since *Windsor* violate that guarantee. The State has no legitimate interest in treating the marriages of same-sex couples as inferior to or less respected than the marriages of opposite-sex couples, or in denying the many protections, benefits, and responsibilities of marriage to same-sex couples. The purpose and effect of these laws are to single out an unpopular group and cause its members harm. Such laws cannot survive equal protection review under any level of scrutiny, let alone under the heightened scrutiny required by *Windsor* and *SmithKline*.

V. *BAKER V. NELSON* DOES NOT BAR PLAINTIFFS' CLAIMS

Defendants erroneously argue that *Baker v. Nelson*, 409 U.S. 810 (1972) bars this Court from considering the merits of Plaintiffs' claims. (Gov. Br. at 97-101; Rich Br. at 10-17.)

Baker does not control here because this case does not involve "the precise issues presented and necessarily decided" in *Baker*. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). At the time *Baker* was decided, same-sex couples were not permitted to marry in any state, and no state had enacted a law denying recognition

to married same-sex couples. Therefore *Baker* did not address the constitutionality of measures like Idaho's anti-recognition law.

Further, unlike the marriage ban at issue here, the Minnesota law in *Baker* lacked "an express statutory prohibition against same-sex marriages." *Baker v. Nelson*, 191 N.W.2d 185, 185 (Minn. 1971). In contrast, Idaho's marriage ban intentionally targets same-sex couples in order to treat them unequally, "rais[ing] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Romer*, 517 U.S. at 634. The *Baker* court did not have occasion to consider the validity of such a law.

In addition, the Supreme Court has cautioned that a summary affirmance is no longer binding "when doctrinal developments indicate otherwise . . . ." *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). To say that intervening doctrinal developments have limited *Baker*'s precedential effect regarding the issues in this case would be a considerable understatement.

At the time *Baker* was decided, the Supreme Court had not yet held: (1) that classifications based on sex require heightened judicial scrutiny, *see Frontiero v. Richardson*, 411 U.S. 677, 688 (1973); (2) that laws enacted to disadvantage gay and lesbian people lack a rational basis, *see Romer*, 517 U.S. 620; (3) that adult same-sex couples have a constitutionally protected right to engage in intimate sexual conduct and to have their relationships treated with equal "dignity," see

Lawrence, 539 U.S. at 559; or (4) that married same-sex couples have a protected liberty interest in their marriages that must be given equal recognition and respect by the federal government, *see Windsor*, 133 S. Ct. at 2694.

As the Tenth Circuit and other courts have held, in light of significant doctrinal developments, *Baker's* summary affirmative is no longer controlling. *Kitchen*, 2014 WL 2868044, *10; *see also*, *e.g.*, *Windsor*, 699 F.3d at 178-79; *Bishop v. Smith*, Nos. 14-5003, 14-5006, slip op. at 14-16 (10th Cir. July 18, 2014).

CONCLUSION

Idaho's marriage ban violates both the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution. Idaho's failure to recognize the marriages of the married Plaintiffs and refusal to marry the unmarried Plaintiffs is demeaning to them and an affront to their basic rights as citizens. For the foregoing reasons, Plaintiffs respectfully request that this Court affirm the judgment of the District Court.

Dated: July 18, 2014

Respectfully submitted,

By: /s/ Deborah A. Ferguson

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STATEMENT OF RELATED CASES

Plaintiffs-Appellees state that there are no related cases pending in this Court other than those identified in the briefs of Defendants-Appellants.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,986 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman type style.

Dated: July 18, 2014

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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 July 18, 2014.

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

s/ Deborah A. Ferguson