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)

REPLY BRIEF OF APPELLANTS RICH AND IDAHO

LAWRENCE G. WASDEN
ATTORNEY GENERAL

STEVEN L. OLSEN
Chief of Civil Litigation Division

W. SCOTT ZANZIG, ISB NO. 9361
CLAY R. SMITH, ISB NO. 6385
Deputy Attorneys General
Statehouse, Room 210, Boise, ID 83720
Telephone: (208) 334-2400
Fax: (208) 854-8073
Counsel for Appellants Christopher Rich and State of Idaho

August 1, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

Appellants Christopher Rich and the State of Idaho submit this reply brief in support of their request that this Court reverse the judgment of the district court which declares Idaho's marriage laws unconstitutional and enjoins their enforcement.

I. This Court Should Adhere to the Supreme Court Precedent Established in *Baker v. Nelson*

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 expand the traditional definition of marriage to include same-sex couples. *Baker* forecloses plaintiffs' claims and requires this Court to reverse the district court's judgment.

Plaintiffs assert two arguments in an effort to avoid *Baker*. First, plaintiffs contend *Baker* did not decide the issues raised by this case. Second, they contend Supreme Court decisions subsequent to *Baker* have effectively overruled it. This Court should reject these arguments and adhere to the precedent the Supreme Court established in *Baker*.

A. *Baker* Decided the Issues Raised in This Case

Plaintiffs contend that Idaho's marriage laws violate the Equal Protection and Due Process Clauses because they do not permit same-sex marriage. These are the very arguments the Supreme Court rejected in *Baker*. The jurisdictional

/ / /

statements presented to the United States Supreme Court in *Baker* included the following issues:

> 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.

In re Kandu, 315 B.R. 123, 137 (Bankr. W.D. Wash. 2004).

Plaintiffs argue that Idaho's marriage laws are different from the Minnesota law at issue in *Baker*, contending that Idaho's traditional man-woman marriage definition is "'born of animosity toward'" same-sex couples. Dkt. 76-1 at 58 (quoting *Romer v. Evans*, 517 U.S. 620, 634 (1996)). The Court should reject this unfounded argument.

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.* There is no evidence to suggest that Idaho's adoption of the traditional definition of marriage in 1864 was the result of any ill will toward same-sex couples. And Idaho's continual reaffirmation of that definition took away no rights same-sex couples

previously enjoyed. Moreover, Idaho's marriage laws are a far cry from the "[s]weeping and comprehensive" disability imposed on gays and lesbians by the Colorado law in *Romer*, the case on which plaintiffs rely for their charge of animus. For the same reasons Oklahoma's marriage laws cannot be said to be the product of impermissible animus, *see Bishop v. Smith*, Nos. 14-5003 & 14-5006, 2014 WL 3537847, at *21-*30 (10th Cir. July 18, 2014) (Holmes, J., concurring), plaintiffs' animus argument cannot be used to declare Idaho's marriage laws unconstitutional.

Plaintiffs also suggest that, even if *Baker* forecloses their claims that the Constitution requires Idaho to permit same-sex marriage, *Baker* does not foreclose their challenge to Idaho's laws to the extent they refuse to recognize out-of-state same-sex marriages. Plaintiffs' argument is based on a distinction without a difference. As discussed more fully below in section IV, the validity of Idaho's marriage recognition laws are tied to its right to define marriage within its borders. *See Kitchen v. Herbert*, No. 13-4178, 2014 WL 2868044, at *41 (10th Cir. June 25, 2014) (Kelly, J., concurring in part and dissenting in part) ("[t]hat the Constitution does not compel the State to recognize same-sex marriages within its own borders demonstrates a fortiori that it need not recognize those solemnized without"). Thus, *Baker* forecloses all of plaintiffs' claims.

/ / /

B. The Supreme Court's Subsequent Decisions Have Not Altered *Baker's* Holding

Plaintiffs argue that this Court should ignore the Supreme Court's precedent in *Baker*, contending that Court's subsequent decisions have rendered *Baker* obsolete. In *Baker*, the Supreme Court rejected the very notion that plaintiffs advance here, *i.e.*, that the Equal Protection and Due Process Clauses require every State to expand the traditional definition of marriage to include same-sex couples. *Baker* is the only case in which the Supreme Court has addressed those issues. 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). "[L]ower courts are bound by summary decisions by [the Supreme] Court until such time as the Court informs [them] that [they] are not." *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (internal quotation marks omitted). The Supreme Court has never re-examined the issues it decided in *Baker*. Nor has it informed the lower courts that the constitutional rules established in *Baker* have changed. In fact, the Court has been careful in its subsequent decisions to make clear that it did not alter *Baker*.

The Supreme Court has addressed substantive due process and equal protection claims involving sexual orientation three times since *Baker*: *Romer* (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); and *United States v. Windsor*, 133 S. Ct. 2675 (2013).

Romer invalidated a Colorado constitutional amendment that prohibited enactment or enforcement of any law or policy "designed to protect . . . homosexual persons or gays and lesbians." 517 U.S. at 624. The Court's opinion makes no mention of same-sex marriage or *Baker*. It certainly did not re-examine the issues in *Baker* or inform lower courts that *Baker* was no longer good law.

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 took care to make clear that the case had no effect on same-sex marriage law: "The present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." 539 U.S. at 578. In light of this, it strains credulity to interpret *Lawrence* as a signal that the Court was abandoning *Baker*.

In *Windsor*, the Court struck down a federal statute, section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7. In doing so, the Court noted that DOMA was an unusual federal intrusion on the states' power to regulate and define marriage. 133 S. Ct. at 2689-90. *Windsor* did not mention *Baker*. Nor did it suggest that all States are required to permit or recognize same-sex marriage. Instead, in concluding its majority opinion, the Court once again took pains to limit its ruling and leave its *Baker* principles untouched: "This opinion and its holding are confined to those lawful marriages [permitted by state law]." *Id*. at 2696. It is

impossible to square this sentence with the notion that the Court intended *Windsor* to overrule *Baker*.

The Supreme Court has left its *Baker* decision untouched. This Court should reject plaintiffs' invitation to overrule *Baker*. *See 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)) (instructing lower courts not to conclude that "more recent cases have, by implication, overruled an earlier precedent"; "the Court of Appeals should . . . leave to [the Supreme] Court the prerogative of overruling its own decisions").

II. The Rational Basis Test Governs Plaintiffs' Claims

Even if *Baker* did not require dismissal of plaintiffs' claims, plaintiffs' challenge to Idaho's marriage laws should be judged under the rational basis standard.

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

The Supreme Court has never held that same-sex couples have a fundamental right to civil marriage.[1] Plaintiffs rely heavily on *Loving v. Virginia*,

[1] Both the Tenth and Fourth Circuits, in divided panel opinions, have very recently become the only federal appellate courts to recognize a fundamental right to same-sex marriage. *Kitchen*, 2014 WL 2868044; *Bishop*, 2014 WL 3537847; *Bostic v. Schaeffer*, No. 14-1167, 2014 WL 3702493 (4th Cir. July 28, 2014). This Court should refuse to follow these courts because recognizing a fundamental right

388 U.S. 1 (1967), *Zablocki v. Redhail*, 434 U.S. 374 (1978), and *Turner v. Safley*, 482 U.S. 75 (1987), to support their argument that civil marriage is a fundamental right that extends to same-sex couples. The Supreme Court has not agreed.

The Court decided *Baker v. Nelson* in 1972, five years after *Loving*. *Baker* makes clear that *Loving* did not create a fundamental right to marry for same-sex couples. The Court decided *Lawrence v. Texas* in 2003, long after it decided *Loving*, *Zablocki*, and *Turner*. In *Lawrence*, the Court indicated that it had not established a fundamental right to same-sex marriage. *See Lawrence*, 539 U.S. at 578 (distinguishing "formal recognition" of same-sex unions from the right to private sexual conduct at issue).

More significantly, just last year, in its *Windsor* decision, the Court sent a clear message that its man-woman marriage decisions have not established a fundamental right to same-sex marriage. If they had, the Court would have struck down DOMA because it interfered with same-sex couples' fundamental right to marry. But the Court did no such thing. On the contrary, the majority opinion went out of its way to limit its holding to same-sex marriages sanctioned by a State. 133 S. Ct. at 2696. This express limitation makes no sense if, as plaintiffs contend, same-sex couples have a fundamental right to marry.

/ / /

---

to same-sex marriage is inconsistent with *Baker* and subsequent Supreme Court authority.

A fair reading of the Supreme Court's opinions leads to one conclusion: neither *Loving*, *Zablocki*, *Turner*, nor any other Supreme Court decision concerning the right to marry applies to same-sex marriage. Such a conclusion is consistent with well-established Supreme Court authority governing substantive due process rights. *E.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (courts should be reluctant to expand such rights, which must be subject to "careful description" and "deeply rooted in the Nation's history and tradition"). Because there is no fundamental right to same-sex marriage, plaintiffs' due process claims are governed by the rational basis test. *Id.* at 722.

B. The Rational Basis Test Governs Plaintiffs' Equal Protection Claim

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. Plaintiffs assert two grounds for subjecting Idaho's marriage laws to heightened scrutiny: (1) the laws discriminate on the basis of sexual orientation, and *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471 (9th Cir. 2014), requires heightened scrutiny; and (2) the laws discriminate on the basis of sex or gender.

/ / /

/ / /

/ / /

1. *SmithKline*'s heightened scrutiny does not apply because Idaho's marriage laws do not classify on the basis of sexual orientation and are not the product of intentional and irrational discrimination

The heightened scrutiny applied in *SmithKline* should not apply here. Before *SmithKline*, this Court did not apply heightened scrutiny to sexual orientation discrimination claims. 740 F.3d at 480. *SmithKline* deviated from that rule to apply heightened scrutiny to a peremptory challenge of a prospective juror because he was gay. *SmithKline* involved an act of intentional, irrational discrimination, the result of a false stereotype about gay persons. *Id.* at 478. The *SmithKline* court determined that *Windsor* justified departure from this Circuit's established rule. 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).

Plaintiffs' challenge to Idaho's marriage laws is distinguishable from *SmithKline* in several critical respects. First, unlike the decision to strike a juror because of his sexual orientation in *SmithKline*, Idaho's marriage laws do not classify on the basis of sexual orientation. They permit a man to marry a woman, or a woman to marry a man, regardless of sexual orientation. The laws may have a disparate impact on gays and lesbians, because they may prefer to marry a person

of the same gender, but the laws do not preclude gays and lesbians from entering into the relationship of civil marriage as defined by Idaho law.

Second, Idaho's marriage laws are based not on a false stereotype or discriminatory assumption, but on irrefutable biological facts. Idaho confers the benefits of civil marriage on opposite-sex couples because they are biologically able to procreate, not because of their sexual orientation. As the Supreme Court has recognized, distinctions based on relevant biological differences do not violate the Equal Protection Clause. *E.g.*, *Nguyen v. INS*, 533 U.S. 53 (2001) (rejecting equal protection challenge to law applying different standards for determining parentage and citizenship depending on sex of citizen parent); *Michael M. v. Superior Ct.*, 450 U.S. 464 (1981) (rejecting equal protection challenge to statutory rape law that imposes sanctions on males but not females).

Third, 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.

Given these significant differences, this Court should not extend *SmithKline's* heightened scrutiny to plaintiffs' challenge to Idaho's marriage laws.

/ / /

/ / /

2. Idaho's marriage laws do not discriminate on the basis of sex

Gender discrimination occurs when a law treats men and women as a class differently. *See, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 678-79 (1973) (requiring women, but not men, seeking military benefits to demonstrate spouse's economic dependency). Idaho's marriage laws treat men and women equally. As the district court properly concluded, the laws "are facially gender neutral and there is no evidence that they were motivated by a gender discriminatory purpose." ER 31. Accordingly, the Court should reject plaintiffs' sex discrimination argument.

III. Idaho Has a Concededly Substantial Interest in Incentivizing Couples with Procreative Capacity to Enter into Stable Legal Relationships through the Institution of Civil Marriage, and May Rationally Conclude that Same-Sex Couples Are Not Similarly Situated in Light of Their Inability to Procreate

Civil marriage in Idaho is a form of contract. Idaho Code § 32-201(1). Its roots nonetheless lie not in traditional matters of commerce but in Idaho's (and other States') deeply rooted interest in encouraging a stable structure for managing the natural consequence of many intimate female-male relationships: children. *See Baker v. Nelson*, 191 N.W.2d 185, 185 (Minn. 1971) ("[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis"), *appeal dismissed*, 409 U.S. 810 (1972). The traditional limitation of civil marriage to

opposite-sex couples thus comes as no surprise. So, while same-sex couples may well bring the same level of emotional commitment to their relationship as opposite-sex couples, one critical difference exists. Same-sex couples cannot procreate. The ultimate question here is whether Idaho must adjust its conception of civil marriage to accommodate couples who as a discrete group lack that biological capacity and extend to them the same governmental benefits available to opposite-sex couples.

Plaintiffs have two principal responses. The first is that Idaho does not limit civil marriage to couples who intend to procreate or, at the least, have the ability to have children. Dkt. 76-1 at 45.[2] The second is that mere conservation of governmental benefits can never serve as a rational basis for distinguishing between similarly situated persons. *Id.* at 49. Rich and the State have addressed

[2] Plaintiffs also observe that "[m]arriage 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 health, and to remain each other's partner and companion into old age, long after any children are grown." Dkt. 76-1 at 45. All of this may be true in some instances or perhaps generally, but the reasons why particular individuals opt to marry say nothing about the governmental interest that may animate a State's determination to create civil marriage and to incentivize its use. No dispute exists that Idaho has a legitimate, indeed compelling, interest in encouraging individuals with procreative capacity to enter into civil marriage because, as a practical matter, they account for all newborns. And, contrary to plaintiffs' position (*id.* at 25), the State is not impaired by the Fourteenth Amendment from calibrating constitutional or statutory distinctions on a particular purpose served by civil marriage. *See infra* 13-16.

both points previously (Dkt. 21-1 at 30 n.7, 41-43), but some amplification may be helpful.

Section 32-201 authorizes marriages among opposite-sex couples without regard to whether they either intend to have children or are physically capable of doing so. Plaintiffs do not explain how it could be otherwise given the long-standing zone of privacy that insulates decision-making about bearing and rearing children. *E.g.*, *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraception); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (forced sterilization); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (educational choice). They thus effectively argue that the class of persons eligible for civil marriage drawn by Idaho is underinclusive—*i.e.*, having allowed marriage between members of the opposite sexes, the State is required to take the further step of allowing marriage among members of the same sex.

Plaintiffs ignore, however, that the distinction drawn is entirely rational. Regardless of whether particular opposite-sex couples have the desire or capacity to procreate, they nevertheless belong to a *class* broadly possessing that desire and capacity. Same-sex couples stand apart in this regard because whatever may prompt them to seek civil marriage, it cannot include procreating a child. There are no exceptions to this biologically driven class differentiation. A State cannot

be faulted under the Equal Protection Clause for drawing legislative classifications without arithmetic precision so long as the classification has a plausible rationale—here incentivizing marriage between men and women because of their biological role in perpetuating the human species. *E.g.*, *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981) ("[a]s long as the classificatory scheme chosen by Congress rationally advances a reasonable and identifiable governmental objective, we must disregard the existence of other methods of allocation that we, as individuals, perhaps would have preferred").

Plaintiffs' reliance on *Plyler v. Doe*, 457 U.S. 202 (1982), and *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011), for the proposition that conservation or targeting of governmental resources may not serve as a rational basis upon which to justify the differing treatment of opposite- and same-sex couples misapprehends those decisions. In both, the courts could identify no rational basis for distinguishing between the involved classes—lawful residents and illegal aliens with respect to access to free public primary and secondary education (*Plyler*), and spouses of opposite-sex married employees and partners of same-sex couple employees with respect to health care benefits' eligibility (*Diaz*)—and thus rejected fiscal savings, standing alone, as adequate justification. *Plyler*, 457 U.S. at 228-30 (reduction of the influx of undocumented aliens; impact on the State's ability to provide high-quality public education; and decreased likelihood that

undocumented students would remain in Texas and "put their education to productive social or political use" there); *Diaz*, 656 F.3d at 1013-14 ("the savings depend upon distinguishing between homosexual and heterosexual employees, *similarly situated*, and such a distinction cannot survive rational basis review") (emphasis added).

Here, in contrast, the marriage incentive—and its associated fiscal impact—relates directly to the characteristic that distinguishes opposite- and same-sex couples. Were sex differences immaterial to procreation, *Plyler* and *Diaz* would hold sway. But the contrary is true, and Idaho has acted rationally in determining that same-sex couples fall outside the circle of relationships that warrant bearing the fiscal burden assumed with regard to opposite-sex couples who enter into civil marriage. *See Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471, 492-93 (1973) (State's "interest in protecting the fiscal integrity of its [unemployment] compensation fund" was rational where it "track[ed]" with otherwise permissible reasons for denying benefits to employees unable to work because of a non-lock-out labor dispute); *Dandridge v. Williams*, 397 U.S. 471, 479-80 (1970) ("Given Maryland's finite resources, its choice is either to support some families adequately and others less adequately, or not to give sufficient support to any family. We see nothing in the federal statute that forbids a State to balance the stresses that uniform insufficiency of payments would impose on all families against the greater

ability of large families—because of the inherent economies of scale—to accommodate their needs to diminished per capita payments."). As Judge Niemeyer correctly reasoned in *Bostic*, "States are permitted to selectively provide benefits to only certain groups when providing those same benefits to other groups would not further the State's interests." 2014 WL 3702493, at *27 (Niemeyer, J., dissenting); *id.* ("Virginia is willing to provide these subsidies because they encourage opposite-sex couples to marry, which tends to provide children from unplanned pregnancies with a more stable environment").[3]

The reasonableness of Idaho's determination not to extend the marriage subsidy to same-sex couples finds further support in plaintiffs' and their *amici curiae*'s own submissions. As discussed in Rich and Idaho's opening brief (Dkt. 21-1 at 36-39), plaintiffs' only expert—Dr. Michael E. Lamb—opined that social science research reflected no significant differences between children residing with their biological parents and those residing with a parent in a same-sex

[3] Plaintiffs attribute to Rich and Idaho that argument "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.'" Dkt. 76-1 at 48. That does not characterize accurately the argument made. The small number of same-sex households in Idaho—579 by Rich and the State's estimate (Dkt. 21-1 at 29 n.5) and 550 by plaintiffs' *amicus curiae* Gary Gates (Dkt. 115 at 5)—is relevant because it underscores the fact that the current classification captures essentially all children living in households headed by two persons and that, given the objective of incentivizing civil marriage among couples with procreative capacity, Idaho could reasonably determine that revisiting the objective's legitimacy was not warranted by a slight change in demographic data.

couple household as to emotional health and adjustment. *See, e.g.*, ER 215 ¶ 13, 223 ¶ 34. Their *amici* agree. *See* Dkt. 105 at 17-18 (American Psychological Association *et al.*) ("the vast majority of scientific studies that have directly compared these groups have found that gay and lesbian parents are as fit and capable as heterosexual parents, and that their children are as psychologically healthy and well adjusted"); Dkt. 108 at 3 (American Sociological Association) ("[t]he clear and consistent consensus in the social science research is that across a wide range of indicators, children fare just as well when raised by same-sex parents as children raised by different-sex parents"). Because these studies necessarily used data predating the availability of same-sex marriage, the marriage subsidy incentive at most *levels* the playing field between children in traditional family settings and those in same-sex households. Idaho can hardly be criticized for not subsidizing a relationship that, so far as plaintiffs contend, needs none to obtain parity of the relevant outcome with the subsidized.[4]

[4] Plaintiffs argue that Rich and Idaho's treatment of Dr. Lamb's declaration "misses the point entirely." Dkt. 76-1 at 43 n.10. They stress instead his conclusion that the benefits of marriage "'are equally advantageous for children and adolescents in families headed by same-sex and different-sex couples.'" *Id.* Even if one assumes the accuracy of this assertion—arguably premature given the only-recent availability of same-sex marriage on a limited scale—the fact remains that the logic of Dr. Lamb's research dictates the conclusion that because children in same-sex couple households have similar adjustment outcomes as those in households headed by their biological parents, no incentive is necessary to achieve

IV. The Validity of Idaho Code § 32-209 Rises or Falls with the Validity of Idaho Code § 32-201

Plaintiffs contend that the prohibition against recognition of marriages entered into by same-sex couples in other States or countries runs afoul of the Due Process and the Equal Protection Clauses in the Fourteenth Amendment.[5] As for due process, they argue "federal courts . . . have held 'the fundamental right to marry necessarily includes the right to remain married.'" Dkt. 76-1 at 55 (quoting *Kitchen*, 2014 WL 2868044, at *16 (10th Cir. June 25, 2014)). As for equal protection, they analogize § 32-209 to Section 3 of DOMA and argue that the Idaho statute "constitute[s] an unprecedented departure from the this state's longstanding practice and law recognizing valid marriages from other states, even where the marriage would have been prohibited under Idaho law" and "target[s] married same-sex couples and [was] not enacted for any reason independent of excluding . . . those couples." Dkt. 76-1 at 56-57. At bottom, therefore, their challenge to § 32-209 walks in lockstep with the one to § 32-201. Because § 32-201 passes muster under the Fourteenth Amendment for the reasons discussed above and in Rich's opening brief, so too does § 32-209. *See Kitchen*, 2014 WL 2868044, at *41 (Kelly, J., concurring in part and dissenting in part) ("[t]hat the

---

outcome parity for the former vis-à-vis the latter. The situation here thus parallels that in *Dandridge*.

[5] Plaintiffs do not attack § 32-209 under the Full Faith and Credit Clause, U.S. Const. art. IV, § 1.

Constitution does not compel the State to recognize same-sex marriages within its own borders demonstrates a fortiori that it need not recognize those solemnized without").

A brief response to plaintiffs' § 32-209 analysis nonetheless is warranted. First, the proposition that the right to marry carries with it a Due Process Clause-grounded right to have a marriage consummated in one jurisdiction recognized in another proves far too much. Aside from same-sex marriages, § 32-209 denies recognition to "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." Plaintiffs' theory thus would allow an Idaho resident under the age of 18 years to marry without compliance with the requirements in Idaho Code § 32-202. Surrounding States have adopted different approaches to the age-of-marriage issue.[6] The same is true with respect to prohibitions against incestuous marriage.[7] The point is obvious: If a fundamental right exists to have a marriage in one State recognized in every other State, the traditional authority of States to control access to civil marital status—the very core of the reasoning in *Windsor*—evaporates. *Cf. Kitchen*, 2014 WL 2868044, at *36 (Kelly, J., concurring in part and dissenting in

[6] Mont. Code Ann. § 40-1-213; Or. Rev. Stat. Ann. § 106.060; Utah Code Ann. § 30-1-9; Wash. Rev. Code Ann. § 26.04.010; Wyo. Stat. Ann. § 20-1-102.

[7] *Compare* Idaho Code § 32-205, *with* Mont. Code Ann. § 40-1-401; Or. Rev. Stat. Ann. § 106.020; Utah Code Ann. § 30-1-1; and Wash. Rev. Code Ann. § 26.04.020; Wyo. Stat. Ann. § 20-2-101.

part) ("[W]ere the rule as the Plaintiffs contend, that marriage is a freestanding right, Utah's prohibition on bigamy would be an invalid restriction. . . . Likewise, were marriage a freestanding right without reference to the parties, Utah would be hard-pressed to prohibit marriages for minors under 15 and impose conditions for other minors.") (citations omitted).

Second, no less evanescent is plaintiffs' reliance on *Windsor*'s equal protection analysis. The fundamental principle on which *Windsor* pivoted was "the extent of the state power and authority over marriage as a matter of history and tradition." 133 S. Ct. at 2691. The Court then quoted from *Sosna v. Iowa*, 419 U.S. 393, 404 (1975), for the rule that "'regulation of domestic relations' is 'an area that has long been regarded as a virtually exclusive province of the States.'" 133 S. Ct. at 2691. The Court further observed that New York "used its historic and essential authority" to authorize same-sex marriage and that DOMA thus "departs from this history and tradition of reliance on state law to define marriage." *Id.* at 2692. Congress' refusal to defer to New York's—and presumably any other State's—policy choice gave rise to "'discriminations of unusual character'" that counseled "'careful consideration to determine whether they are obnoxious to the constitutional provision.'" *Id.* The "discrimination[]" at the heart of *Windsor*, in other words, lay in disfavoring New York's effort at "'shaping the destiny of [its] own times'" and applying a congressional thumb on the scale of matters

historically left to the States' sovereign determinations. *Id.* It was this "discrimination[]" between *the States*—and not opposite- and same-sex couples—which the Court found unsupported by a rational basis. *See id.* at 2693 ("The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence."). Insofar as plaintiffs portray *Windsor* as signaling a jurisprudential sea-change, they ill-advisedly venture into heavy weather because what was sauce for the goose there is sauce for the gander here.

Third, plaintiffs' discussion of the "place of celebration" doctrine is rhetorical window-dressing. Dkt. 76-1 at 51-52. That doctrine is one of sovereign election, not constitutional mandate. Some States have followed it as a matter of common law; in others like Idaho, positive legislation has displaced it. *Jones v. State Bd. of Med.*, 555 P.2d 399, 405 (Idaho 1976) ("'[t]he legislature may at any time by a legislative act repeal any part of the common law either expressly or by passage of an act inconsistent therewith on any particular subject'"); *compare Horton v. Horton*, 198 P. 1105, 1107 (Ariz. 1921) (applying common law place of celebration rule), *with Cook v. Cook*, 104 P.3d 857, 860 (Ariz. Ct. App. 2005) ("[j]ust as enduring as the general rule, however, has been Arizona's exception to that rule; namely, that the *power* to define a valid marriage is vested in this state's

legislature and not in the legislature (or judiciary) of another state nor in the judiciary of this state"); *see generally Restatement (Second) of Conflict of Laws* § 283 (1971) (summarizing common law standards concerning "what law governs the validity of a marriage"). The underlying purpose of the rule—"[t]he need for protecting the expectations of the parties" (*id.*)—reflects its origin in very practical concerns, not constitutional niceties.[8]

Plaintiffs' claim of a "stark departure from its past and current treatment of out-of-state marriages" through § 32-209's 1996 amendment (Dkt. 76-1 at 53) thus brings nothing relevant to the table. It instead reflects a strained attempt to export *Windsor*'s analysis from its congressional context into a legislative environment where States—as *Windsor* itself explicitly held—have largely unfettered discretion. Simply put, States have always possessed the power to restrict

[8] That purpose has no relevance here. None of the affected plaintiffs—all of whom are long-time Idaho residents—could reasonably have relied on their marriages being recognized under Idaho law because they married in California and New York a dozen or more years after § 32-209 was enacted (Dkt. 76-1 at 6, 7) and necessarily were on notice that those marriages would not be recognized in their home State. Indeed, *no* same-sex couple could claim reasonable reliance on applicability of the place-of-celebration doctrine given the fact that § 32-209 was adopted eight years before any such marriages had occurred in Massachusetts—the first State to issue marriage licenses to same-sex applicants pursuant to the order in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003). *See generally* Lynn D. Wardle, *Goodridge and "The Justiciary" of Massachusetts*, 14 B.U. Pub. Int. L.J. 57, 62 (2004) ("On Monday, May 17, 2004, the 180-day stay in Massachusetts expired, and *Goodridge* took effect. An estimated 2,500 marriage licenses were issued to same-sex couples in Massachusetts in the first week, following the legalization of same-sex marriage.").

recognition of marriages entered into under another jurisdiction's law. Inherent in this power is the ability to adjust their recognition statutes to accommodate new circumstances or public policy views. Section 32-209 reflects just such an accommodation.

V. Conclusion

The State of Idaho and Christopher Rich respectfully request that this Court 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.

Respectfully submitted,

HON. LAWRENCE G. WASDEN
Attorney General

STEVEN L. OLSEN
Chief of Civil Litigation

/s/W. Scott Zanzig
W. SCOTT ZANZIG, #9361
CLAY R. SMITH, ISB #6385
Deputy Attorneys General
Statehouse, Room 210
Boise, ID 83720
Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

PURSUANT TO FED. R. APP. P. 32(a)(7)(C)

I certify that:

The brief is

_XX_ Proportionately spaced, has a typeface of 14 points or more and contains 5,491 words

or is

_____ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text

or is

_____ In conformance with the type specifications set forth at Fed. R. App. P. 32(a)(5) and does not exceed _____ pages

By: */s/W. Scott Zanzig*

W. SCOTT ZANZIG, #9361
CLAY R. SMITH, ISB #6385
Deputy Attorneys General
Statehouse, Room 210
Boise, ID 83720
Attorneys for Appellants

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 August 1, 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