Case Nos. 14-35420 and 14-35421

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUSAN LATTA, et al.

Plaintiffs-Appellees,

v.

GOVERNOR C.L. "BUTCH" OTTER and CHRISTOPHER RICH,

Defendants-Appellants,

and

STATE OF IDAHO,

Intervenor-Defendant-Appellant

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

REPLY BRIEF OF APPELLANT GOVERNOR C.L. "BUTCH" OTTER

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INTRODUCTION

Plaintiffs/Appellees' Answering Brief (Dkt. 76-1; "Answering Brief") does not engage Governor Otter's principal defense of Idaho's Marriage Laws.

That defense pervades Governor Otter's Opening Brief (Dkt. 22-2; "Opening Brief"). Referred to there as the "social institutional argument for man-woman marriage," *id*. at 16, 17, 43, it is based on a number of robustly supported legislative facts:

- Idaho's choice, challenged in this civil action, was between two profoundly different and mutually exclusive marriage institutions: man-woman marriage and genderless marriage.
- Each of those, like every fundamental social institution, powerfully teaches, influences, forms, and transforms individuals in our society, thus guiding their conduct in particular but different ways.
- The man-woman marriage institution—primarily through its norm that a child ought to know and be raised by her mother and father, with exceptions made only in the best interests of the child—guides conduct in a way to decrease the number of children who suffer the ills of fatherlessness and/or motherlessness, whereas the genderless marriage institution does just the opposite—primarily through its official repudiation of that norm.

- Because of the nature of the well-documented ills of fatherlessness and motherlessness, Idaho has compelling reasons for minimizing the number of children who suffer them, meaning it has a compelling and wholly legitimate reason for choosing the man-woman marriage institution.
- The only way Plaintiffs in any meaningful, intelligible way can get the relief they seek is for this Court to replace the man-woman marriage institution with a genderless marriage institution.

Plaintiffs' Answering Brief does not deny any of these social institutional realities. That is so even though Governor Otter used these social realities as the basis for these points:

- The Constitution does not recognize a "fundamental right" to suppress the man-woman marriage institution by replacing it with a genderless marriage institution.
- Regardless of the level of judicial scrutiny used, Idahoans have a constitutionally sufficient reason for preserving the man-woman marriage institution and thus, of necessity, for refusing to institute genderless marriage: under the former, a child knowing and being reared by her mother and father is socially preferred and officially encouraged, while the latter officially retracts that preference and encouragement.

- Idaho's allowance of all legally qualified man-woman couples to marry regardless of their procreative intentions or capacities is precisely tailored to Idaho's legitimate objective of strengthening the man-woman marriage institution, thereby enabling it to better fulfill one of its core purposes—influencing and guiding the conduct of all, especially heterosexual men and women, in a way to minimize the incidence and therefore the ills of fatherlessness and motherlessness.
- Choosing the man-woman marriage institution is thus not an act of animus (however defined) but rather the fulfillment of a duty to assure, to the fullest extent practically possible, that children generally are spared those ills.

Although these points are the points on which Plaintiffs' claims rise or fall, their Answering Brief does not contest Governor Otter's treatment of them and does not engage the underlying social institutional realities.

Plaintiffs' Answering Brief also does not engage another of Governor Otter's key points: state laws defining marriage precisely as the Supreme Court defines it under the Due Process Clause cannot be unconstitutional under the Equal Protection Clause. Rather, Plaintiffs assert that the Due Process Clause's right to marry must be deemed "the right to marry the person of one's choice"—the only possible definition that serves their purpose. But that "right" necessarily encompasses a right not only to genderless marriage but also to polygamous

marriages, to first and second degree-of-consanguinity marriages, and to marriages by the very young—each of which is the exercise of "the right to marry the person of one's choice."

Plaintiffs' fundamental rights analysis is unsound. Properly done, such analysis requires both a careful description of the "right" the Plaintiffs are asserting and an assessment of that "right's" place, if any, in the Nation's laws, history, and traditions. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702 (1997). Done as required by the Supreme Court, such analysis refutes Plaintiffs' asserted "right." The only way Plaintiffs can be married (whether by celebration or recognition) in any meaningful, intelligible sense is for the law to replace the man-woman marriage institution with a genderless marriage regime. Yet such replacement is clearly foreign, even inimical, to the right to marry as repeatedly vindicated in Supreme Court decisions. That "right" has no place in the Nation's history and traditions and only a very recent place in the laws of a minority of the States.

Plaintiffs' choice to ignore rather than engage Governor Otter's principal defense of Idaho's Marriage Laws also renders fatally defective their Answering Brief's equal protection arguments. Plaintiffs' message is that Idaho has no legitimate purpose rationally advanced by preserving man-woman marriage. But as Governor Otter demonstrated (and Plaintiffs ignore), Idaho has such a purpose and it is compelling: By preserving the man-woman meaning in marriage, Idaho

perpetuates the powerful social norm that a child ought to know and be raised by her mother and father. Genderless marriage officially retracts that norm. It is wholly illogical to believe that a society officially repudiating that norm will not have higher levels of fatherlessness and motherless, with the attendant ills, compared to a society that perpetuates that norm.

The choice in Plaintiffs' Answering Brief to ignore rather than engage Governor Otter's principal defense also renders fatally defective their animus argument. Their "proof" of animus is that Idaho and its people have no legitimate purpose rationally advanced by man-woman marriage. But that "proof" evaporates immediately when exposed to the realities briefly summarized in the previous paragraph. And Judge Holmes's analysis of animus in connection with marriage laws perpetuating man-woman marriage also defeats Plaintiffs' animus argument. *See Bishop v. Smith*, 2014 WL 3537847, at *21–30 (10th Cir. July 18, 2014) (Holmes, J., concurring).

The animus argument fares no better in the other place where Plaintiffs attempt to deploy it: non-recognition of a same-sex couple's foreign marriage. It is self-contradictory to say that Idaho can recognize such a couple as "married" while the State's legal and hence social meaning of marriage is the union of a man and a woman. Recognition (like celebration) requires that the new, genderless meaning of marriage be its sole meaning for all official and public purposes. Thus under

Plaintiffs argument, one State's radical experiment with polygamy or first or second degree-of-consanguinity marriage or genderless marriage must, as a constitutional matter, become the officially sanctioned marriage norm in every other State. Plaintiffs' Answering Brief offers no response to Governor Otter's analysis of this point. Moreover, Plaintiffs' reasoning would transform a State's general choice-of-law rule regarding recognition of foreign marriages—but stripped of that rule's exceptions—into a federal constitutional requirement, one in direct conflict with the long-established public-policy doctrine in Full Faith and Credit Clause jurisprudence. *See Nevada v. Hall*, 440 U.S. 410, 422–23 (1979). Quite simply, there is no valid "independent" argument under the federal Constitution for "recognition" of the foreign marriage of a same-sex couple.

Plaintiffs' sex discrimination argument also fails; it is in direct conflict with governing Supreme Court decisions. *E.g.*, *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 73 (2001); *United States v. Virginia*, 518 U.S. 515, 533 (1996).

ARGUMENT

I. IDAHO'S MARRIAGE LAWS DO NOT VIOLATE THE DUE PROCESS CLAUSE'S RIGHT TO MARRY.

A. Plaintiffs avoid the key institutional realities, substance, and associated consequences of the "right" they are asserting.

Plaintiffs have consciously chosen to ignore the reality of social institutions in general and the marriage institution in particular. In their Answering Brief,

Plaintiffs never once use the word "institution," and the word appears in that brief only seven times as part of a quote—such as two references to "religious institutions"—unrelated to Governor Otter's presentation of the social institutional realities relevant to the two competing marriage institutions. Plaintiffs take this approach even though that presentation is at the heart of Governor Otter's defense of Idaho's Marriage Laws.

To catalogue briefly what Plaintiffs ignore:

- Marriage is a vital social institution and, like all fundamental institutions, is constituted by a unique web of widely shared public meanings. Those meanings sustain certain norms and thus profoundly teach, form, and transform individuals, supplying them with purposes, identities, and statuses and guiding their conduct. Since pre-history, "the union of a man and a woman" has been a virtually universal core meaning constituting the marriage institution. That meaning sustains the social norm that a child ought to know and be raised by her mother and father and therefore—by influencing adult behavior (particularly of heterosexual men and women) and for the benefit of children generally—serves to diminish the level of fatherlessness and motherlessness, with all those conditions' attendant ills. Opening Br. at 26–43.[1]

[1] *See also* Answering Brief of Defendant-Appellee Coalition for the Protection of Marriage at 26–51, *Sevcik v. Sandoval*, Case No. 12-17668 (9th Cir. Jan. 21, 2014) (Dkt. 110-3).

- The law has no power to usher any same-sex couple into the man-woman marriage institution but certainly has the power to suppress that institution by replacing it with the genderless marriage institution. *When that happens*, genderless marriage is the sole form of marriage for all official and public purposes, *but until that happens*, no same-sex couple can "be married" in any intelligible sense in that jurisdiction. Thus, when a same-sex couple asserts a federal constitutional "right" to "be married" (whether by celebration or recognition), that right's effect and substance is to have the law abolish the man-woman marriage institution by replacing it with the genderless marriage institution. *Id.*
- But the two institutions are profoundly different and mutually exclusive. Idaho cannot have both at the same time, any more than it can sustain the social norm of monogamy while giving legal recognition to polygamous marriages. While man-woman marriage officially sustains it, genderless marriage officially retracts the social norm that a child ought to know and be raised by her mother and father. *See id.*; Brief of *Amici Curiae* Professors Alan J. Hawkins and Jason S. Carroll in Support of Defendants-Appellants and Reversal (Dkt. 54-1); David Blankenhorn, *The Future of Marriage* 201 (2007) ("[A] society that embraces same-sex marriage can no longer collectively embrace this norm and must take specific steps to retract it. One can believe in same-sex marriage.

One can believe that every child deserves a mother and a father. One cannot believe both."). [2]

For the purpose of understanding the federal constitutional "right" to marry that Plaintiffs are asserting here, this is the most important of those realities: When a same-sex couple asserts a "right" to "be married" (whether by celebration or recognition), that "right's" effect (regardless of the proffered purpose) is to have the law replace the man-woman marriage institution with a genderless marriage regime.

B. The Due Process Clause's right to marry cannot be carefully and coherently described as "the right to marry the person of one's choice."

Rather than engage the social realities of the "right" they are claiming, Plaintiffs rely on two assertions. One, they are seeking the benefit not of a "new" right but of a long-established one. Two, the long-established right to marry under the Due Process Clause is "the right to marry the person of one's choice," no more and no less. *E.g.*, Answering Br. at 15, 27, 38. But those assertions fail for multiple reasons.

First, as Plaintiffs never deny, the effect and substance of their asserted "right" is institutional suppression by replacement. Because Plaintiffs' description

[2] Even in his later announcement of his decision to follow "our national elites" into support for genderless marriage, Blankenhorn reaffirmed this truth. David Blankenhorn, Opinion, *How My View on Gay Marriage Changed*, N.Y. Times, June 22, 2012, http://www.nytimes.com/2012/06/23/opinion/how-my-view-on-gay-marriage-changed.html?_r=0.

obscures rather than illuminates that profound reality in the very phenomenon supposedly described, it fails to be either careful or accurate and thus does not merit judicial acceptance.

Second, Plaintiffs' asserted "right" when seen in the light of its effect is profoundly different from the right to marry vindicated by Supreme Court precedent—the right to enter and participate fully in the venerable man-woman marriage institution. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1(1967); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *see also Bostic v. Schaefer*, 2014 WL 3702493, at *18, 21–25 (4th Cir. July 28, 2014) (Niemeyer, J., dissenting).

Third, settled Supreme Court precedent requires a two-step analysis of Plaintiffs' asserted "right," whatever the semantic wrangling over "new right" versus "proper scope of old right." *See Bostic*, 2014 WL 3702493, at *18–19 (Niemeyer, J., dissenting). That analysis requires both a careful and accurate description of the "right" the Plaintiffs are asserting and an assessment of that "right's" place, if any, in the Nation's laws, history, and traditions. *See, e.g.*, *Glucksberg*, 521 U.S. at 720–24. Done as required by the Supreme Court, such analysis refutes Plaintiffs' asserted "right." The asserted "right" of two people of the same sex to marry and thereby profoundly alter marriage's public meanings and norms have only a very recent place in the laws of a minority of States and no place at all in the Nation's history and traditions. *See* Opening Br. at 68–76.

Fourth, Plaintiffs assert their particular definition of the right to marry—"the right to marry a person of one's choice"—because that is the only definition that serves their purpose. That definition, however, has never been deeply rooted in American law and tradition for it would encompass a right not just to genderless marriage but to polygamous marriages, to first and second degree-of-consanguinity marriages,[3] and to marriages by the very young. Each of those, after all, is nothing other than an instance of "marrying the person of one's choice." The Supreme Court has never intimated that the right has such a scope. *See Bostic*, 2014 WL 3702493, at *19, 25 (Niemeyer, J., dissenting). The Court's cases are devoid of any support for such a radical notion, *id.* at *21–25, and that includes *Loving v. Virginia*, 388 U.S. 1(1967).

In *Loving*, the Court affirmed as constitutionally protected the right to marry as it had existed at common law—the right to enter and fully participate in the valuable and venerable man-woman marriage institution, without regard to race.[4] Indeed, there was no question whether the Lovings' union was a marriage, only

[3] First degree of consanguinity encompasses parent and child; second degree of consanguinity encompasses sibling, grandchild, and grandparent. *See* Jesse Dukeminier et al., *Wills, Trusts, and Estates* 79 (7th ed. 2005) (consanguinity table). Every State and apparently even every nation prohibits marriage within the first and second degrees of consanguinity. *See, e.g.*, Lynn D. Wardle, *International Marriage and Divorce Regulation and Recognition: A Survey*, 29 Fam. L.Q. 497, 501 (1995).

[4] *See* Monte Neil Stewart & William C. Duncan, *Marriage and the Betrayal of* Perez *and* Loving, 2005 BYU L. Rev. 555.

whether it was a marriage that the Constitution allowed to be criminalized to achieve racist ends. In ruling that the Constitution did not allow such, the Court never intimated that a couple's "choice" trumps important, legitimate societal interests; that issue was not before it because Virginia's asserted interest—promoting "White Supremacy" and avoiding "mixing of the races"—was not a legitimate interest at all in light of Fourteenth Amendment history and jurisprudence. *Id*. at 7, 11.

Fifth, the Plaintiffs' analogy to *Loving* disregards that Idaho as a matter of policy and law has no *public* interest in valorizing emotional commitments between any couples, regardless of sexual orientation. Rather, Idaho's *public* purposes with its Marriage Laws is to create norms and other incentives to bind mother and father with their children and thus to (1) reinforce the value of every child being connected to her mother *and* father; (2) maintain a child-centered view of marriage that increases the likelihood that biological parents stay together even when adult emotions fade; and (3) reduce the risks and attendant ills of fatherlessness and motherlessness.[5] All this is another reason that Plaintiffs' use of *Loving* is misguided: race has *nothing* to do with these vital and compelling state interests; sexual complementarity has *everything* to do with them.

[5] *See, e.g.*, Matthew B. O'Brien, *Why Liberal Neutrality Prohibits Same-Sex Marriage: Rawls, Political Liberalism, and the Family*, 1 Brit. J. Am. Legal Stud. 411 (2012).

In sum, Plaintiffs' description of the right to marry as the "right to marry the person of one's choice," although the only description that serves their purpose, is not sustained but is rather countered by the Supreme Court's marriage jurisprudence.

C. Plaintiffs wrongly ascribe the "definitional" argument to Governor Otter.

Plaintiffs' Answering Brief at 20–24 sets up and knocks down a "definitional" argument for man-woman marriage and, in the process, ascribes that argument to Governor Otter.

> 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. . . . "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*, . . . (10th Cir. June 25, 2014).

Id. at 21.

Governor Otter, however, has never made a "definitional" argument. He has never suggested that some legal or dictionary definition of marriage is somehow sacrosanct and must be applied in measuring the scope of Plaintiffs' constitutional rights. Rather, he has pointed this Court to three key, uncontested realities: (1) Marriage, like all fundamental social institutions, consists of a unique web of widely shared public meanings, which give rise to and sustain powerful norms. (2) Those institutionalized meanings and the norms they sustain subtly but powerfully

influence and guide human perceptions and behaviors. (3) Man-woman marriage sustains the norm that a child ought to know and be raised by her father and mother, while genderless marriage officially retracts that norm.

On the basis of those uncontested realities, Governor Otter has made additional points relevant to the scope of the Due Process Clause's right to marry, as set forth in section I.B. above. They defeat Plaintiffs' claim that Idaho's Marriage Laws, by preserving the man-woman marriage institution with its unique norms and other social benefits, somehow violate a fundamental right.

D. In their "fundamental right" analysis, the Plaintiffs fail to engage in the right comparison, which is between the two alternative marriage institutions.

The previous sub-sections show that, in the "fundamental rights" analysis required in this case, the relevant comparison is between the two mutually exclusive and profoundly different marriage institutions that constitute Idaho's only two alternatives: man-woman marriage and genderless marriage. As shown above, that relevant comparison is essential in determining the scope of the long-established right to marry. (It is also essential in any application of strict scrutiny to Idaho's Marriage Laws. *See* section I.F. *infra*.) *Only* through that relevant comparison can this Court fairly adjudge the Plaintiffs' Due Process Clause claim.

Unfortunately, Plaintiffs made the choice to not engage in that relevant comparison or even to acknowledge marriage (in whichever form) to be a social

institution. Instead, throughout their Answering Brief Plaintiffs compare the capacities (parental and otherwise), the interests, the longings, and the worthiness of the people who can (man-woman couples) and cannot (same-sex couples) participate in man-woman marriage. Plaintiffs then try to cast what Idaho's Marriage Laws are all about as a choice to prefer, benefit, and valorize Jim and Jane and to deprive and demean June and Janice.

Plaintiffs' comparison, however, misleads the constitutional analysis because the societal interests that both determine the scope of and satisfy constitutional norms of liberty and equality are found in what the man-woman marriage institution provides and a genderless marriage regime does not. The characteristics of people in intimate same-sex relationships who desire to marry give rise to the liberty and equality issues but do *not* resolve those issues. What resolves those issues is, one, the scope of the long-established right to marry and, two, the sufficiency of the reasons for the people's choice of the man-woman marriage institution. And, again, that scope and those reasons are found in the differences between the two competing marriage institutions.[6]

[6] For these same reasons, Plaintiffs' charge that Governor Otter "repeats the analytical error made in *Bowers v. Hardwick*, 478 U.S. 186 (1986)," Answering Br. at 23, is clearly baseless.

E. In their "fundamental right" analysis, the Plaintiffs misuse "harms" to same-sex couples and the children connected to their relationship.

Plaintiffs devote much of their Answering Brief to discussion of the "harms" resulting from the absence of a genderless marriage regime and experienced by same-sex couples and the children connected to their relationships. *E.g.*, Answering Br. at 2–3, 6–11, 16. Lodged within this discussion of harms is the notion that these harms give rise to a fundamental right to a genderless marriage regime. That notion is wrong. Well-settled constitutional jurisprudence never suggests that the *extent* of resulting harm somehow determines the recognition or not of a fundamental right.

In addressing the threshold substantive due process question whether the right asserted by the plaintiff is a fundamental right, it is the nature of the interest asserted, not the extent of the harm, that matters. This principle first became clear in procedural due process cases. *E.g.*, *Bd. of Regents v. Roth*, 408 U.S. 564, 570–71 (1972) ("[T]o determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake."). It is now equally clear in substantive due process cases. Thus, in *United States v. Juvenile Male*, 670 F.3d 999 (9th Cir. 2012), certain juveniles claimed a substantive due process right not to be registered as sex offenders because the resulting harms were grievous, amounting to an "onerous lifetime probation." *Id.* at 1011. But this Court gave no role to that harm in deciding whether to recognize

the asserted right. *Id.* at 1012–13. This Court's approach was consistent with that of the Supreme Court in *Washington v. Glucksberg*, 521 U.S. 702 (1997). There the Court did not weigh or even consider the plight of terminally ill persons who desired to end their life with "dignity" but were precluded from doing so by the statute prohibiting assisted suicide; rather, like this Court in *Juvenile Male*, it applied rational basis review. *Id.* at 728.

United States v. Windsor, 133 S. Ct. 2675 (2013), is consistent with this settled law. It did *not* use the perceived economic and dignitary harms to the disfavored class to recognize a fundamental right; it did not recognize a fundamental right at all or even resolve the case on substantive due process grounds. Rather, it relied on equal protection grounds, specifically, the *Moreno-Cleburne-Romer-Windsor*[7] animus doctrine. *See Bishop*, 2014 WL 3537847, at *21–30 (Holmes, J., concurring). *Windsor* examined the perceived harms to demonstrate the existence of "a disadvantage, a separate status, and so a stigma" and did so as part of the larger endeavor of showing, as required by *Moreno* and *Romer*, that the "purpose and practical effect of the law here in question [was] to impose" such harms. 133 S. Ct. at 2693. (Importantly, those harms were not to a federal constitutional right but rather to a state-created statutory right. *Id*. at 2692.)

[7] *See U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *Romer v. Evans*, 517 U.S. 620 (1995).

By reserving the question whether state laws withholding marriage from same-sex couples offend the Constitution, *id.* at 2696, *Windsor* suggests the question whether *those* laws—like DOMA—deliver a message "demeaning" gay men and lesbians. Not many years ago it would not have been comprehensible to assert that the man-woman marriage institution or the laws sustaining it delivered such a message. *See id*. at 2689. By the late 1990's, however, activists supportive of genderless marriage began a campaign to socially construct just such a "meaning" for man-woman marriage and, at the same time, to obscure man-woman marriage's long-established normative meaning that a child ought to know and be raised by her mother and father. The media and other institutions have facilitated those aims.

But a court should not validate a campaign of assigning to man-woman marriage a meaning and purpose it never had, i.e., harming/demeaning homosexuals, and then demanding that man-woman marriage be held unconstitutional based on that false meaning and purpose. As Chief Justice Roberts noted during oral argument in the Proposition 8 case, "[w]hen the institution of marriage developed historically, people didn't get around and say let's have this institution, but let's keep out homosexuals. The institution developed to serve purposes that, by their nature, didn't include homosexual couples." Transcript of Oral Argument at 36, *Hollingsworth v. Perry*, 133 S. Ct.

2652 (2013) (No. 12-144). More generally, the Court has noted that "there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter." *Lawrence v. Texas*, 539 U.S. 558, 568 (2003). It follows that laws like Idaho's, which, to preserve the man-woman marriage institution, necessarily reject genderless marriage but place no novel burdens on same-sex couples, cannot be fairly portrayed as an effort to "demean" same-sex relationships. Instead, in preserving the man-woman marriage institution, Idaho's Marriage Laws *reaffirm* the same fundamental right recognized by the Supreme Court's right-to-marry decisions and, in doing so, attempt to perpetuate that institution's time-tested solution to the recurring human problems associated with procreation (which is always heterosexual) and with the need to minimize, to the greatest extent practicable, the ills suffered by children and resulting from fatherlessness and motherless.

In sum and in light of the settled law set forth above and honored by *Windsor*, the Plaintiffs' extended discussion of their plight resulting from the absence of a genderless marriage regime in Idaho is simply not relevant to the issue of a fundamental right to such a regime.

F. Idaho's Marriage Laws are valid even when subjected to strict scrutiny.

Because there is no fundamental right to a genderless marriage regime, there is no basis for subjecting Idaho's Marriage Laws to strict scrutiny. (Nor, as shown

in section II's treatment of the Plaintiffs' equal protection claim, is there any valid basis for subjecting those laws to any other form of heightened scrutiny). Nevertheless, Idaho's Marriage Laws withstand strict scrutiny. They do so because they actually and effectively advance state interests that are legitimate and compelling: they assure a society where, because of the force of the norm sustained by the man-woman meaning in marriage, the level of fatherlessness and motherless for children generally, with all the attendant ills, will certainly be lower, compared to a society that has officially repudiated that norm.[8] To say otherwise is to say that long-standing social norms, when sustained by such institutions as marriage, the law, and religion, do not really influence people and guide their behavior in line with those norms—a position no informed person could maintain.

Further, Idaho's Marriage Laws advance the State's compelling societal interests in the requisite "narrowly tailored" way.[9] If Idaho is to have any normative marriage institution at all, it must choose either man-woman marriage or genderless marriage; the real world provides no other choice. Faced with that either-the-one-or-the-other choice, the only way that Idaho could avoid the risk of incrementally more fatherless and motherless children was to opt to preserve the

[8] *See* Brief of *Amici Curiae* Professors Hawkins and Carroll (Dkt. 54-1).

[9] *See, e.g.*, *Glucksberg*, 521 U.S. at 721 ("the Fourteenth Amendment 'forbids the government to infringe . . . "fundamental" liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.'").

man-woman marriage institution. Given the choices before it, then, the alternative Idaho chose—retaining the man-woman marriage institution—was necessarily the "least restrictive" means of furthering that compelling interest.[10] Accordingly, Idaho's choice satisfies the "narrowly tailored" requirement, a point also clearly established on an alternative analysis in the Governor's Opening Brief at 92–93 but ignored by Plaintiffs' Answering Brief.

* * * * * * * * * * *

In sum, Idaho's Marriage Laws do not violate the Due Process Clause's right to marry.

II. IDAHO'S MARRIAGE LAWS DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

As argued in the Governor's Opening Brief at 76–78, codifying a right so that it exactly mirrors the Supreme Court's own definition of a fundamental right cannot give rise to an equal protection violation. Thus, if the Governor is correct that the fundamental right to marry encompasses only entry into the man-woman marriage institution, then Idaho's Marriage Laws—which merely codify that right—cannot be a denial of equal protection. Plaintiffs have no response.

As for the arguments Plaintiffs are willing to engage, equal protection jurisprudence comes into play in the context of three issues: (1) Whether Idaho's

[10] *See, e.g.*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 51 (1973) ("Only where state action impinges on the exercise of fundamental constitutional rights or liberties must it be found to have chosen the least restrictive alternative.")

Marriage Laws are the product of *Moreno-Cleburne-Romer-Windsor* animus. (2) Whether those laws constitute sex discrimination. (3) Whether Idaho has sufficiently good reasons for those laws' sexual-orientation-based effects. The last issue encompasses the contested question of the right level of judicial scrutiny of sexual-orientation discrimination claims in the absence of animus. On each of these issues, Plaintiffs' Answering Brief engages in faulty analysis and reaches an incorrect conclusion.

A. Idaho's Marriage Laws are not the product of *Moreno-Cleburne-Romer-Windsor* animus.

Plaintiffs devote much of their Answering Brief to assertions that Idaho's Marriage Laws are the product of animus, "properly understood." *E.g.*, Answering Br. at 29–34. Those assertions, however, are clearly wrong, for four reasons.

First, to date the most thorough and thoughtful analysis of *Moreno-Cleburne-Romer-Windsor* animus and that doctrine's application to the States' laws preserving man-woman marriage is found in Judge Holmes' concurring opinion in *Bishop v. Smith*, 2014 WL 3537847, at *21–30 (10th Cir. July 18, 2014). That analysis demonstrates quite conclusively that Idaho's Marriage Laws and the similar laws of the majority of the other States are *not* the product of such animus. That analysis defeats Plaintiffs' contrary assertions.

Second, Plaintiffs' contrary assertions rest on the following "proof": Because, Plaintiffs say, there is no good reason for preventing loving, committed

same-sex couples from marrying, the only motive for laws doing that must be animus. This is good "proof," however, only if in fact there is no good reason for preserving the man-woman marriage institution. The Answering Brief's assertions to that effect, however, are coupled with the Plaintiffs' failure to engage the social institutional realities—robustly supported by authoritative legislative facts that Governor Otter has marshaled and presented since the outset of this case—showing Idaho's compelling, legitimate interests intelligently advanced by its Marriage Laws. In light of those realities and that showing, Plaintiffs' "proof" of animus is no proof at all. Indeed, those realities are powerful proof of the absence of animus.

Nor are those realities and their relationship to Idaho's compelling interests "post-hoc rationalizations" for Idaho's Marriage Laws. Those realities had been brought forth and well demonstrated well before Idaho's voters went to the polls in the 2006 general election, when they voted overwhelmingly in favor of Amendment 2.[11] Certainly it has never been a secret that genderless marriage when enshrined in the law sends a socially and culturally powerful message that

[11] For a collection of pre-2006 learned treatises setting forth the social institutional realities undergirding Governor Otter's principal defense of Idaho's Marriage Laws, see, e.g., Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision*, 1 Duke J. Const. L. & Pub. Pol'y 1, 7–28 (2006). For publications applying those realities to genderless marriage, see, e.g., *id.*; Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 U. St. Thomas L. J. 33 (2004); Institute for American Values (Dan Cere, Principal Investigator), *The Future of Family Law: Law and the Marriage Crisis in North America* (2005) (ER 154).

fathers are dispensable in the lives of their children—and mothers too, for that matter. Thus, one campaign flyer favoring Amendment 2 depicted a mother and a father each holding a hand of their young daughter and posed the question: "Which is unnecessary? A father or a mother?" ER 209.

Third, Plaintiffs argue that Idaho's decision to not recognize same-sex-couple marriages celebrated in another State is so "unusual" and such a departure from its standard recognition practice that animus must be the explanation. Answering Br. at 49–53. This argument ignores the law that each State has always had the right to refuse recognition to a foreign marriage that violates that State's strong public policy. *See* Opening Br. at 94–97. Certainly Plaintiffs would not make the same argument against Idaho's non-recognition of another State's celebration of a polygamous marriage or of a first-degree-of-consanguinity marriage. *See id*. at 96–97. Yet such marriages implicate Idaho's strong policy and compelling interests no more than do same-sex couple marriages—exactly because the latter, to be marriages, require replacing with a genderless marriage regime the man-woman marriage institution, with the consequent reduction and then loss of its unique and valuable social benefits.

Fourth, Plaintiffs argue that the provision in Amendment 2 to preclude civil unions—a provision they have never challenged— is so sweeping and so unusual as to be akin to the Colorado initiative struck down in *Romer*. Answering Br. at

32–33. But that argument fails. Idaho's choice is not unusual. Nineteen of the thirty States that enacted state constitutional amendments to protect man-woman marriage made the same choice.[12] *See* Opening Br., Addendum at A-7–A-11. Further, in the years prior to the vote on Amendment 2, there was a serious debate about civil unions focusing on this question: Will the existence of a civil union regime weaken the marriage institution? Some strong proponents of genderless marriage joined with some strong proponents of man-woman marriage to answer "yes" and therefore oppose civil unions,[13] while at the same time some strong proponents of genderless marriage joined with some strong proponents of man-woman marriage to answer "no" and therefore support them.[14] In the light of that

[12] Judge Holmes concluded that Oklahoma's marriage amendment, Okla. Const. art. II, § 35—which, like Idaho's Amendment 2, both enshrines man-woman marriage and prohibits civil unions—was not the product of animus. *Bishop*, 2014 WL 3537847, at *30 (Holmes, J., concurring).

[13] *See, e.g.*, Jonathan Rauch, *Gay Marriage: Why It Is Good for Gays, Good for Straights, and Good for America* 49 (1st ed. 2004) ("To whatever extent they mimic marriage, [civil union benefits] send the message that, from the law and society's point of view, marriage is no longer unique."); Lynn D. Wardle, *Counting the Costs of Civil Unions: Some Potential Detrimental Effects on Family Law*, 11 Widener J. Pub. L. 401 (2002) (highlighting 32 notable consequences of civil unions on family law).

[14] *See, e.g.*, Elisabeth Bumiller, *Bush Says His Party Is Wrong to Oppose Gay Civil Unions*, New York Times, Oct. 26, 2004, http://www.nytimes.com/2004/10/26/politics/campaign/26gay.html?_r=0 (stating the views of Pres. George W. Bush, a supporter of preserving man-woman marriage); M.V. Lee Badgett, *Will Providing Marriage Rights to Same-Sex Couples Undermine Heterosexual Marriage?* Sexuality Res. & Soc. Pol'y, Sept. 2004, at 1 (a survey, by a leading gay rights scholar and activist, of five countries,

good-faith debate, to ascribe animus to one side or the other is to go beyond the pale.

B. Idaho's Marriage Laws do not constitute sex discrimination.

Plaintiffs' sex discrimination argument is that for the law to acknowledge the reality of fathers and mothers *as such* is to engage in unconstitutional sex stereotyping and role assignment. Answering Br. at 33–38. This argument ignores the biological facts that every human being on this planet has *both* a father and a mother, that fatherhood is limited to men and motherhood to women, and that the resulting biological ties to both mother and father matter (albeit in varying ways and to varying degrees) to nearly all human beings.[15] Accordingly, Plaintiffs' argument boils down to a highly contested radical social constructionist theory of gender, under which the law must refuse to acknowledge any inherent (or essential) differences between man and woman and therefore must reject every "gendered" law.[16]

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four of which had some form of civil union laws, concluding that such laws will have no impact on man-woman marriage).

[15] *See, e.g.*, *Bostic*, 2014 WL 3702493, at *23 (Niemeyer, J., dissenting) ("Every person's identity includes the person's particular biological relationships, which create unique and meaningful bonds of kinship that are extraordinarily strong and enduring . . . .").

[16] *See* Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 Can. J. Fam. L. 11, 86–95 (2004).

The Supreme Court has repeatedly rejected Plaintiffs' argument. *See Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 73 (2001); *United States v. Virginia*, 518 U.S. 515, 533 (1996). In Justice Kennedy's words in *Tuan Anh Nguyen*:

> To fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real. The distinction embodied in the statutory scheme here at issue [as in Idaho's Marriage Laws] is not marked by misconception and prejudice, nor does it show disrespect for either class. The difference between men and women in relation to the birth process [and to the role of father and mother] is a real one, and the principle of equal protection does not forbid Congress [or Idaho] to address the problem at hand in a manner specific to each gender.

533 U.S. at 73.

C. Idaho has sufficiently good reasons for its Marriage Laws' sexual-orientation-based effects.

In the abstract, what constitutes a "sufficiently good" reason for a classification implicating sexual orientation varies depending on the level of judicial scrutiny deployed. Here rational-basis review is the right level.

As the *SmithKline* panel explained, it departed from *High Tech Gays v. Defense Industry Security Clearance Office*, 895 F.2d 563 (9th Cir. 1990) (requiring rational-basis scrutiny), and its general duty to adhere to circuit precedent, in order to follow *Windsor*. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 480 (9th Cir. 2014). Thus, under the panel's own analysis, to apply *SmithKline* "heightened scrutiny" other than when *Windsor* actually requires that

application is to create an intra-circuit conflict. *Windsor* actually requires that application *only* when laws create "unusual" classifications that cannot be explained except by animus. There are no such laws in this case. *See* Section II.A. *supra*; Opening Br. at 83–90.

Erecting an across-the-board rule requiring heightened scrutiny for all claims of sexual orientation discrimination moves well beyond *SmithKline* and its application of *Windsor*. By applying *SmithKline* "heightened scrutiny" only to equal protection claims against "unusual" classifications signaling animus, this Court both rightly reserves the momentous question whether sexual orientation ought to become the first new suspect or quasi-suspect class in four decades and rightly assures resolution of that question by application of the Supreme Court's four-part standard—a standard *SmithKline* understandably did not address. *Cf. Windsor v. United States*, 699 F.3d 169, 181–85 (2d Cir. 2012).

Of course *SmithKline* is "binding circuit precedent"— *to the extent it applies*. But it does not apply here. It simply does not supply the controlling equal protection standard for evaluating Idaho's Marriage Laws.

In any event—and without lessening the importance of this Court getting right the level-of-scrutiny issue—because Idaho's Marriage Laws rightly withstand strict scrutiny, see Section I above, they *a fortiori* withstand each and all of the less rigorous standards that are the focus of the *SmithKline* debate.

* * * * * * * * * * *

In sum, Idaho's Marriage Laws do not violate the Equal Protection Clause.

CONCLUSION

Plaintiffs did not engage Governor Otter's principal defense of Idaho's Marriage Laws. The post-*Windsor* decisions requiring a genderless marriage regime likewise have not engaged the social institutional realities and analysis constituting that defense.[17] In a number of instances that defense was not presented to the court adequately or at all. But in the other instances, the court simply ignored it.

Ignoring or otherwise evading the hard questions raised by the claimed right to a genderless marriage regime falls short of the standards of judicial performance that the parties and the Nation have the right to expect will be met, especially in a case of this magnitude. As to those standards, Judge Learned Hand spoke against those judges who "disguise[] the difficulties" in arguments requiring an outcome contrary to their preferences and instead attempt to "win the game by sweeping all the chessmen off the table." Learned Hand, *Mr. Justice Cardozo*, 52 Harv. L. Rev. 361, 362 (1939). And this Court's Chief Judge has raised the question whether it is a breach of judicial ethics for a judge to "caricature the party's argument (as

[17] The post-*Windsor* decisions addressing the constitutionality of man-woman marriage (up to the date of this filing) are collected in the attached Reply Addendum.

lawyers sometimes do) to make it seem less persuasive?" Alex Kozinski, *The Real Issues of Judicial Ethics*, 32 Hofstra L. Rev. 1095, 1103 (2003).

To ignore or otherwise evade a party's well-supported argument does not meet the standards of judicial performance. But unfortunately, in the cases where the principal defense seen here has been adequately presented, that is what courts ruling in favor of genderless marriage have done. Governor Otter respectfully submits that a court doing otherwise and thereby meeting the standards of judicial performance will uphold Idaho's Marriage Laws.[18]

Date: August 1, 2014

By s/ Monte Neil Stewart
Lawyers for Defendant-Appellant Governor Otter

[18] Governor Otter preserves all issues and arguments raised in his Opening Brief even if not addressed, because of length limitations, in this Reply Brief.

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-4, 29-2(c)(2) and (3), 32-2 or 32-4[1] for Case Number 14-35420

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Signature of Attorney or Unrepresented Litigant: s/ Monte Neil Stewart

("s/" plus typed name is acceptable for electronically-filed documents)

Date: August 1, 2014

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REPLY ADDENDUM

POST-*WINDSOR* CASES

Case name & citation	Judge(s)	Procedural Posture	Fundamental Right? (FR)	Equal Protection Analysis (EQ)	Level of Scrutiny	Sex Discrimination
Kitchen v. Herbert, 961 F. Supp. 2d 1181 (D. Utah 2013)	Shelby	Summary Judgment	Yes	Yes	Strict (FR); Int. (Sex Discr.); RB (Sex Or.)	Yes
Bishop v. U.S. ex rel. Holder, 962 F. Supp. 2d 1252 (N.D. Okla. 2014)	Kern	Summary Judgment	N/A	Yes	RB	No
Bourke v. Beshear, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014)	Heyburn	Injunction	No	Yes	RB	N/A
Bostic v. Rainey, 970 F. Supp. 2d 456 (E.D. Va. 2014)	Allen	Summary Judgment/ Preliminary Injunction	Yes	Yes	Strict (FR); RB (EQ)	N/A
De Leon v. Perry, 975 F. Supp. 2d 632 (W.D. Tex. 2014)	Garcia	Preliminary Injunction	Yes	Yes	Strict (FR); RB (EQ)	N/A
Tanco v. Haslam, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014)	Trauger	Preliminary Injunction	N/A	Yes	RB	N/A
DeBoer v. Snyder, 973 F. Supp. 2d 757 (E.D. Mich. 2014)	Friedman	Trial	No	Yes	RB	N/A
Henry v. Himes, 2014 WL 1418395 (S.D. Ohio Apr. 14, 2014)	Black	Declaratory Judgment/ Injunction	Yes	Yes	Strict (FR); Inter (but fails RB)(EQ)	N/A

Case name & citation	Judge(s)	Procedural Posture	Fundamental Right? (FR)	Equal Protection Analysis (EQ)	Level of Scrutiny	Sex Discrimination
Baskin v. Bogan (I), 2014 WL 1568884 (S.D. Ind. April 18, 2014)	Young	Temporary Restraining Order	N/A	Yes	(likely RB, but never stated)	N/A
Baskin v. Bogan (II), 983 F. Supp. 2d 1021 (S.D. Ind. 2014)	Young	Preliminary Injunction	Yes	Yes	RB	N/A
Wright v. Arkansas, 60CV-13-2662 (Cir. Ct., Pulaski Cty., Ark. May 9, 2014)	Piazza	Summary Judgment	Yes	Yes	Strict (FR); Inter (but fails RB)(EQ)	N/A
Latta v. Otter, 2014 WL 1909999 (D. Idaho May 13, 2014)	Dale	Summary Judgment	Yes	Yes	Strict (FR); Inter (EQ)	No
Geiger v. Kitzhaber, 2014 WL 2054264 (D. Or. May 19, 2014)	McShane	Summary Judgment	N/A	Yes	RB	No
Whitewood v. Wolf, 2014 WL 2058105 (M.D. Pa. May 20, 2014)	Jones	Summary Judgment	Yes	Yes	Strict (FR); Inter (EQ)	N/A
Wolf v. Walker, 2014 WL 2693963 (W.D. Wis. June 13, 2014)	Crabb	Summary Judgment	Yes	Yes	Strict (FR); Inter (EQ)	Yes
Baskin v. Bogan (III), 2014 WL 2884868 (S.D. Ind. June 25, 2014)	Young	Summary Judgment	Yes	Yes	Strict (FR); RB (EQ)	No
Kitchen v. Herbert, 2014 WL 2868044 (10th Cir. June 25, 2014)	Lucero Holmes Kelly	Appeal	Yes	Yes	Strict	N/A
Love v. Beshear, 2014 WL 2957671 (W.D. Ky. July 1, 2014) 221/226	Heyburn	Summary Judgment	N/A (No-dicta)	Yes	Inter (but fails RB)	N/A
Brinkman v. Long, Case No. 13-CV-32572 (Dist. Ct., Adams Cty., Colo. July 9, 2014)	Crabtree	Summary Judgment	Yes	Yes	Strict (FR); RB (EQ)	N/A

Case name & citation	Judge(s)	Procedural Posture	Fundamental Right? (FR)	Equal Protection Analysis (EQ)	Level of Scrutiny	Sex Discrimination
Huntsman v. Heavilin, Case No. 2014-CA-305-K (16th Jud. Cir., Monroe Cty., Fla. July 17, 2014)	Garcia	Summary Judgment	Yes	Yes	Strict (FR); Heightened RB (EQ)	N/A
Bishop v. Smith, 2014 WL 3537847 (10th Cir. July 18, 2014)	Lucero Holmes Kelly	Appeal	Yes	No	Strict	N/A
Burns v. Hickenlooper, 2014 WL 3634834 (D. Colo. July 23, 2014)	Moore	Preliminary Injunction	Yes	No	Strict	N/A
Bostic v. Schaefer, 2014 WL 3702493 (4th Cir. July 28, 2014)	Floyd Gregory Niemeyer	Appeal	Yes	Yes	Strict	N/A

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/ Monte Neil Stewart