Case Nos. 14-35420 & 14-35421

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUSAN LATTA, et al.

Plaintiffs-Appellees,

v.

GOVERNOR C.L. "BUTCH" OTTER,

Defendant-Appellant,

CHRISTOPHER RICH,

Defendant,

And

STATE OF IDAHO,

Intervenor-Defendant

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

DEFENDANT-APPELLANT GOVERNOR C.L. (BUTCH) OTTER'S EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR RECALL OF MANDATE AND STAY

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9th Cir. R. 27-3 Certificate

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Governor Otter further certifies that his motion for a stay pending appeal is an emergency motion requiring "relief … in less than 21 days" to "avoid irreparable harm." The facts so showing are these:

Idaho's federal district court on May 13, 2014 filed its Memorandum Decision and Order invalidating and enjoining enforcement of all of Idaho's statutory and constitution provisions preserving marriage as the union of a man and a woman. The injunction by its terms became effective at 9:00 a.m. on Friday, May 16, 2014, and, on May 14, 2014, the district court denied Governor Otter's

motion for stay refused to stay the injunction pending appeal or even pending efforts to seek a stay from this Court.

On May 15, 2014, this Court pursuant to Appellant Governor Otter's motion under Circuit Rule 27-3 entered an order temporarily staying the district court's permanent injunction in these appeals and, on May 20, 2014, entered an order staying the injunction pending appeal.

On October 7, 2014, this Court entered its opinion in the above captioned matter and affirmed the judgment of the District Court for the District of Idaho. Following the close of business, this Court entered an order for immediate issuance of the mandate. Accordingly, the mandate's issuance dissolves the May 20, 2014 stay.

Before filing his motion, Governor Otter notified counsel for the other parties by email at approximately 5:00 a.m. of this motion. I also emailed them a service copy of the motion.

DATED: October 8, 2014.

By: s/ *Thomas C. Perry*
Lawyers for Defendant-Appellant Governor Otter

EMERGENCY MOTION

Pursuant to Circuit Rule 27-3, Defendant-Appellant Governor C.L. "Butch" Otter moves on an emergency basis for recall of the mandate (Dkt No. 182) and a stay of the Ninth Circuit's October 7, 2014 Opinion (Dkt No. 180) invalidating and enjoining enforcement of all of Idaho's statutory and constitutional provisions preserving marriage as the union of a man and a woman. The three-judge panel issued the mandate in this case on October 7, 2014 at 6:00 pm MDT, and by its terms the mandate will be effective on October 8, 2014 as of 8:00 am MDT. The stay is being sought so that Governor Otter can seek further review of the panel's decision, first by the *en banc* Court, and if that fails, by the Supreme Court.

This emergency motion is made on the grounds that:

1. On three separate occasions since January 2014 the Supreme Court of the United States has issued a stay pending appeal in other cases involving the constitutionality of state laws prohibiting same-sex marriage. In each instance, the full Court issued a stay without published dissent after the Tenth and Fourth Circuits had previously denied a stay.

2. Absent the stay requested by Governor Otter's emergency motion, Idaho will experience the same chaos, confusion, conflict, and uncertainty seen in Utah and Virginia, which resulted when those district court decisions were not stayed pending appeal.
3. The law governing issuance of a stay fully supports Governor Otter's emergency motion.

INTRODUCTION

Although this case bears some similarity to the marriage cases in which the Supreme Court denied review earlier this week, it is fundamentally different in two respects. First, this Court's decision merits review because it exacerbates a deep and mature circuit split on the general question whether discrimination on the basis of sexual orientation triggers some form of "heightened scrutiny." The three-judge panel applied the recent (and unreviewed) holding in *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014), that such discrimination requires heightened scrutiny, and it was on that basis that the court invalidated Idaho's marriage laws. While the Second Circuit has agreed that heightened scrutiny applies to sexual-orientation discrimination generally, this Court's holding on that

general point squarely conflicts with decisions of the First, Fourth, Fifth, Sixth, Eighth, Tenth, Eleventh, District of Columbia, and Federal Circuits.

Second, like previous decisions invalidating state marriage laws, and like Section 3 of the Defense of Marriage Act (DOMA) that was invalidated in *United States* v. *Windsor,* 570 U.S. ___, 133 S.Ct. 2675 (2013), the panel's decision represents an enormous "federal intrusion on state power" to define marriage. *Id.* at 2692. Indeed, this case involves not just a refusal by the federal government to *accommodate* a State's definition of marriage, as in *Windsor,* but an outright *abrogation* of such a definition—by a federal court wielding a federal injunction and acting under authority of the federal Constitution. If *Windsor* and its companion case, *Hollingsworth* v. *Perry*, 570 U.S. ___, 133 S.Ct. 2652 (2013), warranted Supreme Court review, surely there is a likelihood that this case will too. And if DOMA's non-recognition was an impermissible "federal intrusion on state power" to define marriage, surely there is at least a good prospect that a majority of that Court will ultimately hold the panel's equally intrusive heightened scrutiny analysis invalid.

Remarkably, unlike in *Hollingsworth*, 133 S. Ct. at 2652, the Court here has failed to maintain its previously issued stay pending a definitive resolution of this most basic of federalism questions. In a departure from the usual practice under Federal Rule of Appellate Procedure 41.b, which generally withholds issuance of the mandate until seven days after the time for a petition for rehearing expires, the Court accelerated the issuance of its mandate—which, without a stay, will prevent the Supreme Court from having the last word on whether same-sex marriages will occur in Idaho.

Unless stayed, the district court's injunction as actuated by this Court's mandate will compel Idaho officials to begin issuing marriage licenses to same-sex couples beginning at 8:00 a.m. MDT this morning. Each same-sex marriage performed will be contrary to the interests of the State and its citizens in being able to define marriage through ordinary democratic channels. See, *e.g.*, *Schuette*, 2014 WL 1577512, at *15 ("In the federal system States 'respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times.'") (quoting *Bond v. United States*, 564 U.S. ___, 131 S. Ct. 2355, 2364 (2011)). The absence of a stay also undercuts

the State's ability to seek rehearing *en banc* and, if necessary, a writ of certiorari from the Supreme Court. A stay is also necessary to minimize the enormous disruption to the State and its citizens of potentially having to "unwind" hundreds of same-sex marriages should the en banc Court, or the Supreme Court, ultimately conclude, as the Governor strongly maintains, that the panel decision and mandate exceed its constitutional authority.

ARGUMENT

Four factors guide this Court's consideration of Governor Otter's emergency motion for stay pending the exhaustion of all appeals, including review by the Supreme Court: (1) Governor Otter's likelihood of success on the merits; (2) the possibility of irreparable harm absent a stay; (3) the possibility of substantial injury to the other parties if a stay is issued; and (4) the public interest. *See Humane Soc'y of the U.S. v. Gutierrez,* 558 F.3d 896 (9th Cir. 2009) (citing *Winter v. Natural Res. Def. Council,* 555 U.S. 7 (2008)). These factors all point to the same conclusion: This Court should "suspend [ ] judicial alteration of the status quo" on the important issues at stake in this litigation by staying

the Injunction. *See also Nken v. Holder*, 556 U.S. 418, 429 (2009) (quotation marks omitted).

I. Governor Otter Has A Reasonable Likelihood of Succeeding on the Merits.

There is a strong prospect that if the Ninth Circuit grants en banc review, a majority of participating judges will vote to reverse the panel decision—especially its holdings on sexual-orientation discrimination—or that the Supreme Court will do so.

1. The various opinions in *Windsor* itself clearly indicate such a prospect. As previously noted, the majority's decision to invalidate Section 3 of DOMA—which implemented a federal policy of refusing to recognize state laws defining marriage to include same-sex unions—was based in significant part on federalism concerns. For example, the majority emphasized that, "[b]y history and tradition the definition and regulation of marriage … has been treated as being within the authority and realm of the separate States." 133 S.Ct. at 2689-90. Citing this Court's earlier statement in *Williams* v. *North Carolina*, 317 U.S. 287, 298 (1942), that "[e]ach state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its

borders," the *Windsor* majority noted that "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.'" 133 S. Ct. at 2691 (quoting *Williams*, 317 U.S. at 298) (alteration in original). The *Windsor* majority further observed that "[t]he significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for 'when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.'" *Id.* (quoting *Ohio ex rel. Popovici* v. *Agler*, 280 U.S. 379, 383-84 (1930)). And the majority concluded that DOMA's refusal to respect the State's authority to define marriage as it sees fit represented a significant—and in the majority's view, unwarranted—"federal intrusion on state power." *Id.* at 2692.

Here, the panel not only refused to accommodate Idaho's definition for purposes of federal law, it altogether abrogated the decisions of the State and its citizens, acting through every available democratic channel, to define marriage in the traditional way. The

panel decision is therefore a far greater "federal intrusion on state power" than the intrusion invalidated in *Windsor*.

2. Contrary to the panel's ruling, settled equal protection jurisprudence does not invite federal courts to evaluate a state's marriage law by "'examin[ing] its actual purposes and carefully consider[ing] the resulting inequality to ensure that our most fundamental institutions neither send nor reinforce messages of stigma or second-class status.'" *Id.* at 14 (quoting *SmithKline*, 740 F.3d at 483). In establishing a framework that assigns "different levels of scrutiny to different types of classifications," *Clark v. Jeter*, 486 U.S. 456, 461 (1988), the Court has approved three—and only three—levels of scrutiny for equal protection claims. The panel's reliance on *SmithKline* for an indeterminate and virtually standardless form of "heightened" scrutiny seriously departs from this Court's precedents.

SmithKline further erred by announcing the first new suspect class in 40 years without a whisper of guidance from the Supreme Court. See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 756-57 (2011) ("[T]he last classification accorded heightened scrutiny by the Supreme Court was that based on nonmarital parentage

in 1977 ….”). What’s more, *SmithKline* took this momentous step without applying the criteria the Court has identified for recognizing a class as suspect, such as political powerlessness and immutability. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441-42 (1985).

Instead, the heightened scrutiny announced by *SmithKline*, and applied by the panel to Idaho’s marriage laws, rests on a misreading of *Windsor*. Although the *SmithKline* panel asserted that it was “bound by controlling, higher authority” when it adopted “*Windsor’s* heightened scrutiny” or “*Windsor* scrutiny” for cases of sexual orientation discrimination, 740 F.3d at 483, Judge O’Scannlain was right that “nothing in *Windsor* compels the application of heightened scrutiny to this juror selection challenge.” Order, *SmithKline Beecham Corp.* v. *Abbott Laboratories*, No. 11-17357, at 8 (9th Cir. June 24, 2014) (O’Scannlain, J., dissenting from denial of rehearing *en banc*). Still less does *Windsor* require the application of a standardless version of heightened scrutiny to the critical task of determining whether Idaho’s time-honored definition of marriage satisfies the Fourteenth Amendment. Whatever else *Windsor* says, it does not hold that sexual

orientation is a suspect class or that all classifications affecting it qualify for heightened scrutiny.

Readily seeing the direction that *SmithKline* might head, unless corrected, Judge O'Scannlain foresaw that "the panel has produced an opinion with far-reaching—and mischievous—consequences, for the same-sex marriage debate and for the many other laws that may give rise to distinctions based on sexual orientation, without waiting for appropriate guidance from the Supreme Court." *Id.* at 3. Yesterday's decision, which centrally relies on *SmithKline* to justify the application of heightened scrutiny to Idaho's marriage laws, bears out Judge O'Scannlain's prediction, and amply warrants reversal.

3. Even if *SmithKline* articulated a correct standard of heightened scrutiny, however, it should not apply to Idaho's marriage laws because they do not facially discriminate based on sexual orientation. Article III, § 28 of the Idaho Constitution provides that "[a] marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state." If as the panel said the presence of facial discrimination depends on "'the explicit terms of the discrimination,'" slip op. at 13 (quoting *Int'l Union, United Auto,*

Aerospace & Agr. Implement Workers of Am., UAW v. *Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991)), then Idaho law simply does not bear the marks of sexual orientation discrimination. It distinguishes between *male-female* unions and all other pairings—not between *heterosexual* unions and other relationships. Idaho law allows a gay man to marry a woman or a lesbian to marry a man. What determines a person's eligibility to marry someone of a given sex is her own sex, not her sexual orientation.

It follows that plaintiffs' claim of sexual orientation discrimination should have been dismissed, not relied upon as a basis—and here the only basis—for invalidating Idaho's marriage law. There is thus a strong likelihood of success on the merits.

4. Another indication of a good prospect of reversal is that the panel decision conflicts with *Baker* v. *Nelson*, 409 U.S. 810 (1972). There, the Supreme Court unanimously dismissed, for want of a substantial federal question, an appeal from the Minnesota Supreme Court squarely presenting the question of whether a State's refusal to recognize same-sex relationships as marriages violates the Due Process or Equal Protection Clauses of the Fourteenth Amendment. *Id.*; see

also *Baker* v. *Nelson*, No. 71-1027, Jurisdictional Statement at 3 (Oct. Term 1972); *Baker* v. *Nelson*, 191 N.W.2d 185 (Minn. 1971). Dismissal of the appeal in *Baker* was a decision on the merits that constitutes "controlling precedent unless and until re-examined by *this Court*" – i.e., the Supreme Court. *Tully* v. *Griffin, Inc.*, 429 U.S. 68, 74 (1976) (emphasis added).

Yet the panel refused to follow *Baker*, believing it had been substantially undercut by the majority in *Windsor*. See Decision at 17. Putting aside the fact that *Baker* wasn't even discussed by the *Windsor* majority, the panel's analysis overlooks that the precise issue presented in *Windsor*—whether the *federal* government can refuse to recognize same-sex marriages performed in States where such marriages are lawful—was very different from the question presented in *Baker*, *i.e.*, whether a *State* may constitutionally refuse to *authorize* same-sex marriages under State law. Because the issues presented were different, the Supreme Court simply had no occasion to address whether *Baker* was controlling or even persuasive authority in *Windsor*; it obviously was not.

In this case, however, *Baker* will be highly relevant because it decided the very issue presented here. To be sure, a dismissal of the sort at issue in *Baker* "is not here 'of the same precedential value as would be an opinion of this Court treating the question on the merits.'" *Tully*, 429 U.S. at 74 (quoting *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974)). But that implies, and practice confirms, that even in the Supreme Court such a dismissal remains of *some* "precedential value." Accordingly, even if the logic of *Windsor* (or other decisions of this Court) suggested an opposite outcome—which it does not—there is at least a reasonable prospect that a majority of this Court sitting en banc will elect to follow *Baker*, because of its precedential value if nothing else. And that outcome is even more likely given (a) the *Windsor* majority's emphasis on respect for State authority over marriage, and (b) the district court's pointed (and correct) refusal to find that Idaho's marriage laws (in contrast with DOMA) are rooted in animus toward gays and lesbians.

A final reason to believe there is a strong likelihood this Court or the Supreme Court will ultimately invalidate the district court's injunction is the large and growing body of social science research

contradicting the central premise of the panel's equal protection holdings.[1] That research—some of it cited in Justice Alito's *Windsor* opinion, 133 S. Ct. at 2715 & n.6 (Alito, J., dissenting)—confirms what the State, its citizens, and indeed virtually all of society have until recently believed about the importance of providing unique encouragement and protection for man-woman unions: (a) that children do best across a range of outcomes when they are raised by their father and mother (biological or adoptive), living together in a committed relationship, and (b) that limiting the definition of marriage to man-woman unions, though it cannot guarantee that outcome, substantially increases the *likelihood* that children will be raised in such an arrangement. Indeed, these are the core "legislative facts" on which legislatures and voters throughout the Nation have relied in repeatedly limiting marriage to man-woman unions. And even when contravened by other evidence, they are not subject to second-guessing by the

[1] In citing this research we do not mean to suggest that the State of Idaho bears the burden of proving that its views on marriage are correct or sound. To the contrary, a government has no duty to produce evidence to sustain the rationality of a statutory classification. *Heller* v. *Doe*, 509 U.S. 312, 320-21 (1993). And indeed "a legislative choice … may be based on rational speculation unsupported by evidence or empirical data." *FCC* v. *Beach Commc'ns*, 508 U.S. 307, 315 (1993). The research discussed here briefly sketches what Idaho and its citizens could rationally believe about the benefits of limiting marriage to man-woman unions.

judiciary without a showing that no rational person could believe them. See, *e.g.*, *Vance* v. *Bradley*, 440 U.S. 93, 112 (1979) ("It makes no difference that the [legislative] facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety.") (internal quotation marks omitted)).

Accordingly, there is a good probability that this Court or the Supreme Court will avoid that result and, in so doing, reject the panel's analysis and reverse its judgment.

II. Irreparable Harm Will Result Absent a Stay.

Without a stay, issuance of the mandate will impose irreparable harm on Idaho and its citizens. The Supreme Court has repeatedly acknowledged that "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *accord Maryland* v. *King*, 567 U.S. ___, 133 S.Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (granting a stay); *Planned Parenthood of Greater Texas Surgical Health Servs.* v. *Abbott*, 571 U.S. ___, 134 S.Ct. 506, 506 (2013)

(Scalia, J., concurring in denial of application to vacate stay). That same principle supports a finding of irreparable injury in this case. For the district court's order—now affirmed by a panel of this Court—enjoins the State from enforcing not only an ordinary statute, but a constitutional provision approved by the people of Idaho in the core exercise of their sovereignty.

1. That States have a powerful interest in controlling the definition of marriage within their borders is indisputable. Indeed, the *Windsor* majority acknowledged that "'[e]ach state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders,'" *Windsor*, 133 S.Ct. at 2691 (quoting *Williams*, 317 U.S. at 298), and emphasized that "[t]he recognition of civil marriages is *central* to state domestic relations law applicable to its residents and citizens." *Id.* (emphasis added). Every single marriage performed between persons of the same sex as a result of the district court's injunction—and in defiance of Idaho law—is thus an affront to the sovereignty of the State and its people. Each such marriage contravenes the State's sovereign interest in controlling "the marital status of persons domiciled within its borders." *Id.*

Idaho's sovereign interest in determining who is eligible for a marriage license is bolstered by the principle of federalism, which affirms the State's constitutional authority over the entire field of family relations. As the *Windsor* majority explained, "'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 (quoting *Sosna* v. *Iowa*, 419 U.S. 393, 404 (1975)) (emphasis added). The panel's decision breaches the principle of federalism by exerting federal control over the definition of marriage—a matter within Idaho's "virtually exclusive province." *Id.*

A federal intrusion of this magnitude not only contravenes the State's sovereignty; it also infringes the right of Idahoans to government by consent within our federal system. Constitutional first principles dictate as much:

> The Constitution is based on a theory of original, and continuing, consent of the governed. Their consent depends on the understanding that the Constitution has established the federal structure, which grants the citizen the protection of two governments, the Nation and the State. Each sovereign must respect the proper sphere of the other, for the citizen has rights and duties as to both.

United States v. *Lara*, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring in the judgment); see also *Bond*, 131 S. Ct. at 2364 ("When government acts in excess of its lawful powers" under our system of federalism, the "liberty [of the individual] is at stake."). Here, the panel's extraordinary decision to overturn Idaho's marriage laws—and its refusal even to stay its order pending further review—places in jeopardy the democratic right of Idahoans to choose for themselves what marriage will mean in their community.

2. Overturning Idaho's marriage laws also has grave practical consequences. Unless a stay is granted immediately, many marriage licenses will be issued to same-sex couples and the State would then confront the thorny problem of whether and how to unwind the marital status of same-sex unions if (as the Governor strongly contends) the panel decision is ultimately reversed. Considerable administrative and financial costs will be incurred to resolve that problem, and the State's burden will only increase as the number of marriage licenses issued to same-sex couples continues to grow. See *Legalization Assistance Project*, 510 U.S. at 1305-06 (O'Connor, J., in chambers) (citing the "considerable administrative burden" on the government as a reason to

grant the requested stay). Only a stay can prevent that indefensible result.

The State's responsibility for the welfare of *all* its citizens makes it relevant, as well, that Respondents and any other same-sex couples who choose to marry before this Court resolves this dispute on the merits will likely be irreparably harmed without a stay. They and their children will likely suffer dignitary and financial losses from the invalidation of their marriages if appellate review affirms the validity of Idaho's marriage laws. The State thus seeks a stay, in part, to avoid needless injuries to same-sex couples and their families that would follow if the marriage licenses that they obtain as a result of the panel's decision are ultimately found invalid—simply because this Court's mandate was not stayed pending final resolution of the central legal issues in this case.

In short, it cannot be seriously contested that the State will suffer irreparable harm from the district court's nullification of Idaho's *constitutional* definition of marriage absent a stay, given that such harm repeatedly has been found when a federal court enjoins the enforcement of ordinary statutes. See *New Motor Vehicle Bd.*, 434 U.S.

at 1345 (relocation of auto dealerships); *Maryland*, 133 S.Ct. at 5 (collection of DNA samples from arrestees); *Planned Parenthood*, 134 S. Ct. at 507 (Breyer, J., dissenting from denial of application to vacate the stay) (restrictions on physicians' eligibility to perform abortions).

III. A Stay Will Not Subject Plaintiffs to Substantial Harm.

Against all this, Respondents can be expected to recite the rule that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976). That rule is inapposite here. While violation of an *established* constitutional right certainly inflicts irreparable harm, that doctrine does not apply where, as here, Respondents seek to establish a novel constitutional right through litigation. Because neither constitutional text nor any decision by a court of last resort yet establishes their sought-after federal right to same-sex marriage, Respondents suffer no constitutional injury from awaiting a final judicial determination of their claims before receiving the marriage licenses they seek. See *Rostker*, 448 U.S. at 1310 (reasoning that the "inconvenience" of compelling Respondents to register for the draft while their constitutional challenge is finally determined does not

"outweigh[ ] the gravity of the harm" to the government "should the stay requested be refused").

Nor, moreover, can Respondents change the state of the law by obtaining marriage licenses on the yet-untested authority of the panel's decision. Our constitutional tradition relies on the certainty and regularity of formal constitutional amendment, or judicial decision-making by appellate courts, which would be subverted by deriving a novel constitutional right to same-sex marriage from the number of people who assert it or the number of days its exercise goes unchecked. See George Washington, *Farewell Address* (Sept. 19, 1796), *reprinted in* GEORGE WASHINGTON: A COLLECTION 518 (W.B. Allen ed., 1988) ("The basis of our political systems is the right of the people to make and to alter their Constitutions of Government. But the Constitution which at any time exists, 'till changed by an explicit and authentic act of the whole People, is sacredly obligatory upon all.'").

IV. The Public Interest Weighs in Favor of a Stay.

The public has an overwhelming interest in maintaining the status quo pending a regular and orderly review of Respondents' claims by the en banc Court of Appeals and this Court. See *Hollingsworth*, 558

U.S. at 197 (granting a stay, in part, because its absence "could compromise the orderly, decorous, rational traditions that courts rely upon to ensure the integrity of their own judgments"). A stay will serve the public interest by preserving the Court's ability to address matters of vital national importance *before* irreparable injury is inflicted on the State of Idaho and its citizens.

Further, by reaffirming Idaho's commitment to man-woman marriage in 2006, the people of Idaho have declared clearly and consistently that the public interest lies with preserving the current marriage institution. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009) ("[T]he district court should give due weight to the serious consideration of the public interest in this case that has already been undertaken by the responsible state officials in Washington, who unanimously passed the rules that are the subject of this appeal."); *Golden Gate Rest. Ass'n*, 512 F.3d 1112, 1126-1127 ("[O]ur consideration of the public interest is constrained in this case, for the responsible officials in San Francisco have already considered that interest. Their conclusion is manifested in the Ordinance that is the subject of this appeal.").

The people of Idaho have expressed their "concerns and beliefs about this sensitive area" and have "defined what marriage is," *id.* at 680—namely, as the "union of a man and a woman." In short, there is nothing in the Fourteenth Amendment that compels this Court to second-guess the people of Idaho's considered judgment of the public interest.

CONCLUSION

This Court should recall the mandate and issue a stay pending the disposition of a timely petition for rehearing and rehearing en banc. Otherwise, this Court should stay its mandate for a reasonable period to allow Governor Otter to seek in a fair and orderly way a stay from the Circuit Justice or the full Supreme Court.

DATED: October 8, 2014

By /s *Thomas C. Perry*
Lawyers for Defendant-Appellant Governor Otter

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 8, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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