No. 14A374

In the Supreme Court of the United States

C.L. "Butch" Otter, in his official capacity as Governor of Idaho; Christopher Rich, in his official capacity of Recorder of Ada County, Idaho; and the State of Idaho,

Applicants,

v.

Susan Latta, Traci Ehlers, Lori Watsen, Sharene Watsen, Shelia Robertson, Andrea Altmayer, Amber Beierle, and Rachael Robertson,

Respondents.

RESPONDENTS' OPPOSITION TO EMERGENCY APPLICATION OF GOVERNOR C.L. "BUTCH" OTTER, ET AL. TO STAY MANDATE PENDING DISPOSITION OF APPLICATIONS FOR STAY PENDING REHEARING AND CERTIORARI

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INTRODUCTION

Applicants cannot meet the high standard for the extraordinary relief they seek. The judgment below is in accord with that of every court of appeals that has decided, following this Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), whether a State's prohibition on marriage by same-sex couples and its refusal to recognize such marriages validly performed elsewhere violate the Equal Protection Clause of the Fourteenth Amendment.

Applicants cannot "establish[] that four Members of the Court will consider the issue sufficiently meritorious to grant certiorari." *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers). On Monday of this week, the Court denied seven petitions for writs of certiorari seeking review of judgments from three courts of appeals that together held that five States' prohibitions on marriages by same-sex couples violate those couples' Fourteenth Amendment rights. Absent any intervening development, there is no reason to believe that applicants' contemplated petition for a writ of certiorari—which, absent such a development, respondents plan to oppose—will meet any different fate.

Applicants likewise cannot establish that, even if certiorari were granted, there would be "a fair prospect that five Justices will conclude that the case was erroneously decided below." *Lucas*, 486 U.S. at 1304. Every court of appeals to have addressed the question presented after *Windsor* has reviewed this Court's precedents and reached the same result as the Ninth Circuit. Applicants fail to demonstrate that the remarkable unanimity among the courts of appeals is incorrect.

Nor does applicants' invocation of an abstract "affront to the sovereignty of the State" (Application at 19) amount to the required showing of irreparable injury. *Cf. Lucas*, 486 U.S. at 1304. Even were such an asserted harm to the State cognizable, it would be decidedly outweighed by the harm to the respondent same-sex couples from the grant of a stay. *See ibid.* If a stay issues, respondents will continue to be denied the right to enter into or have recognized the "most important relation in life," *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (internal quotation marks omitted); they will continue to lack critical legal protections for their families, such as spousal-visitation and medical-decision-making rights in hospitals, that different-sex couples have long enjoyed; and their children will continue to be deprived of the security of knowing that their parents' relationships are recognized by the State where they live.

A stay would visit all those harms on respondents, notwithstanding that this Court's denials of certiorari petitions earlier in the week had the effect of allowing enforcement of judgments freeing similarly situated same-sex couples and their children from such harms in other States. Applicants point to nothing that would justify issuance of a stay in this case only days after the Court denied every other certiorari petition presenting the same claim, thus dissolving all stays in every other court of appeals and allowing the judgments of those courts to take effect. There is no relevant difference between this case and those that would warrant any different outcome here.

The application should be denied.

BACKGROUND

1. In 1996, the Idaho legislature amended Idaho Code § 32-201 to expressly limit marriage to different-sex couples. 1995 Idaho Sess. Laws ch. 104, § 3 (effective Jan. 1, 1996). The legislature also amended Idaho Code § 32-209 to create the first express, categorical exception to Idaho's longstanding tradition of recognizing lawful marriages from other jurisdictions. 1996 Idaho Sess. Laws ch. 331, § 1. The amendment carved out an exception for marriages that "violate the public policy of this state," which are defined to include "same-sex marriages, and marriages entered into under the laws of another state or country with the intent to evade the prohibitions of the marriage laws of this state." Idaho Code § 32-209. In 2006, the Idaho Constitution was amended to provide that "[a] marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state." Idaho Const. art. III, § 28.

2. Respondents are Andrea Altmayer & Shelia Robertson and Amber Beierle & Rachael Robertson, two committed same-sex couples who wish to be married in their home state of Idaho, as well as Susan Latta & Traci Ehlers and Lori Watsen & Sharene Watsen, two same-sex couples married outside of Idaho but whom Idaho refuses to recognize as married. Respondents include a public-school teacher of the deaf, a small-business owner, and an Iraq War veteran. They have formed families, contributed to their professions and communities, and chosen Idaho as their home. Lori Watsen & Sharene Watsen and Andrea Altmayer & Shelia Robertson are parents, and Susan Latta & Traci Ehlers are grandparents. As the court of appeals observed, "[l]ike all human beings, [respondents'] lives are

given greater meaning by their intimate, loving, committed relationships with their partners and children." C.A. Slip Op. at 11-12.

Yet because they are of the same sex, and for no other reason, Idaho law bars respondents from marrying or from having their out-of-state marriages recognized. "The common vocabulary of family life and belonging that others may take for granted is * * * denied to them—as are all of the concrete legal rights, responsibilities, and financial benefits afforded opposite-sex married couples by state and federal law—merely because of their sexual orientation." *Id.* at 12 (alterations, footnote, and internal quotation marks omitted).

3. Respondents filed suit under 42 U.S.C. § 1983, alleging that Idaho's statutory and constitutional marriage ban and anti-recognition laws violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The district court granted respondents' motion for summary judgment and denied applicants' motion to dismiss and motion for summary judgment. *Latta v. Otter*, No. 1:13-cv-00482-CWD, 2014 U.S. Dist. LEXIS 66417 (D. Idaho May 13, 2014).

The district court concluded that Idaho's laws discriminate on the basis of sexual orientation and deprive respondents of equal protection of the laws. *Id.* at *41-82. The district court also ruled that the freedom to marry the person of one's choice is a fundamental liberty interest guaranteed by the Due Process Clause of the Fourteenth Amendment, and that the challenged laws impermissibly deprive respondents of that right. *Id.* at *28-41.

The district court found that "[e]ach of these laws unambiguously expresses a singular purpose—to exclude same-sex couples from civil marriage in Idaho." *Id.* at *55. It concluded that the laws fail under a heightened level of scrutiny, as required by the court of appeals' holding in *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 484 (9th Cir. 2014), and, in the alternative, under the less-stringent rational-basis standard. *Id.* at *22, *81. The district court analyzed each of applicants' stated rationales, including promoting child welfare, focusing resources on couples with biological procreative capacity, federalism, and accommodating religious concerns. The court concluded that none of those interests saved the laws from constitutional infirmity. *Id.* at *41-82.

The district court permanently enjoined enforcement of all Idaho laws and regulations "to the extent they do not recognize same-sex marriages validly contracted outside Idaho or prohibit otherwise qualified same-sex couples from marrying in Idaho." *Id.* at *84. The injunction was stayed pending appeal.

4. The court of appeals unanimously affirmed the district court. The court of appeals held that the Idaho laws at issue violate the Equal Protection Clause of the Fourteenth Amendment because they deny lesbians and gay men "who wish to marry persons of the same sex a right they afford to individuals who wish to marry persons of the opposite sex" and do not survive heightened scrutiny. C.A. Slip Op. at 6.

The court of appeals rejected applicants' argument that this Court's summary dismissal "for want of a substantial federal question" in *Baker v. Nelson*, 409 U.S.

810, 810 (1972), dictated a result in their favor. C.A. Slip Op. at 9. The court of appeals explained that "[s]uch summary dismissals 'prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions,'" *id.* at 10 (quoting *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam)), but only "until 'doctrinal developments indicate otherwise,'" *ibid.* (quoting *Hicks v. Miranda*, 422 U.S. 332, 343-344 (1975)). The court reasoned that subsequent decisions "make clear that the claims before us present substantial federal questions." *Id.* at 10-11 (citing *Windsor*, 133 S. Ct. at 2694-2696; *Lawrence v. Texas*, 539 U.S. 558, 578-579 (2003); *Romer v. Evans*, 517 U.S. 620, 631-634 (1996)). The court of appeals also noted that other circuits uniformly agreed with this conclusion. *Id.* at 11.

Based on circuit precedent, the court of appeals applied a heightened level of scrutiny because the Idaho laws at issue discriminate on the basis of sexual orientation. *Id.* at 13-15 (citing *SmithKline*, 740 F.3d at 474). The court of appeals rejected applicants' argument that heightened-scrutiny review was inappropriate on the asserted ground that the Idaho laws discriminate on the basis of procreative capacity rather than sexual orientation. *Id.* at 13. The court explained that the laws at issue distinguish "on their face between opposite-sex couples, who are permitted to marry and whose out-of-state marriages are recognized, and same-sex couples, who are not permitted to marry and whose marriages are not recognized." *Ibid.*

The court of appeals likewise rejected applicants' proffered justification for Idaho's discrimination, namely, that the laws in question "promote child welfare by encouraging optimal parenting." *Id.* at 15. The court of appeals was unpersuaded by applicants' argument that permitting and recognizing only different-sex marriages ensures that as many children as possible are reared by their married biological mothers and fathers. Idaho gives "marriage licenses to many opposite-sex couples who cannot or will not reproduce * * * but not to same-sex couples who already have children or are in the process of having or adopting them." *Id.* at 23-24. In denying marriage "benefits to people who already have children," Idaho "materially harm[s] and demean[s] same-sex couples and their children" by "[d]enying children resources and stigmatizing their families." *Id.* at 25. Moreover, the court of appeals recognized that there are more-tailored, non-discriminatory ways of achieving applicant's purported goal other than Idaho's "grossly over- and under-inclusive" method. *Id.* at 23.

The court of appeals also rejected applicants' argument that the State constitutionally may use discriminatory laws to send its citizens a "message" that the ideal form of parenting is having children reared by parents of different sexes. *Id.* at 33. The court reasoned that "*Windsor* makes clear that the defendants' explicit desire to express a preference for opposite-sex couples over same-sex couples is a categorically inadequate justification for discrimination." *Id.* at 26. Moreover, the fact that Idaho allows adoption by same-sex couples makes clear that applicants' purported justification "is simply an ill-reasoned excuse for

unconstitutional discrimination." *Id.* at 27. Indeed, the "Idaho Supreme Court has determined that 'sexual orientation [is] wholly irrelevant' to a person's fitness or ability to adopt children." *Ibid.* (alteration in original) (quoting *In re Adoption of Doe*, 326 P.3d 347, 353 (Idaho 2014)). Idaho laws "allow same-sex couples to adopt children" but then unconstitutionally "label their families as second-class because the adoptive parents are of the same sex." *Id.* at 28.

The court of appeals also rejected two additional arguments. First, the court found unconvincing applicants' assertion that each State may, through the democratic process, regulate marriage as it sees fit. "As *Windsor* itself made clear, 'state laws defining and regulating marriage, of course, must respect the constitutional rights of persons.'" *Id.* at 29 (quoting *Windsor*, 133 S. Ct. at 2691). Second, the court of appeals rejected applicants' argument that allowing marriage by same-sex couples would threaten religious liberties. The court explained that whether religious institutions and small businesses must recognize the marriages of same-sex couples are questions that were not before the court. *Id.* at 30.

The court of appeals issued its mandate the same day it issued its opinion, October 7, 2014. The next morning, October 8, applicants filed in the court of appeals emergency motions to recall the mandate and for a stay pending disposition of a petition for rehearing and rehearing en banc.

5. On October 8, applicants also filed an emergency application in this Court for a stay of the mandate pending (1) disposition of applicants' pending motions in the court of appeals and (2) "if necessary," disposition of applicants'

apparently forthcoming "full application" in this Court for a stay pending disposition of a petition for a writ of certiorari. Application at 1. Justice Kennedy ordered that the mandate be stayed pending further order and directing that a response to the application be filed on or before October 9, 2014, by 5:00 p.m.

6. Subsequently, on October 8, the court of appeals issued an order directing that the mandate be recalled pending further order of this Court or the court of appeals.

REASONS THE STAY SHOULD BE DENIED

To warrant a stay of the mandate, an "applicant must demonstrate (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction; (2) a fair prospect that a majority of the Court will conclude that the decision below was erroneous; and (3) a likelihood that irreparable harm [will] result from the denial of a stay." *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (internal quotation marks omitted). Justices considering such applications also may "'balance the equities'—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Ibid.* "Denial of such in-chambers stay applications is the norm; relief is granted only in extraordinary cases." *Ibid.* (internal quotation marks omitted).

I. This Court Is Unlikely To Grant Review In This Case

There is no "reasonable probability" that certiorari will be granted in this case. *Conkright*, 556 U.S. at 1402. Just days ago, this Court denied seven petitions for writs of certiorari presenting the same question that would be presented here:

whether States may, consistent with the Constitution, preclude same-sex couples from marrying and refuse to recognize same-sex couples' marriages lawfully entered into in other States.[1] In each petition, the parties were well represented, and the respondents acquiesced in this Court's review. Those petitions presented suitable vehicles for this Court to decide the constitutional questions, but none of those petitions attracted the votes of four Justices. There is no reasonable probability that a petition in this case would fare any differently.

Indeed, since this Court's decision in *Windsor*, there is no conflict among the courts of appeals on the unconstitutionality of state laws barring marriage by same-sex couples. With striking uniformity, the Fourth, Seventh, and Tenth Circuits have ruled that the Fourteenth Amendment prohibits States from enacting such laws. *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir.), *cert. denied*, Nos. 14-153, 14-225, 14-251 (U.S. Oct. 6, 2014); *Baskin v. Bogan*, --- F.3d ---, Nos. 14-2386, 14-2387, 14-2388, 14-2526, 2014 U.S. App. LEXIS 17294 (7th Cir. Sept. 4, 2014), *cert. denied*, Nos. 14-277, 14-278 (U.S. Oct. 6, 2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir.), *cert. denied*, Nos. 14-124, 14-136 (U.S. Oct. 6, 2014). The decision below continues that unbroken line.

Applicants' attempt to distinguish their potential certiorari petition from those already denied is unavailing. Applicants argue that the courts of appeals are divided on the subsidiary issue of the level of scrutiny applicable to laws that make

[1] *Herbert v. Kitchen*, No. 14-124 (U.S. Oct. 6, 2014); *Smith v. Bishop*, No. 14-136 (U.S. Oct. 6, 2014); *Rainey v. Bostic*, No. 14-153 (U.S. Oct. 6, 2014); *Schaefer v. Bostic*, No. 14-225 (U.S. Oct. 6, 2014); *McQuigg v. Bostic*, No. 14-251 (U.S. Oct. 6, 2014); *Bogan v. Baskin*, No. 14-277 (U.S. Oct. 6, 2014); *Walker v. Wolf*, No. 14-278 (U.S. Oct. 6, 2014).

classifications among individuals based on their sexual orientation. Application at 9-10. "This Court 'reviews judgments, not statements in opinions.'" *California v. Rooney*, 483 U.S. 307, 311 (1987) (quoting *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956)). As noted, no court of appeals since *Windsor* has held that state marriage laws discriminating against same-sex couples withstand constitutional scrutiny—no matter the standard of review used.

In any event, the same subsidiary standard-of-review issue that applicants claim is distinguishing was cited as a basis for review in the certiorari petitions denied earlier this week.[2] The court of appeals' ruling here thus does nothing to alter the landscape that existed at the time this Court denied certiorari in the other marriage cases. The court of appeals simply applied its governing precedent (C.A. Slip Op. at 13-15 (applying *SmithKline*, 740 F.3d at 474))—precedent that was cited to this Court in the briefing of the petitions just denied.[3] Also not new is applicants' heavy reliance on the Eighth Circuit's pre-*Windsor* decision in *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006). Application at 10-11. Six of the

[2] Brief for Respondents at 16-17, *Herbert v. Kitchen*, No. 14-124 (U.S. Aug. 28, 2014); Reply Brief for Petitioners at 5-6 & n.1, *Herbert v. Kitchen*, No. 14-124 (U.S. Sept. 10, 2014); Petition for Writ of Certiorari at 25-30, *Rainey v. Bostic*, No. 14-153 (U.S. Aug. 8, 2014); Response Brief of Bostic, et al. at 26-27, *Rainey v. Bostic*, No. 14-153 (U.S. Aug. 27, 2014); Response Brief of Bostic, et al. at 26-28, *Schaefer v. Bostic*, No. 14-225 (U.S. Sept. 5, 2014); Response Brief of Bostic, et al. at 27-28, *McQuigg v. Bostic*, No. 14-251 (U.S. Sept. 5, 2014).

[3] Brief for Respondents at 17, *Herbert v. Kitchen*, No. 14-124 (U.S. Aug. 28, 2014); Brief for Respondents at 27 & n.19, *Smith v. Bishop*, No. 14-136 (U.S. Aug. 27, 2014); Petition for Writ of Certiorari at 9, 14, 16 n.14, 27, *Rainey v. Bostic*, No. 14-153 (U.S. Aug. 8, 2014); Response to Petition for Writ of Certiorari at 7, *Bogan v. Baskin*, No. 14-277 (U.S. Sept. 9, 2014).

seven petitions denied on Monday asserted the same purported conflict with *Bruning*.[4] Yet the Court decided not to grant review of any of those petitions.

Moreover, all nine of the decisions to which applicants point for rational-basis scrutiny predate *Windsor*. Application at 10 & n.2.[5] All post-*Windsor* court of appeals decisions (including by two courts that applicants count on their side of the purported conflict) dealing with the constitutionality of state marriage bans have applied heightened scrutiny—reasoning either that gay men and lesbians are a protected class or that marriage is a fundamental right. C.A. Slip Op. 13-15; *Kitchen*, 755 F.3d at 1213; *Bishop v. Smith*, 760 F.3d 1070, 1079-1080 & n.4 (10th Cir. 2014); *Bostic*, 760 F.3d at 377; *Baskin*, 2014 U.S. App. LEXIS 17294, at *19-23. Three courts of appeals expressly cited *Windsor*'s rationale as a reason to shift from rational-basis review to heightened scrutiny. C.A. Slip Op. 13-15; *Kitchen*, 755 F.3d at 1213; *Bostic*, 760 F.3d at 377. Given this post-*Windsor* uniformity, there is no reasonable probability this Court will grant applicants' planned petition on the subsidiary level-of-deference question.

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[4] Petition for Writ of Certiorari at 3, 20, *Herbert v. Kitchen*, No. 14-124 (U.S. Aug. 5, 2014); Petition for Writ of Certiorari at 10, 21, *Smith v. Bishop*, No. 14-136 (U.S. Aug. 6, 2014); Petition for Writ of Certiorari at 21, *Rainey v. Bostic*, No. 14-153 (U.S. Aug. 8, 2014); Petition for Writ of Certiorari at 13 & n.11, *Schaefer v. Bostic*, No. 14-225 (U.S. Aug. 22, 2014); Petition for Writ of Certiorari at 17, *McQuigg v. Bostic*, No. 14-251 (U.S. Aug. 29, 2014); Petition for Writ of Certiorari at 7, *Bogan v. Baskin*, No. 14-277 (U.S. Sept. 9, 2014).

[5] *Cook v. Gates*, 528 F.3d 42, 61-62 (1st Cir. 2008); *Thomasson v. Perry*, 80 F.3d 915, 927-928 (4th Cir. 1996); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012); *Bruning*, 455 F.3d at 866-867; *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113 (10th Cir. 2008); *Lofton v. Secretary of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989).

II. Even If Review Were Granted, Applicants Would Not Likely Prevail

Applicants likewise have failed to meet their burden of showing a fair prospect that a majority of the Court would reverse the decision below, even if review were granted. *Conkright*, 556 U.S. at 1402.

1. The court of appeals correctly held that, in excluding same-sex couples from marriage, Idaho law denies them equal protection of the laws by discriminating against them on the basis of their sexual orientation. "[T]he principal purpose and the necessary effect" of Idaho's marriage ban are "to impose inequality" on same-sex couples. *Windsor*, 133 S. Ct. at 2694-2695. Because of their inability to marry, these couples "have their lives burdened, by reason of government decree, in visible and public ways * * * from the mundane to the profound." *Id.* at 2694. In addition to economic and other practical harms, the marriage ban inflicts severe stigma and dignitary harms, "demean[ing] the couple, whose moral and sexual choices the Constitution protects," and "humiliat[ing] * * * children now being raised by same-sex couples." *Ibid.* The court of appeals correctly concluded that this discriminatory treatment could not be justified on any of the grounds offered by applicants; indeed, applicants relied solely on "speculation and conclusory assertions" of "little merit." C.A. Slip Op. at 33.

2. Applicants offer five reasons that the judgment below purportedly would be reversed if the petition were granted. None is persuasive.

a. Relying on *Windsor*, applicants argue that federalism concerns allow each State to define marriage as it sees fit. Application at 11-13. But as the court of appeals noted (C.A. Slip Op. at 29), *Windsor* emphasized that state "laws defining

and regulating marriage, of course, must respect the constitutional rights of persons." 133 S. Ct. at 2691 (citing *Loving v. Virginia*, 388 U.S. 1 (1967)). States may regulate domestic relations, but only "subject to those [constitutional] guarantees." *Ibid.*; *id.* at 2692 (noting the States' "interest in defining and regulating the marital relation, *subject to constitutional guarantees*" (emphasis added)). In *Windsor*, this Court discussed federalism principles in the context of the federal government's failure to respect the state of New York's decision to permit same-sex couples to marry. *Id.* at 2692-2693. Nothing in *Windsor* suggests that federalism concerns trump the constitutional limitations on a State's power to regulate marriage. Were it otherwise, *Loving* might have been decided differently.

b. Applicants argue that the court of appeals incorrectly determined that heightened scrutiny rather than rational-basis review applies. Application at 13-15. Applicants fail to demonstrate that Idaho's discriminatory laws could survive under any standard of review. In any event, application of heightened scrutiny is correct, for at least three reasons.

First, under the factors used by this Court to identify suspect classes, laws that classify based on sexual orientation are constitutionally suspect. *See, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 684-687 (1973) (enumerating factors). Among other reasons, such classifications are suspect because our Nation has a "long and unfortunate history" of discrimination against lesbians and gay men; sexual orientation is an "immutable characteristic" central to one's identity; and one's sexual orientation "bears no relation to ability to perform or contribute to

society." *Id.* at 684, 686; *see Baskin*, 2014 U.S. App. LEXIS 17294, at *21-26. Second, as the Fourth and Tenth Circuits have held, heightened scrutiny is warranted because the state laws at issue severely interfere with a fundamental right, the right to marry. *Bostic*, 760 F.3d at 375-377; *Kitchen*, 755 F.3d at 1208-1218. Third, as explained in Judge Berzon's concurring opinion below, state laws excluding same-sex couples from marriage "are classifications on the basis of gender" and warrant heightened scrutiny for that reason. C.A. Slip Op. at 1 (Berzon, J., concurring). No post-*Windsor* decision from a court of appeals disagrees with application of heightened scrutiny to laws prohibiting marriage by same-sex couples.

Nor does *Windsor* suggest that courts of appeals must apply highly deferential "rational basis" review. *Contra* Application at 14. This Court in *Windsor* emphasized that the Defense of Marriage Act ("DOMA") "require[d] careful consideration." 133 S. Ct. at 2693. Rather than simply give deference to legislative judgments—a hallmark of rational-basis review—this Court held that DOMA was unconstitutional because "the principal purpose and the necessary effect of this law are to demean those persons" who are in a lawful marriage, and "no legitimate purpose overcomes the purpose and effect to disparage and to injure" those persons. *Windsor*, 133 S. Ct. at 2695-2696.

c. Applicants argue that the Idaho laws in question do not discriminate based on sexual orientation (and thus should not be subjected to heightened scrutiny) because they "allow[] a gay man to marry a woman or a lesbian to marry a

man." Application at 15-16. This argument is as unsound as it is demeaning to lesbians and gay men. Idaho's laws allow individuals who are innately attracted to members of a different sex to marry the person of their choosing. Gay men and lesbians are forbidden from doing so. This Court previously has concluded that laws that target same-sex couples discriminate based on sexual orientation. *See Windsor*, 133 S. Ct. at 2693 (noting that DOMA's discrimination against married same-sex couples reflects "'disapproval of homosexuality'" (quoting H.R. Rep. No. 104-664, at 16 (1996))); *see also Lawrence*, 539 U.S. at 575 (law criminalizing same-sex intimacy targets "homosexual persons"); *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2990 (2010) (rule excluding individuals from group membership based on same-sex intimacy discriminates on the basis of sexual orientation).

d. Applicants assert that the decision below impermissibly fails to follow this Court's dismissal for want of a substantial federal question in *Baker v. Nelson*, 409 U.S. 810. This same argument also was presented in four of the recently denied certiorari petitions.[6] Every court of appeals recently to have examined this question has squarely rejected that argument. *Kitchen*, 755 F.3d at 1204-1208; *Bostic*, 760 F.3d at 372-375; *Baskin*, 2014 U.S. App. LEXIS 17294, at *34-35; C.A. Slip Op. at 9-11. In the 40 years since *Baker* was decided, the decision has lost any precedential force in light of the developments in this Court's jurisprudence, including *Romer*,

[6] Petition for Writ of Certiorari at 4, 19, *Herbert v. Kitchen*, No. 14-124 (U.S. Aug. 5, 2014); Petition for Writ of Certiorari at 10, 21, *Smith v. Bishop*, No. 14-136 (U.S. Aug. 6, 2014); Petition for Writ of Certiorari at 29, *Schaefer v. Bostic*, No. 14-225 (U.S. Aug. 22, 2014); Petition for Writ of Certiorari at 17, *McQuigg v. Bostic*, No. 14-251 (U.S. Aug. 29, 2014).

Lawrence, and culminating in *Windsor*. See *Hicks*, 422 U.S. at 344 (lower court not bound by summary dismissal "when doctrinal developments indicate otherwise" (internal quotation marks omitted)).

In any event, that summary dismissal is not binding on this Court. *Edelman v. Jordan*, 415 U.S. 651, 671 (1974). Thus, even if certiorari ultimately were granted in this case (despite its resemblance to cases in which this Court denied petitions just days ago), *Baker* says nothing about whether this Court would affirm the judgment below.

e. Finally, applicants suggest that the Court might reverse because of some unspecified "body of social science research contradicting the central premise of the panel's equal protection holdings." Application at 17. Applicants claim that this research purportedly shows "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." *Id.* at 18. But as the court of appeals explained, even if that assertion about childrearing were true (which respondents deny), it does not justify Idaho's marriage ban. Idaho allows no-fault divorce, and it even allows same-sex couples to adopt—both of which fatally undermine applicants' reliance on this justification. C.A. Slip Op. at 24-25, 27-28.

Applicants also overlook the fact that same-sex couples will continue parenting children regardless of whether they are allowed to marry. Denying these families the right to define their relationships through marriage thus serves only to "humiliate[] * * * children now being raised by same-sex couples," making it "even

more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, 133 S. Ct. at 2694.

* * *

Every court of appeals that has recently considered the justifications that applicants advance for discriminatory marriage laws has rejected them as illogical and insufficient. Applicants fail to demonstrate that this Court would reach a different conclusion.

III. Applicants Will Not Suffer Irreparable Harm In The Absence Of A Stay

Applicants bear the burden of showing that they will suffer irreparable harm if a stay is not granted. *Rubin v. United States*, 524 U.S. 1301, 1301 (1998) (Rehnquist, C.J., in chambers) ("An applicant for stay first must show irreparable harm if a stay is denied."). Applicants fall far short in meeting their burden.

The primary "harm" that applicants identify is the State's inability to enforce its marriage laws. Application at 19-21. But a State can have no legitimate interest in enforcing unconstitutional laws. The decisions on which applicants rely (Application at 19) for the proposition that a State is harmed when it is enjoined from effectuating a state law so concluded only after first determining that the state law was likely constitutional. *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345 (1977) (Rehnquist, J., in chambers); *Maryland v. King*, 133 S. Ct. 1 (2012) (Roberts, C.J., in chambers); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 134 S. Ct. 506 (2013) (Scalia, J., concurring in denial of application to vacate stay). Indeed, assessing irreparable harm requires consideration of not

only "the relative likelihood that the merits disposition one way or the other will produce irreparable harm," but also "the relative likelihood that the merits disposition one way or the other is correct." *Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1305 (1991) (Scalia, J., in chambers). Here, the post-*Windsor* unanimity among the Circuits that laws precluding same-sex couples from marrying are unconstitutional, combined with this Court's denial of certiorari in each of those cases, suggests that applicants are unlikely to prevail and that the asserted harm is therefore illusory.

Nor is a stay warranted because of alleged "practical consequences" associated with "the thorny problem of whether and how to unwind the marital status of same-sex unions." Application at 21. A "thorny problem" is not the same as irreparable harm. Even in the unlikely event that this Court were to grant review and reverse, marriages performed in the interim would not irreparably harm applicants. Under well-settled law, any "administrative" or "financial costs" that might arise from seeking judicial determinations concerning the validity of such marriages cannot constitute irreparable injury. *Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough."). Indeed, this alleged injury is no different from the result of this Court's denial of the petitions this past Monday, which had the effect of lifting stays of lower-court decisions and allowing same-sex couples to marry, even while this Court has not finally determined the unconstitutionality of state laws precluding such marriages.

Applicants' argument that this Court should issue a stay because same-sex couples and their children may suffer "dignitary and financial losses from the invalidation of their marriages," *see* Application at 21, undermines, rather than advances, their argument. Applicants cannot simultaneously acknowledge that being stripped of one's marital status causes profound, irreparable harm and yet urge the Court to deprive respondents of the ability to marry and to have their lawful marriages recognized. The immediate, continuing, and severe harm experienced by same-sex couples as a result of their inability to marry far outweighs any speculative problems that might be caused should applicants or other parties seek invalidation of their marriages in the future.

IV. The Balance Of Harms Weighs Strongly Against A Stay

Even if applicants could show that they face irreparable harm (which they cannot), they would not be entitled to a stay. "The likelihood that denying the stay will permit irreparable harm to the applicant may not clearly exceed the likelihood that granting it will cause irreparable harm to others." *Barnes*, 501 U.S. at 1305. Here, any injury to applicants would be greatly outweighed by the ongoing injury to respondents and the public.

Respondents and numerous other same-sex couples in Idaho will face concrete, grievous, ongoing harm from a stay. As *Windsor* confirmed, marriage is a status of "immense import." 133 S. Ct. at 2692. It is the "most important relation in life." *Zablocki*, 434 U.S. at 384 (internal quotation marks omitted). Throughout the duration of a stay, same-sex couples will face major life events such as births, illnesses, and deaths, all without the crucial legal protections afforded by marriage.

Children reared in homes with same-sex parents, including respondents' children, will continue to be "humiliate[d]" as they are sent the unmistakable message that their families are second class. *Windsor*, 133 S. Ct. at 2694. As the court of appeals concluded, Idaho's "marriage laws, by preventing same-sex couples from marrying" and refusing to recognize their "marriages celebrated elsewhere, impose profound legal, financial, social and psychic harms." C.A. Slip Op. at 32 (footnote omitted). A stay would extend and compound those profound harms.[7]

CONCLUSION

The application should be denied.

[7] *Rostker v. Goldberg*, 448 U.S. 1306, 1310 (1980) (Brennan, J., in chambers) does not help applicants. *Contra* Application at 23. Justice Brennan observed in *Rostker* that no irreparable harm would result from the "inconvenience" of filling out draft cards that could be destroyed if respondents' constitutional challenge were upheld. Here, the inability to marry is far from a minor inconvenience.

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