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.

Reply In Support Of Application For Stay

DIRECTED TO THE HONORABLE ANTHONY M. KENNEDY ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT

Lawrence G. Wasden
Attorney General
Steven L. Olsen
Chief of Civil Litigation
Clay R. Smith
Deputy Attorney General
OFFICE OF THE IDAHO ATTORNEY GENERAL
Statehouse, Room 210
Boise, Idaho 83720-0010

Gene C. Schaerr
Counsel of Record
LAW OFFICES OF GENE C. SCHAERR
332 Constitution Ave., NE
Washington, D.C. 20002
(202) 361-1061
gschaerr@gmail.com

Thomas C. Perry
Counsel to the Governor
OFFICE OF THE GOVERNOR
P.O. Box 83720
Boise, Idaho 83720-0034

Counsel for Applicants

October 10, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

INTRODUCTION

Respondents' Opposition confirms that the present application offers the Court a simple choice: If the Court wishes to signal that its recent denial of various marriage-related petitions was intended to finally and conclusively resolve the constitutionality of State laws defining marriage as the union of a man and a woman—as Respondents assume and the Ninth Circuit panel apparently believes—the Court should deny Idaho's application. Otherwise, the Court should grant the application, not only because of the enormous practical importance of Idaho's marriage laws to the people of Idaho, but also for another reason not present in those cases.

Specifically, as Respondents do not dispute, this case presents two related and important federal issues that extend well beyond marriage and independently merit this Court's review:

- For Fourteenth Amendment equal-protection purposes, how should a court determine whether a law that on its face does not classify on the basis of sexual orientation—as Idaho's marriage laws do not—nonetheless constitutes *discrimination* on the basis of sexual orientation? and

- Assuming sexual-orientation discrimination (not just a disparate impact) has been shown, should it be judged for equal-protection purposes under a rational-basis standard or some form of heightened scrutiny?

Contrary to Respondents' suggestions (at 10-12), these issues were not squarely presented in the recently denied petitions, and their resolution alone will not conclusively resolve the constitutionality of Idaho's man-woman definition of marriage—as much as the State of Idaho would welcome such a resolution. But resolution of these subsidiary issues will materially assist the Ninth Circuit—and

courts around the Nation—in resolving this case and others like it, as well as a host of other cases involving alleged sexual-orientation discrimination. And the wide, deep and mature circuit split on the general standard of review for sexual-orientation discrimination claims itself demonstrates that this Court's guidance is urgently needed.

Although Respondents nibble around the edges of Idaho's showing on the latter issue, they do not dispute that it is the subject of a sufficiently mature circuit conflict to warrant review. Nor do they seriously dispute that a majority of this Court could well reject the Ninth Circuit's holding that claims asserting sexual-orientation discrimination are subject to some kind of ill-defined, amorphous "heightened scrutiny" standard. Nor do Respondents seriously deny that enjoining the enforcement of a presumptively constitutional State statute *ipso facto* inflicts irreparable injury on Idaho. Nor do they offer any serious argument disputing that the balance of equities in this case favors the Applicants—as it did in prior cases in which this Court stayed lower-court decisions invalidating State marriage laws enacted by the people or their representatives. Accordingly, based on the standard-of-review issue alone, this Court's settled standards governing requests for stays pending certiorari require the issuance of a stay here.

Indeed, in the cases in which this Court recently denied petitions for review, the Court issued stays as needed to ensure that the marriage laws enacted by the people of the affected States remained in force until this Court had a full opportunity to determine whether it wished to hear those cases on the merits. The principles of comity and federalism that animated this Court's decision in *United States* v.

Windsor, 570 U.S. ___, 133 S. Ct. 2675 (2013), require that the people of Idaho receive the same courtesy. Accordingly, Governor Otter and Attorney General Wasden respectfully request that the application be granted.

REASONS FOR GRANTING THE STAY

I. There is at least a reasonable likelihood that certiorari will be granted if the *en banc* Ninth Circuit does not overturn the panel's decision.

Respondents cannot deny that the Ninth Circuit's decision deepens a mature circuit split on the correct level of review for adjudicating claims of sexual orientation discrimination. Instead, they draw a false distinction between the lower court's judgment and its ground of decision. See Opposition at 11 ("'This Court 'reviews judgments, not statements in opinions.'") (quoting *California v. Rooney*, 483 U.S. 307, 311 (1987) (some internal quotation marks omitted). Here the Ninth Circuit *rested its decision* exclusively on a determination that Idaho's laws reaffirming the historic definition of marriage violate the Fourteenth Amendment's Equal Protection Clause *because* they failed the heightened scrutiny prescribed by *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014), for all claims of sexual orientation discrimination. See Opinion at 6. The Ninth Circuit's choice of a standard of review—and the rationale for that choice—is independently significant because it supplied the central ground of decision. Accordingly, it is an appropriate and compelling basis for a question presented to this Court, a question deserving of review in part because it implicates an undisputed 9-2 circuit split.

Nor can Respondents avoid that split—or the separate and direct conflict with *Citizens for Equal Protection* v. *Bruning,* 455 F.3d 859, 866-67 (8th Cir. 2006) and *Baker* v. *Nelson*, 191 N.W.2d 185, 187 (Minn. 1971)—by treating *Windsor* as though

it renders irrelevant everything that came before it. It does not matter that the nine court of appeals decisions that conflict with the Ninth Circuit on whether sexual orientation constitutes a suspect class "predate *Windsor*." Opposition at 12. *Windsor* did not invalidate section 3 of the Defense of the Marriage Act based on sexual-orientation discrimination, much less address the correct level of review for such claims. Instead, it gave that provision "careful consideration" because Congress's intervention into State domestic laws was an "unusual departure" from the federal norm. 133 S. Ct. at 2692. *Windsor* nowhere suggested it was altering the established framework for equal protection claims, much less directing lower courts to disregard all prior level-of-review decisions. Accordingly, those circuits that have subjected claims of sexual-orientation discrimination to rational-basis review rather than heightened scrutiny are still bound by their pre-*Windsor* decisions.

Respondents are also incorrect in suggesting that this issue—the standard of review for claims of sexual-orientation discrimination—was fairly presented in the recently denied cases. The panel's decision here was the first time a federal circuit had held that a state's marriage laws transgress the Equal Protection Clause because they fail to meet a standard of heightened scrutiny applicable to sexual orientation-based discrimination. Accordingly, none of the petitions previously before the Court could or did squarely present that issue for the Court's review.

To be sure, a few of the respondents in those cases raised sexual-orientation discrimination as an alternative ground for affirmance, and in so doing urged the Court to adopt the *SmithKline* standard nationwide. But a case involving an issue raised as an alternative ground for affirmance is obviously very different from a case

in which the petition itself identifies that issue as a question presented—which is what the Applicants' petition will do.

Accordingly, in this crucial respect, this case is fundamentally different from the cases in which the Court recently denied review. And unlike those cases, the issue in this case will be presented in a way that does not require the Court to resolve conclusively the global question of whether the Fourteenth Amendment in any of its aspects bars a State from defining marriage as the union of a man and a woman.

II. There is at least a fair prospect that the Ninth Circuit's decision will be reversed if the *en banc* court does not overturn the panel's decision.

Respondents are also wrong in claiming that Applicants "would not likely prevail" on the merits. Opposition at 13. That of course is the wrong standard; all that is needed is a "fair prospect" of prevailing—which Applicants certainly have.

1. Although Respondents do not quite say it, their principal argument for why Idaho lacks even a fair prospect of reversal boils down to the assumption that *Windsor* squarely decides the level-of-scrutiny issue. Opposition at 13. That is false. As previously explained, *Windsor* did not discuss, much less decide, whether the man-woman definition of marriage (a) constitutes discrimination on the basis of sexual orientation or (b) whether, if so, such discrimination is subject to some form of heightened scrutiny. And Judge O'Scannlain's dissent from denial of rehearing in *SmithKline* ably explains why *Windsor* does not remotely support the Ninth Circuit's conclusion on the level-of-scrutiny point, which would represent a substantial intrusion into the States' authority to define and regulate marriage. See *SmithKline Beecham Corp. v. Abbott Labs.*, 759 F.3d 990, 993 (9th Cir. 2014) (O'Scannlain, J., dissenting from denial of rehearing en banc).

To the contrary, besides expressly declining to address the constitutionality of traditional State marriage laws, *Windsor*, 133 S. Ct. at 2696, the entire *Windsor* opinion is based on *State* authority over marriage and the unconstitutionality of DOMA's interference with a *State's* decision to grant equal dignity and legal status to same-sex and opposite-sex unions. See*, e.g.*, *Windsor*, 133 S. Ct. at 2692 ("Here the *State's* decision to give [same-sex couples] the right to marry conferred upon them a dignity and status of immense import. When the *State* used its historic and essential authority to define the marital relation in this way, *its* role and *its* power in making the decision enhanced the recognition, dignity, and protection of the class in their own community. DOMA, because of its reach and extent, departs from this history and tradition of reliance on *state* law to define marriage.") (emphasis added); see *also id.* at 2696 ("The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the *State, by its marriage laws*, sought to protect in personhood and dignity.") (emphasis added). Indeed, virtually every important sentence in *Windsor* explaining why DOMA is unconstitutional includes the word "State."

That is why Respondents are so careful in cutting and splicing language from *Windsor*—it is nearly impossible for them to quote an entire key sentence without stumbling over that all-important "State" qualifier. So they pluck references to "dignity" out of the opinion, but omit *Windsor's* essential text grounding the existence of dignity interests in State law. See*, e.g.*, Opposition at 13. If *Windsor* means what it says, it provides strong support for Idaho's marriage laws, and cuts strongly against

the Ninth Circuit's conclusion that such laws must be subject to some form of heightened scrutiny.

2. Besides their misinterpretation of *Windsor*, Respondents offer very little support for the Ninth Circuit's conclusion that classifications based on sexual orientation require heightened scrutiny. Respondents cannot deny that this Court has already declined no fewer than three invitations to apply heightened scrutiny to sexual-orientation classifications—in *Windsor*, *Romer*, and *Lawrence*—even though in some cases (*Windsor* and *Romer*) the lower court had relied on a heightened standard. See *Windsor*, 133 S. Ct. 2675 (2013); *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003). Respondents also cannot deny that the Ninth Circuit's recognition of gay men and lesbians as the first new suspect class in 30 years breaks new ground or that it departs from the settled law of every other Circuit to address the issue save the Second.

Nor can Respondents deny that the Ninth Circuit has taken this momentous step without even applying the criteria this Court has identified for recognizing a class as suspect, such as political powerlessness. See *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441-42, 445 (1985). Respondents argue that some of those criteria are met, but omit any argument on the essential political-powerlessness criterion for an obvious reason: the LGBT movement today has enormous political power. It seems highly unlikely that this Court will recognize gay men and lesbians as a new suspect class—injecting the courts into every aspect of federal, state, and local governance that adversely impacts those groups—when the rapid rise of their political and social power is unprecedented in our Nation's history.

Changing the subject, Respondents also argue that "the Fourth and Tenth Circuits have held [that] heightened scrutiny is warranted because the state laws at issue severely interfere with a fundamental right, the right to marry." Opposition at 15. That is true but irrelevant. None of those cases applied heightened scrutiny based on sexual orientation as a new suspect class, and the Ninth Circuit did not hold that Idaho's laws violate the fundamental right to marry. The same is true of Judge Berzon's novel concurrence arguing that traditional marriage laws constitute sex discrimination and thus warrant heightened scrutiny: It says nothing about whether this Court will reverse the Ninth Circuit's majority decision for improperly declaring a new suspect class based on sexual orientation.

3. Even assuming heightened scrutiny applies to discrimination based on sexual orientation, there is a fair prospect of reversal because mere disparate impact is not enough to establish discrimination. Respondents take offense at the notion that Idaho's man-woman marriage definition does not discriminate *on its face* against gay men and lesbians. But that is true: Idaho's marriage definition, under Article III, section 28 of its State Constitution, says nothing about sexual orientation—it merely specifies that any person can marry only a person of the opposite sex. It cannot be denied that, for a variety of personal reasons, gay men and lesbians can and sometimes do marry persons of the opposite sex.

To be sure, the man-woman definition creates a disparate impact on gay men, lesbians and others who desire a different definition of marriage—and no one denies that the impact can create emotional and other hardships. But because Idaho's marriage definition is facially neutral with respect to sexual orientation, the key

question under heightened scrutiny is whether imposing such a hardship was the *purpose* of that definition. See *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979) (in disparate impact context, governmental decision maker must have "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group"). The answer is plainly no. Traditional marriage laws (whether in statute, common law, or custom) predate by millennia both the notion of homosexuality as a set orientation and the concept that marriage could possibly include same-sex couples. Indeed, as the *Windsor* majority noted, "until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage." *Windsor*, 133 S. Ct. at 2689. Throughout history, including Idaho's history, the core purpose of the traditional marriage definition has always been to unite a man and a woman for the benefit of each other and their children, not to harm gay men and lesbians. The Ninth Circuit did not find that Idaho's marriage definition was inspired by animus. Hence, even under heightened scrutiny, that definition satisfies equal protection. For this reason, too, reversal is likely.

4. Finally, Respondents argue that the standard of review does not really matter because, given inadequacies that Respondents perceive in the pertinent social science, Idaho's marriage laws could not ultimately "survive under any standard of review." Opposition at 14. But that is not necessarily an issue for this Court if it decides to grant review here. The Court may decide simply to (a) determine whether the Ninth Circuit was correct in creating a new suspect class subject to heightened

scrutiny, and then, having reversed that conclusion, (b) remand to the Ninth Circuit to address Respondents' other claims, including their argument that Idaho's man-woman definition cannot survive even rational-basis review.

In any event, Respondents' argument on this point ignores numerous opinions by respected federal judges—beginning with Justice Alito—who have concluded that the man-woman definition of marriage easily satisfies rational-basis review. See *Windsor*, 133 S. Ct. at 2717-20 (Alito, J., dissenting); *Herbert* v. *Kitchen,* 755 F.3d 1193, 1236-40 (2014) (Kelly, J., dissenting); *Bostic* v. *Schaefer,* 760 F.3d 352, 393-95 (2014) (Niemeyer, J., dissenting); *Robicheaux v. Caldwell*, 2 F.Supp.3d 910 (E.D. La. 2014). The mere fact that these judges have so concluded creates at least a fair prospect that Idaho will ultimately prevail, especially if rational-basis review applies.

Respondents, moreover, offer no evidence or analysis to dispute the extensive social-science findings that support Idaho's definition: that children generally 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 that defining marriage as a man-woman union substantially increases the *likelihood* that children of heterosexuals will be raised in such an arrangement. See Application at 18. Contrary to Respondents' arguments, the mere fact that Idaho could conceivably do *more* to increase that likelihood—such as returning to a fault-based divorce system or denying same-sex couples the ability to adopt—has no logical bearing on whether the man-woman definition of marriage actually serves that purpose, that is, increases the likelihood that children of heterosexuals will be reared by a mom and a dad. Moreover, regardless of the standard of review, nothing in logic or law requires a

government to pursue a given purpose through *every* conceivable means in order to justify pursuing that purpose through *one* means. And given that some 98 percent of children are born to heterosexual couples, Idaho has ample reason to define marriage so as to maximize the likelihood that, whenever reasonably possible, the children of *those* couples will be reared by their own mothers and fathers.

In sum, Governor Otter and Attorney General Wasden—and the State of Idaho—have at least a fair prospect of prevailing on the merits.

III. Without a stay, Idaho and its elected officials will suffer irreparable harm.

Respondents have also failed to rebut the Applicants' showing of irreparable injury. Respondents do not dispute the fundamental principle 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. of California v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) (emphasis added). And this Court's recent decision in *Schuette v. BAMN*, 134 S. Ct. 1623 (2014), provides one reason that principle applies to statutes addressing important social issues: "It is demeaning to the democratic process to presume"—as the Ninth Circuit has done here—"that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Id.* at 1637.

Respondents counter with the assertion that "a State can have no legitimate interest in enforcing unconstitutional law." Opposition at 18. But that begs the very question that would be presented in a certiorari petition—and as to which, for reasons just discussed, Applicants' position has substantial force.

Nor is it surprising that the in-chambers opinions holding that a State is harmed when it is enjoined from enforcing one of its laws reached that conclusion "only after first determining that the state law was likely constitutional." Opposition at 18 (citing decisions cited in Application). That simply reflects the reality that, in each of those decisions, the Justice who authored the opinion was following this Court's standard approach for addressing stay requests—the second step of which is a determination that the applicant has some likelihood of prevailing on the merits, and the *third* step of which requires analysis of irreparable injury to the applicant. Moreover, it is well settled that, in calculating the "likelihood of irreparable harm…if the judgment is not stayed," the Court "assum[es] the correctness of the applicant's position." *Barnes v. E-Sys., Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1302 (1991) (Scalia, J., in chambers). Respondents are thus incorrect in suggesting that barring enforcement of a State's law does not impose irreparable injury if the law was found unconstitutional by a lower court. Such an exception would swallow the general rule entirely.

Respondents' irreparable injury argument also ignores that *Baker v. Nelson*, 409 U.S. 810 (1972) (per curiam), which remains the only definitive statement by this Court on the issue, summarily rejected Fourteenth Amendment challenges to the validity of man-woman marriage statutes, and thus established that such statutes are at least presumptively valid. Moreover, whatever popular significance may be attached to Monday's orders denying review in other cases, they leave *Baker* and the presumptive validity of Idaho's marriage laws intact. *E.g.*, *Teague v. Lane*, 489 U.S. 288, 296 (1989) ("[T]he 'denial of a writ of certiorari imports no expression of opinion

upon the merits of the case.'"). Accordingly, by being enjoined from enforcing its presumptively valid marriage laws, Idaho will be irreparably injured if a stay is not granted.

IV. The balance of equities favors a stay.

Respondents' argument on the balance of the equities (Opposition at 20-21) is equally misguided, for four reasons. *First*, it assumes that Respondents are being irreparably injured by the denial of a "right" to marry. But neither this Court nor the Ninth Circuit has held that the fundamental right to marry encompasses a right to marry someone of the same sex. This Court expressly declined to address that issue in *Windsor*. See 133 S.Ct. at 2696. And the decision below turns not on fundamental rights but on a single Ninth Circuit panel's path-breaking holding that gay men and lesbians constitute a suspect class protected by heightened scrutiny. Temporary postponement of legal benefits arising from that new suspect-class status while this Court determines the correctness of that holding does not constitute irreparable harm—especially when that holding was likely erroneous.

Indeed, Respondents' balancing-of-harms argument turns on the same fundamental misreading of *Windsor* that infects the decision below: the false notion that the dignity interests associated with marriage arise from the Constitution. *Windsor* repeatedly emphasized that such dignitary interests arise from *State* law:

> Here the *State's* decision to give [same-sex couples] the right to marry conferred upon them a dignity and status of immense import. When the *State* used its historic and essential authority to define the marital relation in this way, *its* role and *its* power in making the decision enhanced the recognition, dignity, and protection of the class in their own community. DOMA, because of its reach and extent, departs from this history and tradition of reliance on *state* law to define marriage.

133 S. Ct. at 2692 (emphasis added). Thus, under any fair and complete reading of *Windsor*, it is not the denial of state recognition generally that "demeans" same-sex couples and "humiliates" their children, but rather DOMA's unfavorable "differentiation" between "*state*-sanctioned same-sex marriages" and state-sanctioned traditional marriages. *Id.* at 2694; *see also* 2696 ("The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the *State, by its marriage laws*, sought to protect in personhood and dignity.") (emphasis added). Because Idaho law has never granted Respondents the status of marriage in the first place, the dignitary interests recognized in *Windsor* simply do not exist in this case.

Second, while the harm to Idaho from invalidating its laws is essentially per se irreparable (*see supra*), any harm to Respondents is not. Respondents themselves do not claim to be suffering from any unique circumstance that would make waiting several additional months for this Court to adjudicate this matter an *irreparable* harm. If they prevail, they will obtain the status of marriage and their harms will be redressed. And they lack standing to speculate about possible harms other same-sex couples may experience during that time. *Cf.* Opposition at 20-21.

Third, Respondents ignore the manifold difficulties that would be created for themselves *and* the State if same-sex marriage was forced upon Idaho now, as a result of the panel decision, and an en banc panel or this Court were later to reverse. Were Idaho's position ultimately to prevail, issues would arise as to whether those marriages were void not only prospectively but also void *ab initio*, requiring some

kind of "de-marriage" procedure and attendant challenges in both the domestic relations and economic spheres. The interests of persons or entities other than the same-sex couples themselves—*e.g.*, employers, government employees, retailers, and creditors—would also be affected. The situation here thus presents a classic case for maintaining the status quo until final resolution of this litigation.

Fourth, Respondents ignore the irreparable injury to what the plurality in *Schuette* called the "fundamental right" of the People of Idaho to deliberate and then "act through a lawful electoral process" on matters of great importance to their State. 134 S.Ct. at 1637. As the plurality put it, "freedom does not stop with individual rights. Our constitutional system embraces, too, the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times and the course of a nation that must strive always to make freedom ever greater and more secure." *Id.* at 1636-37. By overturning the judgment of the people of Idaho on an issue as fundamental as the meaning of marriage, the Ninth Circuit's decision deprives the people of Idaho of that important right. A stay is thus necessary to protect that fundamental right pending this Court's adjudication of Respondents' claims.

For all these reasons, the balance of equities weighs decisively in favor of a stay.

V. The Ninth Circuit's constructive denial of the Applicants' pending stay requests warrants treating the present application as an application for a full stay pending certiorari.

Finally, the Ninth Circuit's utter silence about the Applicants' emergency stay requests eliminates any need for this Court to wait for the Ninth Circuit to act. On

October 8, the Applicants on behalf of Idaho and the interveners in the Nevada litigation *both* filed emergency stay requests with the Ninth Circuit.[1] Tellingly, the Ninth Circuit immediately directed all parties in the *Nevada* case to file a response by the end of the next day. Order in No. 14-35420, 14-35421 & 12-17668, Oct. 8, 2014, DktEntry: 189 (9th Cir. 2014). But the panel did not acknowledge the Idaho motions, much less direct the Respondents to respond. Instead, the panel acknowledged and responded to this Court's temporary stay by ordering that the mandate in the Idaho case be "recalled pending further order of this court or the Supreme Court." *Id.*

This open-ended recall, without even acknowledging the Idaho stay motions then pending before the panel, and in the face of active briefing and consideration of the Nevada motion, amounts to a constructive denial of the Applicants' request. As the Ninth Circuit itself has held, "[t]he denial of a motion need not be express but may be implied." *Agostino v. Ellamar Packing Co.*, 191 F.2d 576, 577 (9th Cir. 1951). In accordance with that principle, numerous courts have held that after a reasonable period "[a] court's failure to specifically address a motion … is equivalent to a denial." *Dickson v. Slezak*, 73 A.D.3d 1249, 1251, 902 N.Y.S.2d 206, 209 (2010).[2] And here,

---

[1] See Defendant-Appellant Governor C.L. (Butch) Otter's Emergency Motion Under Circuit Rule 27-3 For Recall of Mandate and Stay, Oct. 8, 2014, DktEntry: 184; Coalition for the Protection of Marriage Joinder in Governor C.L. (Butch) Otter's Emergency Motion Under Circuit Rule 27-3 For Recall of Mandate and Stay, Oct. 8, 2014, DktEntry: 269. Contrary to Respondents' suggestion (at 8), moreover, the Applicant Governor Otter's motion asked the Ninth Circuit for a stay, not just pending rehearing, but "pending the exhaustion of all appeals, including review by the Supreme Court." Defendant-Appellant Governor C.L. (Butch) Otter's Emergency Motion Under Circuit Rule 27-3 For Recall of Mandate and Stay, Oct. 8, 2014, DktEntry: 184, at 5; accord *id.* at 1 ("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."); *id.* at 5 (seeking stay pending "rehearing *en banc* and, if necessary, a writ of certiorari from the Supreme Court").

[2] Accord, *e.g., Sikora v. Gibbs*, 132 Ohio App. 3d 770, 774, 726 N.E.2d 540, 543 (1999) (holding that "failure to rule on a motion generally is treated as if the court overruled it"); *Townsend v. Angellotti*, 129 Cal. 466, 468, 62 P. 59 (1900) (observing that "the petitioner would be justified in treating the silence of the order as a denial of her motion"); *Bartold v. Bartold*, 155 Cal. App. 2d 251, 253, 318 P.2d

the panel's failure to address the Idaho motions pending before it means that, if this Court's stay were lifted, the mandate would almost certainly go into effect, and same-sex marriages would quickly begin—in flat contravention of Idaho law.

Respondents tacitly acknowledge that the Applicants' Ninth Circuit motions have been constructively denied by treating the application at issue here not just as an emergency request for a temporary stay pending action by the Ninth Circuit, but as an application for a permanent stay pending the disposition of Applicants' eventual certiorari petition. See, *e.g.,* Opposition at 1. All parties to this proceeding thus agree that the Court can and should now treat the application here as a full application for stay pending the filing and disposition of that eventual petition for a writ of certiorari. Requiring the Applicants to file a second application for a "permanent" stay would be waste of the parties' and the Court's resources.

CONCLUSION

In light of the Ninth Circuit's constructive denial of Applicants' pending stay requests, and Respondents' decision to treat the application as an application for a full stay pending the filing and disposition of an eventual petition for certiorari, Applicants request that the Circuit Justice treat the application that way as well. Alternatively, if the Circuit Justice would prefer that the Applicants file a second application seeking only a stay pending certiorari, Applicants request that the temporary stay be maintained pending submission and resolution of that application. If the Circuit Justice is either disinclined to grant the requested relief or wishes to

69, 70 (1957) (finding that the "appellant was justified in treating the silence of the order as a denial of his motion for change of custody").

have the input of the full Court, Governor Otter and Attorney General Wasden respectfully request that the application be referred to the Court, and that it be granted.

Respectfully submitted,

_____

Lawrence G. Wasden
Attorney General
Steven L. Olsen
Chief of Civil Litigation
Clay R. Smith
Deputy Attorney General
OFFICE OF THE IDAHO
ATTORNEY GENERAL
Statehouse, Room 210
Boise, Idaho 83720-0010

Gene C. Schaerr
Counsel of Record
LAW OFFICES OF GENE C. SCHAERR
332 Constitution Ave., NE
Washington, D.C. 20002
(202) 361-1061
gschaerr@gmail.com

Thomas C. Perry
Counsel to the Governor
OFFICE OF THE GOVERNOR
P.O. Box 83720
Boise, Idaho 83720-0034

Counsel for Applicants

October 10, 2014