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

GOVERNOR C.L. "BUTCH" OTTER'S OPPOSITION TO MOTION TO DISSOLVE STAY

Thomas C. Perry
Counsel to the Governor
Office of the Governor
P.O. Box 83720
Boise, Idaho 83720-0034
Telephone: (208) 334-2100
Facsimile: (208) 334-3454
tom.perry@gov.idaho.gov

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

Attorneys for Defendant- Appellant Governor Otter

INTRODUCTION

What is left of the State sovereignty justly celebrated in decisions such as *Alden* v. *Maine,* 527 U.S. 706 (1999), *Schuette v. BAMN,* 134 S.Ct. 1623 (2014), and *United States* v. *Windsor,* 570 U.S. ___, 133 S.Ct. 2675 (2013), if a State cannot even keep a democratically enacted law in place until reasonable appellate options have been exhausted? Granting Plaintiffs' "emergency" motion to dissolve this Court's May 2014 stay would not merely contravene the spirit and intent of Federal Rule of Appellate Procedure 41 as well as the terms of that stay—which extends to this entire "appeal," not just to the panel opinion. Granting that motion would also improperly treat the sovereign State of Idaho as an ordinary litigant, entitled to no more respect than a fly-by-night payday loan business or massage parlor. The relief the Plaintiffs seek is thus as wrong as a matter of principle as it is wrong as a matter of law.

Equally important, Plaintiffs' motion pervasively misconstrues or ignores the applicable legal standards, in two respects. First, Plaintiffs ignore the fact that it is *they* who have the burden of persuasion on a motion to dissolve a stay or vacate a injunction, *Perry v. Brown*, 639 F.3d 1153, 1154 (9th Cir. 2011) (citations omitted), and that *they* "must

demonstrate that facts have changed sufficiently since the court issued its order." *Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers*, 472 F.3d 1097, 1101 (9th Cir. 2006) (relying on *Sharp v. Weston*, 233 F.3d 1166, 1169-70 (9th Cir. 2000)). Plaintiffs' suggestion that the Supreme Court's recent denial of Idaho's stay application as well as various petitions for certiorari filed on behalf of other States provides the requisite "change circumstances" rests upon a flat misreading of those two events.

Second, even if Plaintiffs were correct that this Court should analyze its May 2014 stay as though it were being requested for the first time, Plaintiffs are wrong in suggesting that Idaho must "show[] a *likelihood* that a petition for rehearing or a petition for a writ of certiorari will be granted and … that they *will* prevail on the merits." Motion at 6. Under the settled law of this Circuit, all Idaho must show is a "'reasonable probability,' 'fair prospect,' [or] 'substantial case on the merits,'" or that the decision sought to be stayed raises "'serious legal questions." *Lair v. Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012) (citations omitted). In other words, the "[t]he standard does not require" the party

seeking a stay "to show that 'it is more likely than not that they will win on the merits.'" *Id.* (citations omitted).

As we now show, Plaintiffs have failed to make a sufficient showing on any the relevant factors.

I. Plaintiffs Fail To Show That Governor Otter No Longer Has A Reasonable Likelihood of Succeeding on the Merits, Either in This Court or the Supreme Court.

First, there remains a fair prospect that Governor Otter will ultimately succeed on the merits, either before the en banc Ninth Circuit, or before the Supreme Court.

1. As to the State's recent Supreme Court application, Plaintiffs are incorrect in confidently proclaiming (at 2) that the considerations that on Friday "led the Supreme Court to deny" that application were the Court's views on such matters as the "likelihood that" the State parties "will succeed on the merits." In fact, the Court provided no explanation for its action. And Plaintiffs' motion ignores the potentially critical procedural posture in which the State parties found themselves when the Court acted.

Specifically, as Appellants made clear in their application to the Supreme Court, the Appellants still have pending before this Court a motion to stay the mandate that this Court recalled on October 8. That motion were filed on the morning of October 8, shortly before the filing of Appellants' application to the Supreme Court, and seek the same relief sought there—a stay pending disposition of Appellants' forthcoming motion for rehearing and, if necessary, the disposition of a petition for certiorari to the Supreme Court.[1] This of course means that, when the Supreme Court denied Appellants' stay application, unexhausted remedies were still available—a classic basis for denying a stay. It is therefore entirely reasonable to assume *that* was the reason the Supreme Court denied Appellants' stay application. Accordingly, that decision cannot properly be interpreted as having denied the Appellants' stay application on the merits.

2. Plaintiffs are also incorrect in claiming that the Supreme Court's recent denial of several petitions for certiorari in other cases—

[1] This morning, Governor Otter submitted a letter requesting that the Court establish a briefing schedule on the pending motion for stay, and that, if the Governor's pending stay motion is denied, that the Court give him a reasonable time in which to seek a further stay from the Supreme Court.

including the *Kitchen* case on which this Court relied in granting the May 20 stay—indicates there "is no reasonable probability that a petition in this case would fare any differently." Motion at 7. In fact, the issues presented by this case are very different from the Fourteenth Amendment issues presented in the cases in which certiorari was denied. Specifically, this case presents two related and important federal issues that extend well beyond marriage and independently merit further 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?

These issues were not squarely presented in the recently denied petitions.

Moreover, as explained in the Governor's pending motion for stay—and as Plaintiffs have not disputed—there currently exists a wide, deep and mature circuit split on the general standard of review for sexual-

orientation discrimination claims. Only the Second Circuit has agreed with this Court that sexual orientation is a suspect class subject to any form of heightened scrutiny. *Windsor v. United States,* 699 F.3d 169, 181-85 (2d Cir. 2012). Conversely, nine other circuits have squarely held that sexual orientation is *not* a suspect class and hence that such claims are *not* subject to heightened scrutiny. *See Cook* v. *Gates,* 528 F.3d 42, 61-62 (1st Cir. 2008); *Thomasson* v. *Perry,* 80 F.3d 915, 927-28 (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); *Citizens for Equal Prot.* v. *Bruning,* 455 F.3d 859, 866-67 (8th Cir. 2006); *Price-Cornelison* v. *Brooks,* 524 F.3d 1103, 1113 (10th Cir. 2008); *Lofton* v. *Sec'y 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). Given that square conflict, there remains at least a fair prospect that the Supreme Court will grant review to resolve that fundamental conflict in this case.

There is also a reasonable likelihood that the Supreme Court will reverse this Court's holding on that point. The Supreme Court has not recognized a new suspect class in almost 40 years. 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 ...."). And the Supreme Court has steadfastly *declined* several invitations to make sexual orientation a suspect class—in *Lawrence v. Texas*, 539 U.S. 558 (2003), *Romer v. Evans*, 517 U.S. 620 (1996), and *Windsor* itself. What's more, *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014), took the momentous step of creating a new suspect class without applying the criteria the Supreme Court has identified for recognizing such a class, 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 simply applying "*Windsor's* heightened 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 claims of sexual orientation discrimination. 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*). By itself, Judge O'Scannlain's opinion establishes that Governor Otter has a reasonable likelihood of prevailing on this issue in the Supreme Court.

Beyond that, 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 Plaintiffs 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.*, Motion at 8, 11. In short, *Windsor* provides strong federalism support for Idaho's marriage laws, and cuts against this Court's conclusion that such laws must be subject to some form of heightened scrutiny.

3. Governor Otter recognizes of course that this Court has already denied en banc review of *SmithKline*. But the en banc Court has not yet been presented with the equally important, general issue of *how* one determines whether a law that does not *on its face* discriminate on the basis of sexual orientation nevertheless constitutes "discrimination" on that basis. Nor has the en banc Court been called upon to address that question in the context of State marriage laws defining marriage as

the union of a man and a woman. There is a strong likelihood that, even if he does not prevail on the general "suspect class" issue decided in *SmithKline,* Governor Otter will prevail on the more limited question of whether the (admitted) disparate impact created by Idaho's man-woman marriage definition rises to the level of "discrimination" on the basis of sexual orientation.

Idaho's marriage laws clearly 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 statute, Decision 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's 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. Indeed, 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*.

While the man-woman definition has an obvious disparate impact on gay men and lesbians, the panel did not find—and Plaintiffs cannot establish—the additional element necessary to convert this disparate impact into a finding of discrimination. The key question under heightened scrutiny is whether imposing such a disparate impact or hardship was the *purpose* of that definition. *See, e.g., 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. Indeed, the panel appropriately 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, there is a fair prospect of reversal—either by the en banc Court, or by the Supreme Court.

4. Another indication of a reasonable prospect of reversal—especially by the en banc Court—is that the panel decision contravenes *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 9-11. That is incorrect. 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"—that is, in the Supreme Court—"'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." And of course it does not undermine *Baker*'s binding character on the en banc Court.

Accordingly, even if the logic of *Windsor* suggested an opposite outcome—which it does not—there is at least a reasonable likelihood that a majority of this Court sitting en banc will elect to follow *Baker*, and a reasonable likelihood that the Supreme Court will do so, 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 reasonable 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.[2] 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. It is (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 the children of heterosexuals, at least, 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

[2] 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.

contravened by other evidence, they are not subject to second-guessing by the 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 reasonable probability that the en banc Court or the Supreme Court will avoid that result and, in so doing, reject the panel's analysis and reverse its judgment.

II. Plaintiffs Fail to Show That The State And Its Citizenry Will No Longer Suffer Irreparable Harm Absent a Stay.

Plaintiffs have also failed to rebut the State's prior showing that it and its citizens would suffer irreparable harm absent a stay. Nor do they attempt to rebut the bedrock principle, repeatedly acknowledged by the Supreme Court, 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—would thus undermine the

sovereignty of the State and its people. Each such marriage would contravene 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 federalism concerns, which affirm 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. As Justice Kennedy has explained:

> 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 v. United States*, 131 S.Ct. 2355, 2364 (2011) ("When government acts in excess of its lawful powers" under our system of federalism, the "liberty [of the individual] is at stake."). Dissolving the stay before the appellate process is completed would place in jeopardy the democratic right of Idahoans to choose for themselves what marriage will mean in their community.

2. Relatedly, dissolving the stay would foster political disengagement and even apathy among Idaho's voters on matters of State concern. After all, if a popular referendum on so important and sensitive an issue as the definition of marriage can be overturned by the federal judiciary *without* the State even being afforded the opportunity to exhaust its appellate remedies, why should ordinary citizens even bother to vote on such matters? As the Supreme Court recently noted in *Schuette v. BAMN*, 134 S. Ct. 1623 (2014), "It is demeaning to the democratic process to presume"—as the Plaintiffs' motion does—"that

the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Id.* at 1637.

Similarly, if laws passed by State legislatures can be overturned without the State having an opportunity for full appellate review before the law loses its force, why should ordinary citizens bother to vote for State office-holders? Dissolving the stay would thus signal to voters that the only elections that really matter are *federal* elections, and that perception too would inflict irreparable injury on the State and its political processes.

3. Dissolving the stay would also impose another form of irreparable injury. Unless the stay remains in force, many marriage licenses will be issued to same-sex couples before the State is able to exhaust its appellate remedies. Then, if the State ultimately prevails, the couples so married will undoubtedly claim—as they did in Utah—that they now have a "vested right" to the marital status they achieved as a result of this Court's decision and its vacatur of the current stay. And the only legal authority on this question indicates that those couples will be correct. *See Evans v. Utah,* __ F.Supp.2d__, 2014 WL 2048343 (D. Utah May, 19, 2014).

Why does this amount to irreparable injury? It means that, even if Idaho ultimately prevails, many same-sex couples will be able to continue claiming State-conferred marital benefits of all kinds. And that circumstance will constitute an ongoing, permanent affront to the authority of the State and its people over this important aspect of domestic-relations law.

At a minimum, if the stay were dissolved but the panel decision ultimately overturned, the State would have to confront the thorny problem of whether and how to unwind the marital status of same-sex unions. 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 *INS v. Legalization Assistance Project*, 510 U.S. 1301, 1305-06 (1993) (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.

In short, it cannot be seriously contested that, absent a stay, the State will suffer irreparable harm from the district court's nullification of Idaho's constitutional definition of marriage, 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). That too is a powerful reason to deny the Plaintiffs' motion.[3]

III. Plaintiffs Fail To Show That A Stay Will Subject Them to Substantial Irreparable Harm.

Plaintiffs, moreover, have failed to show that they will suffer any substantial irreparable harm if the stay remains in force long enough for the State to exhaust its appeal rights. *First,* contrary to Plaintiffs' argument, the usual rule that the loss of constitutionally protected "freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976), is inapposite here. While violation of an *established* constitutional right

[3] Indeed, under this Court's "sliding scale" approach, such injury would justify maintaining the stay in place even if the probability of success on the merits were insufficient to justify a stay. *See, e.g., Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (applying sliding scale approach in context of preliminary injunction).

certainly inflicts irreparable harm, that doctrine does not apply where, as here, Plaintiffs 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, Plaintiffs 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. 1306, 1310 (1980) (reasoning that the "inconvenience" of compelling Plaintiffs 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").

Second, Plaintiffs' irreparable-injury and balancing-of-harms arguments turn on a fundamental misreading of *Windsor* as holding that the dignity interests associated with marriage arise from the Constitution. That is incorrect. *Windsor* repeatedly emphasized that such dignitary interests, not from the Constitution itself, but 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 Plaintiffs the status of marriage in the first place, the dignitary interests recognized in *Windsor* simply do not exist in this case.

Third, while the harm to Idaho from invalidating its laws is essentially per se irreparable (*see supra*), any harm to Plaintiffs is not. Plaintiffs do not claim to be suffering from any unique circumstance that would make waiting several additional months for this Court and the Supreme Court to reach a final adjudication of this case 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.* Motion at 11. All of this likewise weighs heavily against granting their motion—especially given *their* burden to demonstrate changed circumstances.

IV. Plaintiffs Fail To Show That The Public Interest No Longer Weighs in Favor of a Stay.

Finally, Plaintiffs have failed to demonstrate that the public interest no longer weighs in favor of a stay. To the contrary, the public has an overwhelming interest in maintaining the status quo pending a regular and orderly review of Plaintiffs' claims by the en banc Court of Appeals and this Court. See *Hollingsworth*, 558 U.S. 183, 197 (2010) (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." And nothing in the Fourteenth Amendment compels much less allows this Court to second-guess the people of Idaho's considered judgment of the public interest.

CONCLUSION

This Court should leave in place the May 2014 stay that it previously entered in this case, pending the disposition of the Governor's forthcoming petition for rehearing en banc and, if that is denied, a petition for a writ of certiorari. 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 13, 2014

By /s *Gene C. Schaerr*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 13, 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:

Deborah A. Ferguson
d@fergusonlawmediation.com

Craig Harrison Durham
craig@chdlawoffice.com

Shannon P. Minter
sminter@nclrights.org

Christopher F. Stoll
cstoll@nclrights.org

W. Scott Zanzig
scott.zanzig@ag.idaho.gov

Clay R. Smith
clay.smith@ag.idaho.gov

By /s/ *Gene C. Schaerr*