Supreme Court of the United States
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December 31, 2014

Clerk
United States Court of Appeals for the Ninth
Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: C. L. "Butch" Otter, Governor of Idaho, et al.
v. Susan Latta, et al.
No. 14-765
(Your No. 14-35420, 14-35421)

Dear Clerk:

The petition for a writ of certiorari in the above entitled case was filed on December 30, 2014 and placed on the docket December 31, 2014 as No. 14-765.

Sincerely,

Scott S. Harris, Clerk

by

Jacob C. Travers
Case Analyst

No. 14-____

IN THE

Supreme Court of the United States

C.L. "BUTCH" OTTER, *et al.*,
Petitioner

v.

SUSAN LATTA, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the decision below, a panel decision of the Ninth Circuit (per Reinhardt, J.) held that Idaho's man-woman definition of marriage violates the Fourteenth Amendment to the federal Constitution because that definition discriminates on the basis of sexual orientation and does not satisfy the heighted scrutiny that another recent Ninth Circuit decision (also written by Reinhardt, J.) held applicable to claims of sexual-orientation discrimination. This case thus presents the following questions, of which the second and third are subsidiary to the first:

1. Whether the Fourteenth Amendment requires a State to define or legally recognize marriages as between people of the same gender?

2. Whether State laws allegedly discriminating on the basis of sexual orientation—such as laws defining marriage as a union of a man and a woman—are subject to rational-basis review, as nine other circuits hold, or to some form of heightened scrutiny, as the Second and Ninth Circuits have held?

3. Whether Idaho's laws defining marriage as a union of a man and a woman satisfy rational-basis scrutiny, heightened scrutiny, or both?

PARTIES TO THE PROCEEDING

Petitioner is C. L. "Butch" Otter, as Governor of the State of Idaho, in his official capacity.

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

Respondents also include Christopher Rich, as Recorder of Ada County, Idaho, in his official capacity, and the State of Idaho. These respondents are expected to file their own petition for certiorari within the next few days.

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INTRODUCTION

The time has come for this Court to resolve a question of critical importance to the States, their citizens and especially their children: Whether the federal Constitution prohibits a State from maintaining the traditional understanding and definition of marriage as between a man and a woman. And this case—either alone or in combination with one of the cases arising out of the Sixth Circuit's decision in *DeBoer* v. *Snyder,* 772 F.3d 388 (6th Cir. 2014)—is an ideal vehicle for resolving that question as well as the subsidiary questions on which its resolution depends.

Three reasons are obvious. Unlike some of the cases currently before the Court, for example, this case involves *both* of the settings in which plaintiffs have challenged state man-woman marriage laws—i.e., the licensing of new marriages, and the recognition of existing marriages from other States. Because the arguments for invalidating state marriage laws vary somewhat between these two settings, it will be more efficient for the Court to resolve the underlying constitutional question in a case that involves both.

In addition, the Ninth Circuit here not only invalidated Idaho's man-woman definition, but it did so on a basis that is certain to spawn intense and contentious litigation in a variety of settings beyond marriage. Specifically, in an opinion authored by Judge Reinhardt, the court held that Idaho's traditional definition violates the Fourteenth Amendment because it discriminates on the basis of sexual orientation, which, according to prior and recent Ninth Circuit precedent, requires heightened scrutiny. See 11a-12a (relying

upon *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, *reh'g en banc* denied, 759 F.3d 990 (9th Cir. 2014) (Reinhardt, J.)). The latter holding deepens a mature circuit conflict that this Court will need to resolve regardless of how it rules on the specific question of man-woman marriage.

Furthermore, between the main panel opinion and the two concurrences, the panel here has made a concerted effort to articulate in their most plausible form all three of the principal constitutional arguments that have been advanced against man-woman marriage laws: (1) the sexual-orientation discrimination argument adopted by the panel; (2) the sex discrimination argument articulated in Judge Berzon's concurrence; and (3) the fundamental-rights argument articulated in Judge Reinhardt's concurrence. This case thus provides the Court with a handy compendium of all the main arguments that will need to be addressed in determining the constitutionality of state man-woman marriage laws.

Two other reasons for choosing this case over other available options are perhaps less self-evident. *First*, this is the only case now available to the Court in which the man-woman definition of marriage has been defended, in part, on grounds of avoiding religious strife and church-state entanglements. That is an issue this Court will likely want to consider as it resolves the core constitutional question presented here. And it was squarely presented to and addressed—adversely—by the Ninth Circuit. See 26a.

Second, and most important, this is the only case now available to the Court where any public officials

have mounted a truly vigorous policy defense of the man-woman understanding and definition of marriage—including an explanation of its salutary effects on the children of heterosexual couples, and why such a definition satisfies any level of constitutional scrutiny. Other States have shied away from defending that definition with full vigor, preferring instead to rely on narrower rational-basis-type defenses. Those defenses are both valuable and correct. However, it is important that at least one of the cases this Court considers on the merits be a case in which the traditional definition has been defended with the most robust defense available. This is that case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, 1a–82a, is reported at 771 F.3d 456. The opinion of the United States District Court for the District of Idaho, 83a–140a, is reported at 19 F. Supp. 3d 1054.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(3). The Ninth Circuit had appellate jurisdiction under 28 U.S.C. § 1291. The Court of Appeals filed its opinion and entered judgment on October 7, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTONAL AND STATUTORY PROVISIONS

The Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provide, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article III, § 28 of the Idaho Constitution provides:

> A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this State.

Idaho Code § 32-201(1) provides in relevant part:

> Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of parties capable of making it is necessary.

Idaho Code § 32-209 provides in relevant part:

> All marriages contracted without this State, which would be valid by the laws of the State or country in which the same were contracted, are valid in this State, unless they violate the public policy of this State. Marriages that violate the public policy of this State include, but are not limited to, 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.

STATEMENT

Since its territorial days during the Lincoln Administration—and for the past century and a half—Idaho has defined civil marriage as a union between one man and one woman. *See* 1864 Idaho Terr. Sess. L. 613; 1889 Idaho Terr. Sess. L. 40; 1901 Civ. Code Ann. § 1990; Idaho Code § 32-202. Despite recent changes in other States, Idaho's legislature and citizens have firmly adhered to this understanding and definition of marriage, in large measure because they wish to foster a marriage culture that is focused, not primarily on the needs and interests of adults, but on the welfare of children.

A. Competing visions of marriage

As Justice Alito pointed out, those who favor redefining marriage to accommodate same-sex couples see the institution primarily from an adult-centered perspective, with marriage's principal purpose being to endorse, legitimize and facilitate love and commitment between adults. *United States* v. *Windsor,* 133 S. Ct. 2675, 2718 (2013) (Alito, J., dissenting) (describing competing visions). The adult-centric view holds that, because the love of a same-sex couple is just as good as that of a man-woman couple, the government's refusal to recognize that love as a marriage is unjust discrimination.

By contrast, those who wish to retain the man-woman marriage definition—including a large majority of Idahoans—believe the government has no legitimate interest in formally recognizing loving relationships, whether opposite-sex or same-sex.

Their view of marriage is biologically based and primarily child-centered. And it holds that the principal (though not exclusive) purpose of marriage is to unite a child to his or her biological mother and father whenever possible, and when not possible, to *a* mother *and* father. *Id.*

The difference in these views is not that one promotes equality, justice, and tolerance, while the other endorses inequality, injustice, and intolerance. Rather, it is a difference in understanding about what the marriage institution *is*—or ought to be. And the question in this case is whether the federal Constitution compels States and their people to endorse one vision over the other. Petitioner Governor Otter maintains that neither the Fourteenth Amendment nor *Windsor* compels Idaho to redefine marriage, and thus to abandon the child-centric vision of marriage that has ably served its people for so long.

B. Idaho's marriage laws

Idaho Code § 32-202, which was last amended in 1981, specifies the persons who may marry under Idaho law. It identifies those qualified to marry as "[a]ny unmarried male . . . and any unmarried female" of specified age, and "not otherwise disqualified." Based on this statute, the Idaho Attorney General issued a formal opinion in 1993 concluding that Idaho law did not permit persons of the same sex to marry. Idaho Att'y Gen. Op. No. 93-11, 1993 WL 482224, at *10 (Nov. 3, 1993) (citing § 32-202 for the principle that "[t]he State of Idaho does not legally recognize either

homosexual marriages or homosexual domestic partnerships. By statute, marriage is limited in Idaho to the union between a man and a woman").

In 1995, Idaho's legislature amended Idaho Code § 32-201 to eliminate recognition of common law marriages. *See* 1995 Idaho Sess. Laws ch. 104. The amendment also affirmed Idaho's longstanding definition of marriage. *See id.* § 3. Section 32-201 currently provides in relevant part: "Marriage is a personal relation arising out of a civil contract between a man and a woman."

The next year, Idaho's legislature amended Idaho Code § 32-209, which governs recognition of foreign or out-of-State marriages. *See* 1996 Idaho Sess. Laws ch. 331, § 1. That section provides that marriages contracted "without this State" are not valid in Idaho if they "violate the public policy of this State," including the policy barring "same-sex marriages."

Ten years later, in response to judicial decisions in other States ordering the elected branches to permit same-sex marriages, the Idaho legislature proposed Article III, section 28 (2006 Idaho Sess. Laws H.J.R. No. 2), and the Idaho electorate approved it as a state constitutional amendment with 63% of the vote. The constitutional amendment reaffirmed Idaho's traditional definition of marriage. Article III, section 28 provides: "A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state."

C. District court proceedings and decision

Plaintiffs below, respondents here, are four same-sex couples. Two desired to get married in Idaho but could not under Idaho law. The other two couples received marriage licenses in other States and wanted Idaho to recognize them. They argued that the Equal Protection and Due Process Clauses of the Fourteenth Amendment require Idaho to expand the definition of civil marriage to include same-sex couples. They challenged the validity of Article III, Section 28 of the Idaho Constitution and Idaho Code § 32-201 (which limit civil marriage to unions between one man and one woman), and Idaho Code § 32-209 (which prohibits recognition of out-of-State marriages that violate Idaho's public policy).

Respondents sued Idaho's Governor, C.L. "Butch" Otter, and the Ada County Recorder, Christopher Rich in their official capacities. The district court permitted the State of Idaho to intervene to defend its laws.

The district court resolved the case on motions. Recorder Rich and the State of Idaho filed a Rule 12(b)(6) motion to dismiss; Governor Otter and respondents filed cross-motions for summary judgment. The district court issued a Memorandum Decision and Order granting respondents' motion on May 13, 2014. 83a-140a.

The district court rejected the defendants' showing that *Baker v. Nelson,* 409 U.S. 810 (1972), barred plaintiffs' challenges. 97a-102a. The court acknowledged that *Baker* resolved the precise issues raised by respondents, 98a, and that prior to *Windsor*, courts were "reluctant" to depart from the precedent the

Court set in *Baker*. 100a. But the court determined that *Windsor* "dramatically changed" the States' authority over same-sex marriage, 99a, purportedly constituting a "doctrinal development" thus allowing the district court to conclude *Baker* is no longer controlling. 101a.

On the merits of the case, the district court concluded the right to same-sex marriage is a fundamental right protected by the Due Process Clause. 102a-110a. And based on the Ninth Circuit's decision in *SmithKline*, the court held that Idaho's laws discriminated on the basis of sexual orientation, a constitutionally suspect class, and therefore subjected the laws in question to heightened scrutiny. 114a-119a.

Based on a cursory analysis, the district court found Idaho's marriage laws could not withstand heightened scrutiny. 119a-139a. In so holding, the court barely acknowledged—much less engaged—extensive record evidence establishing what has come to be called the "institutional" defense of marriage. See 162a-175a (outlining evidence). That defense holds that marriage is a social institution that conveys to heterosexual couples important social norms—such as the value of biological connections between children and the adults who raise them—that in turn help heterosexuals be better parents and take a more responsible approach to procreation. Because those norms rest on the man-woman understanding and definition of marriage, removing that definition and replacing it with an "any two qualified persons" definition will inevitably weaken those child-centric norms. As a result, more children of heterosexual couples will likely

grow up without the active influence of one or both biological parents, and will therefore face an increased risk of crime, emotional and psychological difficulties, poor performance in school and other ills. See 168a (describing evidence on risks to children).

Given its determinations on the merits, the district court declared Idaho's marriage laws unconstitutional and permanently enjoined their enforcement. 140a.

On May 14, 2014, the district court denied Governor Otter's motion for a stay pending appeal. That same day, the court entered judgment in plaintiffs' favor consistent with its May 13 memorandum decision and order.

All defendants filed emergency motions with the Ninth Circuit seeking a stay of the district court's judgment pending appeal. The Ninth Circuit granted the emergency motions on May 20, 2014, and entered a stay pending appeal consistent with this Court's decision granting a stay in *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014).

D. Ninth circuit proceedings and decision

The Ninth Circuit affirmed the district court. The panel opinion held that Idaho's marriage laws violate the Fourteenth Amendment's Equal Protection Clause because they discriminate on the basis of sexual orientation—which the Ninth Circuit had recently held in *SmithKline* to be a constitutionally suspect class requiring heightened scrutiny. 11a-12a.

Although the opinion acknowledged a rational basis for what it described as Idaho's "procreative channeling" justification ("[t]his makes some sense"), 18a, it found that neither this nor other justifications could withstand heightened scrutiny. 13a-30a. But in rejecting the institutional defense of Idaho's man-woman marriage laws, the opinion attacked a straw man. For example, the opinion claimed that this defense was based on the idea that "allowing same-sex *marriages* will adversely affect opposite-sex marriage." 13a. But the opinion failed to acknowledge that the institutional defense is based not on the mere existence of same-sex "marriages," but instead on the necessary *redefinition* of marriage from an inherently gendered institution to a genderless institution—and the resulting destruction of social norms based on biological and other differences (and complementarity) between men and women. See 168a-172a. Finally, the panel held that possible clashes between its newly minted right to same-sex marriage and religious liberties was irrelevant to its decision. 26a.

The panel opinion's author, Judge Reinhardt, wrote a concurrence concluding that Idaho's marriage laws also violate the Due Process Clause because they deny same-sex couples a fundamental right to marry. 42a-47a. Judge Berzon also wrote a concurring opinion, concluding that Idaho's marriage laws discriminate on the basis of gender in violation of the Equal Protection Clause. 48a-82a.

Following issuance of its opinion, the Ninth Circuit, inconsistent with its practice, immediately issued the mandate. Governor Otter filed an emergency motion for stay of the mandate in the Ninth Circuit and this

Court, and Justice Kennedy granted a temporary stay. This Court later denied a permanent stay. *Otter v. Latta*, 135 S. Ct. 345 (2014), 141a. The Plaintiffs then filed a motion to dissolve the pre-existing Ninth Circuit stay, which Governor Otter opposed. The Ninth Circuit granted the Plaintiffs' request. 143a. Since October 15, 2014, Idaho has issued marriage licenses to same-sex couples.

Governor Otter filed a timely petition for rehearing en banc on October 21, 2014—more than two months ago. 152a-185a. Although the mandate has already been issued, the Ninth Circuit has not yet acted on the petition. Given the amount of time that has passed, we assume there are not enough votes to grant the petition, and that the delay is the result of a forthcoming dissent from its denial.

REASONS FOR GRANTING THE PETITION

This case warrants review for three independent reasons. First, the Ninth Circuit's decision not only conflicts with this Court's decision in *Baker,* it also conflicts directly with the Sixth Circuit's decision in *DeBoer,* and with an earlier decision of the Eighth Circuit. Second, the Ninth Circuit's decision to apply heightened scrutiny to Idaho's marriage laws—based on its holding that sexual orientation discrimination is subject to heightened scrutiny—conflicts directly with decisions in nine other circuits, even as it opens the floodgates to massive additional litigation over alleged sexual-orientation discrimination in a range of areas beyond marriage. Third, and most important, the Ninth Circuit's decision to invalidate Idaho's marriage

laws—and with them the remaining man-woman marriage laws of every other State within that Circuit—poses a serious risk of irreparable injury to countless children of heterosexual couples. This case, moreover, is an ideal vehicle in which to determine, once and for all, the validity of such laws.

I. The Ninth Circuit's decision conflicts with this Court's teachings about the States' authority to define and regulate marriage, and directly conflicts with the decisions of the Sixth and Eighth Circuits in *DeBoer* and *Bruning*.

Certiorari is warranted, first and foremost, because the Ninth Circuit's decision is at odds with this Court's precedent regarding the States' authority to limit marriage to the union of a man and a woman, as well as decisions of other courts of appeal directly on point. Indeed, the Ninth Circuit's ruling deprives Idaho citizens of the "fundamental right" to "act through a lawful electoral process." *Schuette* v. *BAMN*, 134 S. Ct. 1623, 1637 (2014) (plurality), and ignores that the federal Constitution says nothing about how States must define marriage.

1. The Ninth Circuit's decision conflicts with and misconstrues *Baker*, which is this Court's last definitive word on the States' authority to adhere to the man-woman definition of marriage. The *Baker* plaintiffs asserted that Minnesota's marriage laws, which were construed to permit only opposite-sex marriage, violated the Equal Protection and Due Process Clauses. *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971). The Minnesota Supreme Court disagreed, and this Court summarily dismissed the appeal "for want

of a substantial federal question." 409 U.S. at 810. That dismissal "prevent[s] lower courts from coming to opposite conclusions," *Mandel v. Bradley*, 432 U.S. 173, 176, (1977), unless and until this Court rules to the contrary.

The Ninth Circuit panel opinion concluded that this Court's decisions had rendered *Baker* obsolete, and in so doing cited *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); and *Windsor*. 11a. But none of these decisions overruled *Baker*. *Romer* invalidated a Colorado constitutional amendment that prohibited enactment or enforcement of any law or policy "designed to protect . . . homosexual persons or gays and lesbians." 517 U.S. at 624. The Court's opinion makes no mention of same-sex marriage or *Baker*. *Lawrence* struck down State laws criminalizing sodomy. It involved the government's authority to regulate private, consensual sexual conduct, not the issue whether a State's citizens have the authority to define marriage. 539 U.S. at 578 (this case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.").

And *Windsor,* which invalidated a portion of the federal Defense of Marriage Act (DOMA) that sought to preserve the man-woman definition as a matter of federal law even for citizens of States that had decided to allow same-sex marriage, did not mention *Baker.* It instead affirmed *Baker*'s core holding that States have the authority to define marriage. 133 S. Ct. at 2693. *Windsor* certainly did not hold that all States are required constitutionally to permit or recognize same-sex marriage. Nor did it establish that States have no

choice in deciding whether marriage should be limited to opposite-sex couples. Quite the contrary, the Court went out of its way to make clear that the flaw in DOMA was Congress' failure to give effect to New York's determination as to who is eligible to enter into the marriage relationship.

Windsor, like *Baker*, thus respects the authority of *all* the States to define marriage within their borders. *Baker* thus remained binding on the court of appeals; it was for this Court, not Ninth Circuit, to declare whether it should be revisited.

The Ninth Circuit's decision violated not only its duty to follow *Baker*, but also this Court's long-established principles recognizing State authority to regulate domestic relations. Since the nineteenth century, this Court has consistently recognized that the States, not federal courts, have the power to define marriage. *Pennoyer v. Neff*, 95 U.S. 714, 734–35 ("[t]he State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created"); *Haddock v. Haddock*, 201 U.S. 562, 575 (1906), *overruled on other grounds*, *Williams v. North Carolina*, 317 U.S. 287 (1942) ("[n]o one denies that the States, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce"). *Windsor* itself reaffirmed this precedent: "By history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States." 133 S. Ct. at 2689–90.

2. On the first question presented, the Ninth Circuit's decision also directly conflicts with the Sixth Circuit's recent decision in *DeBoer*, a case that has spawned several certiorari petitions currently pending before the Court. In *DeBoer*, the Sixth Circuit properly acknowledged the continuing effect of *Baker*. 772 F.3d at 399-402.

It further analyzed the plaintiffs' constitutional claims challenging traditional marriage laws, and rejected them. Writing for the majority, Judge Sutton noted at the outset that "[f]rom the founding of the Republic to 2003, every State defined marriage as a relationship between a man and a woman, meaning that the Fourteenth Amendment permits, though it does not require, States to define marriage in that way." *Id.* at 404. The opinion examined potential justifications for the traditional marriage definition and found at least two rational bases for it.

First, governments are "in the business of defining marriage, not to regulate love but to regulate sex, most especially the intended and unintended effects of male-female intercourse." 772 F.3d at 404. Encouraging male-female couples, who possess "unique procreative possibilities," to enter stable family units for the benefit of their biological children, is one rational basis for providing marriage benefits to a man and a woman. *Id.* at 404-05. The opinion's analysis of this rational explanation for opposite-sex marriage statutes succinctly concluded that, "[b]y creating a status (marriage) and by subsidizing it (e.g., with tax-filing privileges and deductions), the States created an incentive for two people who procreate together to stay together for purposes of rearing offspring"–a wholly

reasonable regulation reflecting not animus as to same-sex couples but an "awareness of the biological reality that couples of the same sex do not have children in the same way as couples of opposite sexes and that couples of the same sex do not run the risk of unintended offspring."

The Sixth Circuit also found a second rational basis: Because same-sex marriage is a new phenomenon, States may rationally choose to "wait and see before changing a norm that our society (like all others) has accepted for centuries." 772 F.3d at 406.

These rational reasons supporting the traditional definition of marriage led the court to uphold the marriage laws of four States against constitutional attack because, it concluded, there was no reason to subject the laws to any higher level of scrutiny. Such laws are not the result of improper animus; they merely codify "a long-existing, widely held social norm already reflected in State law." *Id.* at 408. Nor do traditional marriage laws deprive same-sex couples of a fundamental right. Same-sex marriage is not "deeply rooted in this Nation's history and tradition.'" *Id.* at 411 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)); *accord Windsor*, 133 S.Ct. at 2689 (same-sex marriage is a "new perspective, a new insight").

According to the Sixth Circuit, moreover, the Equal Protection Clause does not require heightened scrutiny. Indeed, as the Sixth Circuit pointed out, this Court has never held that heightened scrutiny applies to sexual orientation discrimination claims. See *id.* at 772 F.3d 413-15. That holding squarely and directly conflicts with the holding of the Ninth Circuit in this

case that claims of sexual orientation discrimination *are* subject to heightened scrutiny—which is the subject of the second question presented here.

3. On both questions, moreover, the Ninth Circuit's decision also squarely conflicts with *Citizens for Equal Protection v. Bruning*, 455 F.d 859, 864-69 (8th Cir. 2008), where the Eighth Circuit rejected an equal protection challenge to a Nebraska constitutional amendment that affirmed the traditional man-woman marriage definition. Like the Sixth Circuit in *DeBoer*, the Eighth Circuit rejected the notion that heightened scrutiny should apply to sexual orientation discrimination claims. *Id.* at 866-67. And like the Sixth Circuit, the Eighth Circuit found ample, rational justifications for the traditional marriage definition. *See id.* at 867-68.

4. To be sure, the Ninth Circuit is not the only federal appellate court to hold traditional marriage laws unconstitutional. Recently, the Fourth, Seventh, and Tenth Circuits have done so as well, on varied grounds. *See Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) (same-sex couples have fundamental right to marry under the Due Process Clause); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) (traditional marriage laws cannot meet the rational basis test); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) (same-sex couples have fundamental right to marry). All of these decisions have deprived voters in the affected States of their "fundamental right" to "act through a lawful electoral process," *Schuette*, *supra,* 134 S. Ct. at 1637 (plurality), on a question of enormous importance to themselves and their children. And the cacophony of reasoning in these opinions and their deep intrusion

into a core component of state sovereignty highlight the immediate need for this Court to settle the issue and instruct the federal and state courts on the applicable Fourteenth Amendment standards.

II. The Ninth Circuit's application of heightened scrutiny to Idaho's marriage laws is not required by *Windsor* and conflicts with the law of this Court and at least nine other circuits.

In addition to the specific conflict with the Sixth and Eighth Circuit's holdings as to state marriage laws, certiorari also is warranted because the Ninth Circuit improperly invoked heightened scrutiny—the subject of the second question presented. Specifically, the Ninth Circuit's conclusion that Idaho's laws discriminate on the basis of sexual orientation conflicts with this Court's precedents requiring proof of discriminatory purpose in disparate impact cases. And the Ninth Circuit's application of heightened scrutiny to sexual orientation discrimination claims is based on a misreading of *Windsor* that conflicts with the law in the vast majority of the courts of appeal, and that will have enormous practical consequences for state actors and courts alike.

1. Idaho's marriage laws do not classify on the basis of sexual orientation. On their face, the laws apply equally to heterosexuals and homosexuals – both may marry a person of the opposite sex, and neither may marry a person of the same sex. Without a doubt, the laws disparately affect gays and lesbians. But there is no evidence that these laws, which can be traced back to the Civil War era and were merely codified in recent decades, were designed to discriminate against them.

Nevertheless, the Ninth Circuit determined that Idaho's choice not to redefine marriage to include same-sex couples amounts to unlawful discrimination on the basis of sexual orientation. In so doing, the court violated the rule established by this Court that disparate impact alone does not establish unlawful discrimination; a discriminatory purpose must also be present. *See, e.g., Crawford v. Bd. of Ed. of Los Angeles,* 458 U.S. 527, 537-38 (1982) (even when a facially neutral law has a disproportionate impact on a suspect class, the Equal Protection Clause is not violated absent proof of a discriminatory purpose).

There is no evidence that animus toward gays and lesbians motivated Idaho when it adopted the traditional definition of marriage in the 1860s. Idaho's marriage laws are based (at a minimum) on legitimate and longstanding legislative choices, not irrational stereotypes or animus. The State has defined marriage as a union between a man and a woman based on irrefutable biological facts, including the possibility of both deliberate and accidental procreation. The State confers the benefits of civil marriage on opposite-sex couples because they alone are biologically able to procreate together and are thus responsible for virtually all children being raised in Idaho households, not because of their sexual orientation.

2. Besides it error in finding discrimination on the basis of sexual orientation, the Ninth Circuit compounded its error by holding that laws discriminating on that basis are subject to heightened scrutiny. In so holding, the Ninth Circuit court relied on its *SmithKline* decision, issued earlier in 2014. 14a. That decision determined that *Windsor* required the panel

there to reject established Ninth Circuit precedent, which applied rational basis review to sexual orientation discrimination claims, and instead apply some undefined form of heightened scrutiny to all such claims. 740 F.3d at 480-83.

The Ninth Circuit's application of heightened scrutiny is based on a misreading of *Windsor*. As the Sixth Circuit pointed out in *DeBoer,* nothing in *Windsor* says that gays and lesbians comprise a suspect class, or that sexual orientation discrimination claims are governed by heightened scrutiny. *See DeBoer*, 772 F.3d at 413-15. The Ninth Circuit's reading of *Windsor* is thus in square conflict with the Sixth Circuit's reading.

The Ninth Circuit's approach also conflicts with that employed by the large majority of the courts of appeal. At least nine circuits—including the Sixth—apply rational basis review to claims of sexual orientation discrimination. *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); *DeBoer*, 772 F.3d at 413-15; *Bruning*, 455 F.3d at 866-67; *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). Only the Second Circuit has joined the Ninth in subjecting claims of sexual orientation discrimination to heightened scrutiny. See *Windsor* v. *United States*, 699 F.3d 169 (2d Cir. 2012), *affirmed on other grounds, United States* v. *Windsor*, 133 S.Ct. 2675 (2013).

That approach has sweeping implications beyond the marriage context. It will subject States and all other government actors to additional potential liability on a range of subjects, including employment, educational opportunities, public benefits, and housing. And it will subject those government actors and the courts to massive additional litigation costs burdens.

This mature conflict alone warrants this Court's review. And it provides a compelling reason to use this case as a vehicle for resolving the overarching question of whether States have authority under the federal Constitution to retain the traditional man-woman definition of marriage—and the child-centric vision of marriage that lies at its heart.

III. The Ninth Circuit's holding that Idaho's marriage laws do not satisfy the relevant standard of review—based on the importance of those laws to the welfare of Idaho's children—is likewise erroneous and warrants this Court's review.

The Ninth Circuit was also wrong to hold that Idaho's marriage laws fail the relevant standard of review—be it rational basis or heightened scrutiny.

1. Idaho's marriage laws easily satisfy the rational basis standard, which applies here, and which this Court has articulated thus:

> [W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for

> the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.

City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441-42 (1985); see also *Nguyen v. INS*, 533 U.S. 53, 73 (2001) ("[t]o fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it").

Rational basis is a deferential standard. It "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). The rational basis standard is satisfied so long as there is a plausible justification for the classification; the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decision-maker; and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational. *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992). This Court further "has made clear that a legislature need not strike at all evils at the same time or in the same way, . . . and that a legislature may implement [its] program step by step, . . . adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981) (internal citation and quotations omitted).

Moreover, a State "has no obligation to produce evidence to sustain the rationality of a statutory classification" because "a legislative choice is not subject to courtroom fact-finding." *Heller v. Doe*, 509 U.S. 312, 320 (1993). It is thus "irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Beach Commc'ns*, 508 U.S. at 315. The test is simply whether the involved distinction or classification "is at least debatable." *Clover Leaf Creamery*, 449 U.S. at 464. Once plausible grounds are asserted, the "inquiry is at an end"–*i.e.*, rebuttal is not permitted. *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980).

Courts have repeatedly held that rational bases validly support marriage laws that limit marriage to the union of one man and one woman. *See*, *e.g.*, *DeBoer*, 772 F.3d at 404-08; *Bruning*, 455 F.3d at 867-68; *Andersen v. King County*, 138 P.3d 963, 982-83 (Wash. 2006); *Hernandez v. Robles*, 855 N.E.2d 1, 6-9 (N.Y. App. Div. 2006); *Morrison v. Sadler*, 821 N.E.2d 15, 22-31 (Ind. Ct. App. 2005). Under rational basis review, "[w]hen…the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and nonbeneficiaries is invidiously discriminatory." *Johnson v. Robison*, 415 U.S. 361, 383 (1974). Furthermore, "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Heller*, 509 U.S. at 320. Thus, under rational review, courts must "accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Id.* at 320-21. And "it is entirely ir-

relevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *FCC v. Beach Communications*, 508 U.S. 307, 315 (1993).

The rational bases the Sixth Circuit recently found as ample justification for the marriage laws of Michigan, Ohio, Kentucky, and Tennessee apply with equal force to Idaho's. Idaho's determination–again dating back over 150 years to the first territorial code – to target its finite resources on fostering long-lived opposite-sex relationships through marital status benefits is rational when those relationships produce almost all children and account for a sizable majority of family households in the State. For marriage purposes, the distinguishing characteristics of opposite-sex and same-sex couples are the procreative capacity of the former, not the participants' sexual orientation. The Idaho Legislature in 1995, as well as the Idaho electorate in 2006, thus had a rational basis to conclude that targeting the legislative benefits of marriage to opposite-sex couples would further the State's interest in encouraging stable families for child-rearing purposes. Idaho was not required to change over a century of practice by making civil marriage available to individuals who desire to access the governmental benefits of such status but who categorically lack the capacity to procreate with one another.

2. The Ninth Circuit was also wrong to reject another defense offered in support of Idaho's man-woman definition of marriage, namely, that even if heightened scrutiny applies, it is satisfied here. As Judge Sutton concluded, "[b]y creating a status (marriage) and by

subsidizing it (e.g., with tax-filing privileges and deductions), the States create[] an incentive for two people who procreate together to stay together for purposes of rearing offspring." 772 F.3d at 405. But in addition to financial incentives, as was amply demonstrated below, this combination of State-sanctioned status and benefits also reinforces certain child-centered norms or expectations that form part of the social institution of marriage. Those norms—such as the value of biological connections between children and the adults who raise them—independently encourage man-woman couples "to stay together for purposes of rearing offspring." See 162a-166a (summarizing norms and associated record evidence); *accord* Brief of *Amici Curiae* 76 Scholars of Marriage in No. 14-556 et al (filed December 15, 2014) ("Marriage Scholars Amicus"), at 3-9. Given the importance of those norms to the welfare of the children of such couples, the State has a compelling interest in reinforcing and maintaining them.

Some of those norms, moreover, arise from and/or depend upon the man-woman understanding that has long been viewed as central to the social institution of marriage. See *Windsor,* 133 S.Ct. at 2718. For example, because only man-woman couples (as a class) have the ability to provide dual biological connections to the children they raise together, the State's decision—implemented by the man-woman definition—to limit marital status and benefits to such couples reminds society of the value of those biological connections. It thereby gently encourages man-woman couples to rear their biological children together. 166a-172a; Marriage Scholars Amicus at 4-7. And it does so without denigrating other arrangements—such as adoption or

artificial insemination—that such couples might choose when, for whatever reason, they are unable to have biological children of their own.

Like other social norms traditionally associated with the man-woman definition of marriage, the biological connection norm will likely be diluted or destroyed if the man-woman definition (and associated social understanding) is abandoned in favor of a definition that allows marriage between "any two otherwise qualified persons"—which is what same-sex marriage requires. 166a-171a; Marriage Scholars Amicus at 9-11.

Just as those norms benefit the State and society, their dilution or destruction can be expected to harm the interests of the State and its citizens. For example, over time, as fewer heterosexual parents embrace the biological connection norm, more of their children will be raised without a mother or a father—usually a father. That in turn will mean more children of heterosexuals raised in poverty, doing poorly in school, experiencing psychological or emotional problems, and committing crimes—all at significant cost to the State. 167a-168a; Marriage Scholars Amicus at 11-18.

This analysis also explains why Idaho's decision to retain the man-woman definition of marriage should not be seen as demeaning gay and lesbian citizens or their children, and why it satisfies any form of heightened scrutiny. The definitional choice Idaho faced was a binary one: *either* preserve the man-woman definition and the benefits it provides to the children of heterosexuals (and the State), *or* replace it with an "any two qualified persons" definition and risk losing those

benefits. There is no middle ground. Idaho's choice to preserve the man-woman definition is thus narrowly tailored—indeed, it is perfectly tailored—to the State's interests in preserving those benefits and in avoiding the enormous societal risks accompanying a redefinition. See Marriage Scholars Amicus at 23-26.

Under a proper means-ends analysis, therefore, Idaho's choice passes muster under any constitutional standard. See *Grutter* v. *Bollinger,* 539 U.S. 982 (2003) (holding that affirmative action program satisfied strict scrutiny, and that the courts were required to defer to legislative facts found by decision-makers); see also 168a-175a (rebutting Ninth Circuit's tendentious attempts to respond to this defense). The Ninth Circuit's misapplication of this Court's precedents to a question of such surpassing importance amply warrants this Court's review.

IV. This case is an ideal vehicle for resolving the questions presented, and should be reviewed instead of or in tandem with the Sixth Circuit's decision.

Moreover, this is the only case now available for review by this Court in which any public officials have mounted a vigorous "institutional" defense of the man-woman definition of marriage, recognizing the choice articulated in Justice Alito's dissent, or have sought to defend that definition under heightened scrutiny. For that reason alone, assuming the Court grants one of

the petitions arising from the Sixth Circuit's decision, this case should be heard in tandem with that case.[1]

In addition, as previously explained, this is the only case now available to this Court in which any public officials have defended the man-woman definition in part on the grounds of reducing the potential for religious conflict and church-state entanglement. That issue has substantial potential importance to this Court's resolution of the principal question presented. See, *e.g., Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014) ("A test that would sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent."); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983) (referring to "the States' compelling interest in the maintenance of domestic peace"). And that too is a powerful reason to grant the present petition now, and to consider this case along with (or instead of) one of the pending Sixth Circuit cases.

Next, as previously explained, this is the only case presently available to the Court in which an appellate court has invalidated a State's marriage laws based on

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[1] If this petition is granted along with the forthcoming petition from the other defendants in this case, petitioner will make every effort to ensure that all petitioners submit joint briefing and argument on the merits. Those efforts will be facilitated by the Court's granting review on all three questions presented here, thereby making clear that the Court wishes to hear a comprehensive defense of the laws at issue.

a rationale that requires heightened scrutiny for alleged discrimination on the basis of sexual orientation. Given the importance of the Ninth Circuit's holding on that point beyond the context of marriage, that too is a powerful reason to grant the present petition now, and to consider this case along with or in lieu of the Sixth Circuit's decision.

Also, as previously noted, the two concurring opinions in this case articulate in their most plausible form the other two principal constitutional arguments that have been advanced against man-woman marriage laws: sex discrimination in violation of the Equal Protection Clause, and deprivation of a fundamental right in violation of the Due Process Clause. Those two opinions provide an additional reason to prefer this case to one in which only one or two of the main constitutional challenges have been forcefully articulated.

Finally, this case involves claims by same-sex couples seeking a marriage license in Idaho and same-sex couples seeking Idaho's recognition of a license issued in another State. If this Court ultimately vindicates Idaho's right to retain its marriage definition, the Court will also be in a position to reject the recognition claim under the Fourteenth Amendment or Full Faith and Credit Clause. Indeed, this Court has already recognized that "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." *Nevada v. Hall*, 440 U.S. 410, 422 (1979). To the contrary, "the very nature of the federal union of States . . . precludes resort to the full faith and credit clause as the means for compelling a State to substitute the statutes of other States for its own statutes dealing with a subject

matter concerning which it is competent to legislate." *Pac. Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501 (1939). Thus, if Idaho prevails here, this Court will have necessarily concluded that the State is "competent" to define marriage. And forcing Idaho—or any other state—to recognize another state's marriage license in violation of the first state's Constitution would improperly compel that state to "substitute" the marriage laws of another state for its own laws.

Accordingly, the Court's resolution of the questions presented here can mark the end of marriage litigation in all respects—if this Court resolves those questions in the context of this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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