Case Nos. 14-35420 and 14-35421

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUSAN LATTA, et al.

Plaintiffs-Appellees,

v.

GOVERNOR C.L. "BUTCH" OTTER and CHRISTOPHER RICH,

Defendants-Appellants,

and

STATE OF IDAHO,

Intervenor-Defendant-Appellant

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

OPENING BRIEF OF APPELLANT GOVERNOR C.L. "BUTCH" OTTER

Thomas C. Perry
Cally A. Younger
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
cally.younger@gov.idaho.gov

Monte Neil Stewart
Daniel W. Bower
STEWART TAYLOR & MORRIS PLLC
12550 W. Explorer Drive, Ste 100
Boise, Idaho 83713
Telephone: (208) 345-3333
Facsimile: (208) 345-4461
stewart@stm-law.com
dbower@stm-law.com

Lawyers for Defendant-Appellant Governor Otter

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INTRODUCTION

Nearly all human societies since pre-history have had a social institution of marriage constituted by the core public meaning of "the union of a man and a woman." Over the millennia, the man-woman marriage institution has uniquely provided valuable social benefits necessary to the well-being and stability of society and the development of individuals, especially children. In particular, the man-woman marriage institution's norms and other public meanings have assured that a greater portion of children know and are raised by mother and father and are thereby spared the ills of fatherlessness and motherlessness.

Toward the end of the twentieth century, however, various individuals and groups began a campaign to use the force of law to replace the man-woman marriage institution with an institution that would still be called "marriage" but would have a very different core meaning: "the union of any two persons without regard to gender" (hereafter "genderless marriage"). That campaign promised greater economic and dignitary benefits to same-sex couples and children connected to their relationships.

Thus arose a great social contest between two mutually exclusive and profoundly different marriage institutions: man-woman marriage and genderless marriage. Like every other state, Idaho has had to choose one or the other in the face of a clash between deeply held interests and values. On one hand are the

interests of Idaho citizens who have formed intimate, committed relationships with someone of the same sex—and in some cases are raising or wish to raise children together—and who want Idaho to confer on them the public recognition and benefits of marriage. Governor Otter and Idaho's people respect and value those citizens as both equal before the law and fully entitled to order their private lives in the manner they have chosen. At the same time, the citizens of Idaho understand that they must not abandon their duty to protect the best interests of those who cannot do that for themselves, the children through the generations.

The Idaho Legislature made its choice in the form of statutes preserving the man-woman meaning at the core of the State's marriage institution; Idaho's people, by voting overwhelmingly in favor of a proposed state constitutional amendment, made the same choice.

The role of the Fourteenth Amendment in Idaho's choice of man-woman marriage is to require that the State and its people have a sufficiently good reason for their choice. If they do, their choice does not offend the Constitution. *See Grutter v. Bollinger*, 539 U.S. 306 (2003). Indeed, in those circumstances, our Constitution honors and vindicates the people's "fundamental right" to make such choices, especially on difficult social issues. *See Schuette v. BAMN*, 134 S. Ct. 1623, 1636–38 (2014). And although, in the abstract, the answer to whether the reason for a challenged government action qualifies as "sufficiently good" may

vary depending on the level of judicial scrutiny deployed, the level-of-judicial-scrutiny issue is not dispositive here. That is because Idaho's powerful, legitimate interests genuinely and substantially advanced by its choice of man-woman marriage satisfy *any* level of judicial scrutiny.

Because Idaho's choice is between two very real and influential but mutually exclusive social institutions, what matters for constitutional purposes is a comparison between the two. Only through that comparison can this Court fairly judge the constitutional sufficiency of the reasons sustaining the people's choice of man-woman marriage. That is because Idaho's compelling interests advanced by that choice *are* what man-woman marriage provides and genderless marriage does not provide.

The right comparison is not between the capacities (parental and otherwise) or the interests or the longings or the worthiness of the people who can and cannot participate in man-woman marriage. That comparison misleads the constitutional analysis because the societal interests that satisfy constitutional norms of liberty and equality are found in what the man-woman marriage institution provides and a genderless marriage regime does not. The capacities, interests, longings, and worthiness of people in intimate same-sex relationships who desire to marry give rise to the liberty and equality issue but do not answer it. What answers this Court's constitutional inquiry is the sufficiency of the reasons for the people's

choice of man-woman marriage. And, again, those reasons, centering on Idaho's important interests, are found in the differences between the two competing marriage institutions.

The man-woman meaning at the core of marriage, reinforced by the law, has always recognized, valorized, and made normative the uniting and complementary roles of "mother" and "father," with society perceptively understanding the consequences to be more children who know and are raised by their mother and father and fewer children who experience fatherlessness and motherlessness. In contrast, with its regime of "Parent A" and "Parent B," the genderless marriage institution denies any space in the law for the uniting and complementary roles of "mother" and "father." And it effectively teaches *everyone*—married and unmarried, gay and straight, men and women, and all the children—that a child knowing and being reared by her mother and father is neither socially preferred nor officially encouraged.

There is no denying this stark difference between what the two competing marriage institutions teach on this crucial point. At the same time, we are unaware of any responsible voice asserting that a society with fewer children knowing and being raised by their mothers and fathers, compared to a society with more such children, will provide an equal amount of flourishing by children generally through the generations.

Hence one very real benefit Idaho seeks to capture with its choice of man-woman marriage is relatively more children knowing and being raised by their mother and father. And one very real risk Idaho seeks to avoid is higher rates of fatherlessness and motherlessness among its children generally, now and for generations to come.

Accordingly, underlying both Idaho's choice of man-woman marriage and, say, New York's choice of genderless marriage is a value judgment. Idaho's judgment is that the value of maximizing the number of children through the generations who experience both mother and father and avoid the ills of fatherlessness is greater than the value of the economic and dignitary benefits that genderless marriages might provide. New York's judgment is just the opposite. Each State no doubt views the other's choice as the result of a misguided valuation and therefore as a failure of public morality.

The Constitution, however, leaves this particularly poignant value judgment to each State and its people. *See Schuette*, 134 S. Ct. 1623; *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Washington v. Glucksberg*, 521 U.S. 702 (1997); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Dandridge v. Williams*, 397 U.S. 471 (1970). The Constitution does so in important part because Idaho's choice, like New York's, requires a judgment between competing legitimate values and interests. *See Schuette*, 134 S. Ct. at 1636–38; *see also*

David Blankenhorn, *The Future of Marriage* 171–212 (2007). Idaho and its people have understood that choosing between the two competing marriage institutions presents an unavoidable clash between deeply held interests and values. They have also understood that they must not abandon their duty to protect the best interests of children through the generations, who cannot do that for themselves. The choice to fulfill that duty is not constitutionally suspect; indeed, it ranks among the highest and best pursuits of our constitutionally ordered society. As the plurality in *Schuette* recently put it in a similar context, "It is demeaning to the democratic process to presume the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." 134 S. Ct. at 1637.

Because Idaho has both constitutional authority to choose the man-woman marriage institution and constitutionally sufficient reasons for doing so, this Court should reverse the district court's contrary decision and judgment.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331, 1343(3). The district court entered its decision on May 13, 2014, Memorandum Decision and Order ("Decision"), Excerpts of Record ("ER") 6–62, and on May 14, 2014, its Judgment, ER 1–2. On May 14 and 19, 2014, Defendant Governor Otter filed, respectively, his Notice of Appeal and Amended Notice of Appeal, ER 73–75, 63–65, and on May 14, 2014, Defendant Ada County Clerk Rich and Defendant-

Intervenor State of Idaho filed their Notice of Appeal. ER 66–68. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

ISSUE PRESENTED

Whether the Fourteenth Amendment's Equal Protection Clause or its Due Process Clause compels Idaho to change its core public meaning of marriage from the union of a man and a woman to the union of two persons.

Preservation: Governor Otter raised this issue throughout his briefing on the cross-motions for summary judgment.

ADDENDUM OF PERTINENT AUTHORITIES

Pursuant to Ninth Circuit Rule 28-2.7, Governor Otter has reproduced pertinent constitutional and statutory provisions in an Addendum accompanying this Opening Brief.

FACTUAL AND PROCEDURAL STATEMENT

1. The States' traditional authority over marriage.

In cases spanning three centuries, the Supreme Court has emphasized that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States." *Ex parte Burrus*, 136 U.S. 586, 593–94 (1890); *Simms v. Simms*, 175 U.S. 162, 167 (1899) (same); *Rose v. Rose*, 481 U.S. 619, 625 (1987) (same); *Windsor*, 133 S. Ct. at 2691 (quoting *Burrus*). The States' power to define marriage flows from the

fact that "[t]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce." *Haddock v. Haddock*, 201 U.S. 562, 575 (1906), *overruled on other grounds*, *Williams v. North Carolina*, 317 U.S. 287 (1942).

Thus, marriage and domestic relations is "an area that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). And Supreme Court precedent over the years has taught "solicitude for state interests, particularly in the field of family and family-property arrangements." *United States v. Yazell*, 382 U.S. 341, 352 (1966). Indeed, "[i]nsofar as marriage is within temporal control, the States lay on the guiding hand." *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979).

In *Windsor*, the Supreme Court reaffirmed the States' traditional authority over marriage. 133 S. Ct. at 2691. In declaring § 3 of the federal Defense of Marriage Act unconstitutional (that section is hereafter referred to as "DOMA"), the Court emphasized the States' "historic and essential authority to define the marital relation," *id.* at 2692, on the understanding that "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities,'" *id.* at 2691 (quoting *Williams*,

317 U.S. at 298 (alteration in original)). The Court further noted that, "[c]onsistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations." *Id.* at 2691. Specifically, the Court held that New York's recognition of same-sex marriage was "without doubt a proper exercise of its sovereign authority within our federal system, all in the way that the Framers of the Constitution intended." *Id.* at 2692. Congress went astray there, the Court held, by "interfer[ing] with the equal dignity of same-sex marriages . . . conferred by the States in the exercise of their sovereign power." *Id.* at 2693. The Court also emphasized that New York's official recognition of the same-sex marriages at issue there was "central" to the Court's decision. *Id.* at 2692.

2. History of marriage as the union of a man and a woman.

The understanding of marriage as a union between a man and a woman and its purpose of uniting man-woman couples and their children into family units recognized by society was, until recently, universally accepted by courts, legal scholars, philosophers and sociologists. *See, e.g.*, 1 William Blackstone, *Commentaries* *422 (describing the relationship between parent and child as "consequential to that of marriage, being its principal end and design: and it is by virtue of this relation that infants are protected, maintained, and educated"). In the words of sociologist Kingsley Davis:

> The family is the part of the institutional system through which the creation, nurture, and socialization of the next generation is mainly accomplished . . . . The genius of the family system is that, through it, the society normally holds the biological parents responsible for each other and for their offspring. By identifying children with their parents . . . the social system powerfully motivates individuals to settle into a sexual union and take care of the ensuing offspring.[1]

This historic understanding was reflected in prominent dictionaries from the time of the Fourteenth Amendment's framing and ratification.[2] Indeed, the country's leading expert on family law during that era opined: s "Marriage between two persons of one sex could have no validity, as none of the ends of matrimony could be accomplished thereby. It has always, therefore, been deemed requisite to the entire validity of every marriage . . . that the parties should be of different sex."[3]

The Supreme Court has taken the same view:

> [C]ertainly, no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate states of the Union, than that which seeks to establish it on the basis of the idea of the family, *as consisting in and springing from the union for life of one man and one woman* . . . .

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[1] ER 1102–03; *see also* ER 1202–13.

[2] *E.g.*, Noah Webster, *Etymological Dictionary* 130 (1st ed. 1869); Joseph E. Worcester, *A Primary Dictionary of the English Language* 176 (1871); John Bouvier, *A Law Dictionary Adapted to the Constitution and Laws of the United States* 105 (1856).

[3] 1 Joel Prentiss Bishop, *Commentaries on the Law of Marriage & Divorce* *175 (1st ed. 1852).

Murphy v. Ramsey, 114 U.S. 15, 45 (1885) (emphasis added).

More recently, the Supreme Court has continued to acknowledge the historical roots and societal importance of man-woman marriage. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race."); *see also Zablocki v. Redhail*, 434 U.S. 374, 386 (1978). Indeed, just last year the Supreme Court reiterated that until recently, "marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." *Windsor*, 133 S. Ct. at 2689.

This conception is not uniquely American. Until a decade ago, "it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex." *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006). In the words of eminent anthropologist Claude Levi-Strauss, "the family—based on a union, more or less durable, but socially approved, of two individuals of opposite sexes who establish a household and bear and raise children—appears to be a practically universal phenomenon, present in every type of society." ER 1107–08 . In short, marriage has long been understood as "a social institution with a biological

foundation." 1 Claude Levi-Strauss, *Introduction*, *in* A History of the Family: Distant Worlds, Ancient Worlds 5 (Andre Burguiere et al. eds., 1996).

3. History of Idaho's marriage laws.

Since territorial days, Idaho law always affirmed the man-woman meaning at the core of the State's marriage institution. [4]

In more recent years, various individuals and groups began a political and judicial campaign to use the force of law to replace the man-woman marriage institution with a genderless marriage regime. During the early stages of that campaign, the Idaho Legislature gave the man-woman marriage institution further statutory protection by enacting Idaho Code §§ 32-201 and 32-209. 1995 Idaho Sess. Laws ch. 104, § 3; 1996 Idaho Sess. Laws ch. 331, § 1.[5]

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[4] Idaho's marriage statutes, including Idaho Code § 32-202 (which Plaintiffs do not challenge), have defined marriage as a contract between a man and a woman since the first Territorial Code. 1864 Idaho Terr. Sess. L. 613 (specifying that marriage is between any unmarried male 18 years of age or older and any unmarried woman 16 years of age or older capable of "consenting to and consummating marriage").

[5] Section 32-201 provides in pertinent part: "Marriage is a personal relation arising out of a civil contract between a man and a woman . . . ." Section 32-209 provides in pertinent 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.

Then in three consecutive sessions, 2004, 2005, and 2006, in light of then-recent state-court decisions invoking state constitutions to redefine marriage in genderless terms, the Idaho Legislature debated the need for and wisdom of an amendment to Idaho's Constitution to further affirm the State's choice of the unique social benefits of the man-woman marriage institution, an amendment that would require the approval of Idaho's voters. In 2006, the Idaho Legislature chose to send such a proposed amendment to the voters. Known as Amendment 2, it reads: "A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state."

In the campaign leading up to the vote on Amendment 2 in the 2006 general election, an important part of the public discussion focused on the fact that the man-woman marriage institution establishes, teaches, and influences in favor of a child knowing and being reared by her mother and father—while the genderless marriage institution repudiates that norm. Thus, one campaign flyer favoring Amendment 2 depicted a mother and a father each holding a hand of their young daughter and posed the question: "Which is unnecessary? A father or a mother?" ER 209.

Over 63% of Idaho's voters approved Amendment 2, and it became a part of the State's constitution. Idaho Const. art. III, § 28.

4. Recent experimentation and contests in other States.

A strong majority of States have followed a path similar to Idaho's. Currently, 33 States preserve the man-woman meaning of marriage, including 29 States that have a constitutional provision doing so. Addendum 3. Of those, 20 States also have constitutional language precluding government sanction of any other marriage-like relationship. Addendum 4.

Either by judicial action premised on state constitutions or by state legislative action or, in the case of California, by the decision of a single federal judge, seventeen States have withdrawn all official recognition of the man-woman meaning of marriage and implemented a genderless marriage regime. Addendum 3. The Massachusetts Supreme Judicial Court made its State the first of those seventeen with its divided (4-3) decision, effective in 2004. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). So the genderless marriage experiment is in its earliest infancy.

Pending civil actions challenge on federal constitutional grounds the marriage laws of every State that, by some form of state action, has not abandoned its man-woman marriage institution. Addendum 5. It is anticipated that the United States Supreme Court will use one of those civil actions—perhaps this one—to resolve the question whether the Fourteenth Amendment compels the States to

suppress the man-woman marriage institution and replace it with a genderless marriage institution.

5. Procedural history of this case

Four same-sex couples ("Plaintiffs"), two of which want to be married in Idaho and two of which want Idaho to recognize their foreign marriages, filed their 42 U.S.C. §1983 civil action on November 8, 2013, which they later amended on January 29, 2014, alleging that Idaho's laws preserving the man-woman meaning of marriage, including Amendment 2 (collectively "Idaho's Marriage Laws"), violate the Fourteenth Amendment's Due Process and Equal Protection Clauses. ER 1249–78. The Plaintiffs named as defendants Governor Otter in his official capacity as the Chief Executive Officer of Idaho[6] and Ada County Clerk Rich. Counsel to the Governor appeared on Governor Otter's behalf;[7] the Attorney General, on behalf of Clerk Rich. The Attorney General also successfully moved to allow the State of Idaho to intervene as a party defendant. In part in the interest of a speedier resolution at the district court level, all parties consented to Magistrate Judge Candy Dale hearing this civil action for all purposes.

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[6] Article IV, section 5 of the Idaho Constitution states: "The supreme executive power of the state is vested in the governor, who shall see that the laws are faithfully executed."

[7] Under Idaho Code § 67-1407(1), the Governor has the discretion, when sued in his official capacity, to appear in any court through his own counsel or utilize the Attorney General's legal services.

Before the panel decision in *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014), the Attorney General's clients made a Rule 12(b) motion to dismiss, which the magistrate judge later treated as a motion for summary judgment. ER 19. Thereafter, in a coordinated fashion, the Plaintiffs and Governor Otter filed and briefed cross-motions for summary judgment. ER 45, 57. Governor Otter in large measure premised his summary judgment motion on the social institutional realities involved in Idaho's choice between the two mutually exclusive marriage institutions (or what is known generally as "the social institutional argument for man-woman marriage", which is set forth below in Argument, Section I.B.).

On May 5, 2014, the magistrate judge heard oral arguments on the dispositive motions. On May 13, 2014, the magistrate judge entered her Memorandum Decision and Order ("Decision"), holding that Idaho's Marriage Laws, to the extent they preserve the man-woman meaning of marriage, violate the Fourteenth Amendment's Due Process and Equal Protection Clauses and, on that ground, enjoining enforcement of those laws. ER 6–62. On May 14, 2014, the magistrate judge both refused to stay the Decision pending appeal and entered a final judgment. ER 1–5. Governor Otter and the other defendants immediately appealed, ER 66–75, and immediately filed emergency motions for stay pending appeal. This Court's motion panel unanimously granted those motions, with the

consequence that no marriages have been performed in contravention of Idaho's Marriage Laws.

6. The Decision.

The Decision holds at 19–28 that the right to marry protected by the Fourteenth Amendment Due Process Clause ought to be viewed as encompassing marriage by same-sex couples; at 30–31 that Idaho's Marriage Laws do not constitute sex discrimination; at 31–36 that the proper level of judicial scrutiny for the claim of sexual orientation discrimination is "intermediate scrutiny"; and at 36–55 that Idaho's Marriage Laws do not withstand any form of constitutional scrutiny. ER 24–33, 35–60.

A striking feature of the Decision is that it does not engage Governor Otter's social institutional argument for man-woman marriage.

SUMMARY OF ARGUMENT

As each State must do, Idaho must choose, through its laws, one or the other of two mutually exclusive and profoundly different social institutions of marriage. One is the man-woman marriage institution, the one developed and sustained by virtually all societies since pre-history, with its core, constitutive meaning of "the union of a man and a woman." The other is the new genderless marriage institution, with its core, constitutive meaning of "the union of two persons without regard to gender." Through legitimate democratic processes that literally included

all the State's citizens, Idaho chose to preserve its man-woman marriage institution and, therefore, not to adopt the genderless marriage institution.

Idaho did this because of its considered and robustly supported judgments that (1) the greater the portion of children—all children through the generations including those (the vast majority) conceived by heterosexual coupling—who know and are raised by mother and father, the greater the flourishing and well-being of children and humankind generally and (2) because of children's social and political helplessness and because children are the State's future, Idaho ought to advance the best interests and fullest flourishing of children generally, even when to do so subordinates adult desires.

Those judgments are directly linked to Idaho's choice to preserve the man-woman marriage institution because—and these conclusions are also robustly supported by the best intellectual and scientific work on social institutions—the man-woman marriage institution materially fosters a society where more children know and are raised by their mothers and fathers, while the genderless marriage institution does just the opposite. The man-woman meaning at the core of the marriage institution, reinforced by the law, has always recognized, valorized, and made normative the roles of "mother" and "father" and their uniting, complementary roles in raising their offspring. In contrast, the genderless marriage institution, reinforced by the law, does just the opposite by denying any space in

the law for the distinct role of "mother" or the distinct role of "father." Genderless marriage's core institutionalized meaning of "the union of two persons without regard to gender" teaches *everyone*—married and unmarried, gay and straight, men and women, and all the children—that a child knowing and being reared by her mother and father is neither socially preferred nor officially encouraged.

What fundamental social institutions teach matters because those teachings, reinforced by the law, powerfully influence and guide—in one direction or another—the behavior of all of us. Justice Kennedy has recognized that teaching power. *See Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring). Consistently, social scientists have recognized that changing from man-woman marriage to genderless marriage creates a grave risk of influencing human behavior, particularly that of heterosexual males, in a way that over time will result in a lesser portion of the children knowing and being raised by mother and father and therefore in a greater portion of the children experiencing the ills of fatherlessness and motherlessness.

Idaho's conclusions are further buttressed by the robustly supported understanding that the ethos of the man-woman marriage institution is relatively but decidedly more child-centric, while the ethos of the genderless marriage institution is relatively but decidedly more adult-centric—a difference that Justice Alito recently described in some detail. *United States v. Windsor*, 133 U.S. 2715–

16 n.6, 2718 (Alito, J., dissenting). The decidedly more child-centric marriage institution is important to a range of parental decisions beyond ensuring that the child is raised by both her father and her mother; its subtle but powerful teachings will exert an influence on parents to stay away from the abuse of alcohol or drugs; destabilizing extramarital affairs; excessively demanding work schedules; or time-consuming hobbies or other interests that take them away from their children.

One more difference between the two competing marriage institutions also matters in assessing Idaho's choice. Idaho's choice of the man-woman marriage institution furthers the State's vital interests in preserving democratic legitimacy and a broad consensus for its marriage institution, as well as accommodating religious freedom and reducing the potential for civic strife.

The fundamental right to marry that the Due Process Clause has long protected is the right to enter into and participate in the deep, rich, and empowering man-woman marriage institution, with its centuries and volumes of meaning. Idaho's Marriage Laws reaffirm that right, no more and no less. The "right" to marry a person of the same sex is not a fundamental right because it necessarily encompasses a right to compel a State to suppress the man-woman marriage institution and replace it with the profoundly different genderless marriage institution—which then becomes what marriage officially *is* for everyone. Accordingly, the "right" to marry a person of the same-sex is clearly not one of

"those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (quotations and citations omitted).

Idaho's Marriage Laws do not violate the Equal Protection Clause. For one thing, they simply reaffirm the fundamental constitutional right to marry long recognized under the Due Process Clause, and a law doing that clearly cannot constitute a violation of the Equal Protection Clause, otherwise the Fourteenth Amendment is at war with itself. Equally important, Idaho's Marriage Laws substantially advance Idaho's vital and compelling interests identified above and pertaining to the flourishing and well-being of all its children through the generations. Accordingly, Idaho's Marriage Laws can withstand any level of judicial scrutiny, although rational basis review is the level of scrutiny sensibly and most correctly applied here.

Idaho has the undisputed constitutional authority to regulate domestic relations within its borders. It has wisely and legitimately exercised that authority, through fair and open democratic processes, in making a difficult and poignant policy decision. Because the reasons supporting Idaho's decision are so compelling and so robustly supported by the best thinking of the ages and sound scientific work, that decision stands in full harmony with the Constitution.

STANDARD OF REVIEW

The Court reviews *de novo* a grant of summary judgment, *e.g.*, *Gabriel v. Alaska Elec. Pension Fund*, 2014 WL 2535469, at *4 (9th Cir. June 6, 2014), which is granted only when there are no genuine disputes of material adjudicative fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The parties agree that here there are no disputed adjudicative facts. Disputed legislative facts, of which there are some here, do not preclude entry of summary judgment, *see, e.g.*, *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1105 (D. Haw. 2012), for reasons explained below in Argument, Section I.E.

ARGUMENT

The overarching issue in this case is whether the people of Idaho, "seek[ing] a voice in shaping the destiny of their own times," *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011), have the right to deliberate together and democratically decide what vision of marriage best advances their understanding of the public good, or whether that fundamental matter of domestic relations and community life will be decided by federal judges applying historically unprecedented interpretations of the Fourteenth Amendment.

This is no light matter. Democratic decision making within the States—especially in a foundational matter like marriage that is essential to the welfare of

all families, children, and communities—has a morality and legitimacy that cannot just be brushed aside with invocations of individual rights. "[F]reedom 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 . . . ." *Schuette v. BAMN*, 134 S. Ct. 1623, 1636–37 (2014) (opinion of Justice Kennedy, announcing the judgment of the Court). Yet it would be a vain right if matters of fundamental importance to our lives together could simply be withdrawn from the democratic process by an extravagant claim of constitutional right. For even in "difficult and delicate" areas, *id.* at 1636, where voters must deliberate and decide "against a historical background . . . that has been a source of tragedy and persisting injustice," *id.* at 1637, our common democratic "history demands that we continue to learn, to listen, and to remain open to new approaches if we are to aspire always to a constitutional order in which all persons are treated with fairness and equal dignity," *id.*

That deliberative process of learning, listening, and remaining open does not dictate a single conclusion, least of all with respect to marriage. Its purpose is to refine the will of the people, not to reach results courts deem best. Hence, while many believe affirmative action is essential to remedy past racial injustices, the Supreme Court in *Schuette* rejected a constitutional challenge to Michigan's flat

ban on affirmative action in university admissions in favor of allowing the people of Michigan to deliberate and decide that wrenching issue. It is axiomatic that "[i]f the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen." *Alden v. Maine*, 527 U.S. 706, 751 (1999).

At its core, "[t]he idea of democracy is that it can, and must, mature. Freedom embraces the right, indeed the duty, to engage in a rational, civic discourse in order to determine how best to form a consensus to shape the destiny of the Nation and its people." *Schuette*, 134 S. Ct. at 1637. That an issue involves deeply "sensitive or complex" matters that profoundly affect people's lives is no reason to conclude it is beyond "the grasp of the electorate." *Id.* at 1637. On the contrary, such a "holding would be an unprecedented restriction on the exercise of a *fundamental right* held not just by one person but by all in common. It is the right to speak and debate and learn *and then, as a matter of political will, to act through a lawful electoral process*." *Id.* (emphasis added).

Plaintiffs seek to "foreclose[] the [people of the State of Idaho] from . . . exercising their own judgment" about which marriage institution best advances the interests of all Idaho's citizens, despite the fact that marriage is "an area to which

States lay claim by right of history and expertise." *United States v. Lopez*, 514 U.S. 549, 583 (1995). But like the citizens of Michigan in *Schuette*, the people of Idaho have a "fundamental right" to deliberate and then adopt the marriage institution that is most consistent with their considered judgment about the highest and best purposes of marriage. That democratic right—exercised continuously for nearly 125 years by the people of Idaho—is directly threatened here.

The State's historical authority under the Constitution to define and regulate marriage is set forth above. What follows explains in great detail the fundamental social, institutional, and familial realities of marriage that the people of Idaho recently reaffirmed as they "engage[d] in a rational, civic discourse in order to determine how best to form a consensus" about marriage that will best "shape the destiny" of the State of Idaho. *Schuette*, 134 S. Ct. at 1637. Those understandings may no longer command majority support in a minority of States or among those with different social values, but they remain fundamental to how the people of Idaho understand marriage and its role in their common lives, and thus merit great judicial respect.

I. IDAHO'S REASONS FOR CHOOSING THE MAN-WOMAN MARRIAGE INSTITUTION OVER GENDERLESS MARRIAGE FULLY SATISFY THE REQUIREMENTS OF THE FOURTEENTH AMENDMENT.

A. Idaho has powerful, legitimate interests in fostering a society where more rather than fewer children know and are raised by mother and father and thereby escape the ills of fatherlessness and motherlessness.

Based on their experience and democratic deliberations, Idahoans have come to these two conclusions:

- The greater the portion of children—all children through the generations including those (the vast majority) conceived by heterosexual coupling—who know and are raised by mother and father, the greater the flourishing and well-being of children and humankind generally.
- Because of children's social and political helplessness and because children *are* the State's future, Idaho ought to advance the best interests and fullest flourishing of children generally even when to do so subordinates adult desires.

Both conclusions are fully consistent with centuries, even millennia, of human experience; with common sense; with the best evidence from the social sciences; with virtually universally shared philosophical and religious understandings; and with the highest of our Nation's ideals. Tellingly, no responsible public voice to our knowledge has directly and publicly challenged either conclusion.[8]

[8] This is not to say—and Governor Otter wants to be clear—that those in other parenting situations, including same-sex couples, cannot be loving parents; they clearly can. The point is that features inherent in the man-woman marriage

Social science has established the link between humankind's sustainable flourishing and mother-father child-rearing. "The intact, biological, married family remains the gold standard for family life in the United States, insofar as children are most likely to thrive—economically, socially, and psychologically—in this family form."[9]

Social science has also illuminated a cause of the link between human flourishing and mother-father child-rearing: it is what the literature usually calls "gender complementarity." While the value of gender complementarity in parenting is common sense to many, the concept likewise finds confirmation in a growing body of social science research. As a group of 70 scholars recently concluded, the "empirical literature on child well-being suggests that the two sexes bring different talents to the parenting enterprise, and that children benefit from growing up with both biological parents."[10] In other words, the benefits flow not just from having *two* parents of any gender, but from what scholars call "gender-differentiated" or mother-father parenting: "The burden of social science evidence supports the idea that gender-differentiated parenting is important for human development and that the contribution of fathers to childrearing is unique and

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institution powerfully enhance child welfare generally and thus provide compelling support for Idaho's choice of that institution.

[9] ER 533.

[10] ER 712.

irreplaceable."[11] Indeed, research shows that men and women parent children differently, and in so doing contribute distinctly to healthy child development. [12]

Social science has established the link between fatherlessness and a host of social ills. *See, e.g.*, David Popenoe, *Life Without Father: Compelling New Evidence That Fatherhood & Marriage are Indispensable for the Good of Children & Society* (1996); David Blankenhorn, *Fatherless America: Confronting Our Most Urgent Social Problem* (1995).[13] Indeed, in 2009, the White House announced that it was launching "a national conversation on fatherhood and personal

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[11] ER 735; *accord, e.g.*, Norval D. Glenn, *The Struggle for Same-Sex Marriage*, 41 Soc'y 25, 27 (2004) ("[T]here are strong theoretical reasons for believing that both fathers and mothers are important, and the huge amount of evidence of relatively poor average outcomes among fatherless children makes it seem unlikely that these outcomes are solely the result of the correlates of fatherlessness and not of fatherlessness itself."); ER 521 ("The weight of scientific evidence seems clearly to support the view that fathers matter.").

[12] Although he later embraced the movement to redefine marriage to include same-sex couples, child-development expert Michael Lamb pointed out nearly 40 years ago that "[b]oth mothers and fathers play crucial and qualitatively different roles in the socialization of the child." Michael E. Lamb, *Fathers: Forgotten Contributors to Child Development*, 18 Human Dev. 245, 246 (1975); *accord* A. Dean Byrd, *Gender Complementarity and Child-Rearing: Where Tradition and Science Agree*, 6 J. L. & Fam. Stud. 213 (2004); *see also* A. Dean Byrd & Kristen M. Byrd, *Dual-Gender Parenting: A Social Science Perspective for Optimal Child Rearing*, *in* Family Law: Balancing Interests and Pursing Priorities 382–87 (2007).

[13] *See also* Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families*, 65 J. Marriage and Fam. 876 (2003); Eirini Flouri & Ann Buchanan, *The role of father involvement in children's later mental health*, 26 J. Adolescence 63, 63 (2003) (concluding "[f]ather involvement at age 7 protected against psychological maladjustment in adolescents," even when controlling for mother involvement).

responsibility." The conversation commenced with an event celebrating five outstanding fathers. The President explained:

> [W]hen fathers are absent—when they abandon their responsibility to their kids—we know the damage that does to our families. Children who grow up without a father are more likely to drop out of school and wind up in prison. They're more likely to have substance abuse problems, run away from home, and become teenage parents themselves.[14]

Studies on the children of divorce further bolster our sad understanding of the ills of fatherlessness and motherlessness because divorce involving children unavoidably operates to increase both those conditions.[15] The studies demonstrate that, compared to children in intact mother-father families, the children of

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[14] Press Release, Office of the Press Secretary, The White House, *President Obama Launches National Conversation on Importance of Fatherhood and Personal Responsibility* (June 19, 2009), http://www.whitehouse.gov/the-press-office/president-obama-launches-national-conversation-importance-fatherhood-and-personal-r.

[15] *E.g.*, Elizabeth Marquardt, *Between Two Worlds: The Inner Lives of Children of Divorce* (2005); Paul R. Amato & Bruce Keith, *Parental divorce and the well-being of children: A meta-analysis*, 100 Psychol. Bull. 26, 26–46 (1991); Paul R. Amato, *Parental absence during childhood and depression in later life*, 32 Soc. Q. 543, 543–56 (1991); Judith S. Wallerstein, *Children of divorce: Preliminary report of a ten-year follow-up of young children*, 54 Am. J. Orthopsychiatry 444, 444–58 (1984); Judith S. Wallerstein, *Children of divorce: Preliminary report of a ten-year follow-up of older children and adolescents*, 24 J. Am. Acad. Child Psychiatry 545, 545–53 (1985); Judith S. Wallerstein, *Women after divorce: Preliminary report from a ten-year follow-up*, 56 Am. J. Orthopsychiatry 65, 65–77(1986); Judith S. Wallerstein, *Children of divorce: Report of a ten-year follow-up of early latency-age children*, 57 Am. J. Orthopsychiatry 199, 199–211 (1987); Judith S. Wallerstein & Sandra Blakeslee, *Second Chances: Men, Women, and Children a Decade After Divorce* (1989); Judith S. Wallerstein & S.B. Corbin, *Daughters of divorce: Report from a ten-year follow-up*, 59 Am. J. Orthopsychiatry 593, 593–604 (1989).

divorce—whose condition necessarily includes an increase in fatherlessness and/or motherlessness—on average fare worse on virtually all measures of human flourishing. Thus, children of divorce on average have lower academic achievement, more behavioral problems, poorer psychological adjustment, more negative self-concepts, more social difficulties, and more problematic relationships with both mothers and fathers.

A recent study of young adults conceived by anonymous sperm donors points to their generally lower level of flourishing, compared to their age cohorts raised by either natural or adoptive mother and father. Researchers "learned that, on average, young adults conceived through sperm donation are hurting more, are more confused, and feel more isolated from their families. They fare worse than their peers raised by biological parents on important outcomes such as depression, delinquency, and substance abuse."[16]

International human rights laws recognize the interest of children in knowing and being raised by mother and father. *See, e.g.*, Blankenhorn, *Future*, *supra*, at 193 (concluding after an in-depth review that "[t]he world's main human rights statements say that children have a right to their two natural parents."); Margaret Somerville, *Children's human rights and unlinking child-parent biological bonds with adoption, same-sex marriage and new reproductive*

[16] ER 750.

technologies, 13 J. Fam. Stud. 179, 179–201 (2007). This recognition in human rights is understandable given the scientific and common-sense support for the link between vindication of that interest and human flourishing.

Philosophical and religious understandings also recognize the interest of children in knowing and being raised by mother and father.[17]

Our national ideals also recognize the interest of children in knowing and being raised by mother and father. Justice Brennan adroitly summarized those ideals, noting that "the optimal situation for the child is to have both an involved

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[17] *See, e.g.*, Aristotle, *Nicomachean Ethics*, Book VIII, section 12 ("for parents love their children as being a part of themselves, and children their parents as being something originating from them."); John Locke, *Two Treatises of Government* § 78 (Peter Laslett ed., 1988) (1690) ("*Conjugal Society* . . . draws with it mutual Support, and Assistance, and a Communion of Interest too, as necessary not only to unite their Care and Affection, but also necessary to their common Off-spring, who have a Right to be nourished and maintained by them, till they are able to provide for themselves."); J. David Velleman, *Family History*, 34 Philosophical Papers 357, 370–71 (November 2005) ("The baby . . . has an inborn nature that joins together the nature of two adults. If those two adults are joined by love into a stable relationship—call it marriage—then they will be naturally prepared to care for it with sympathetic understanding, and to show it how to recognize and reconcile some of the qualities within itself. A child naturally comes to feel at home with itself and at home in the world by growing up in its own family."); Congregation for the Doctrine of the Faith, *Donum Vitae* II.A.1 (Joseph, Cardinal Ratzinger) (Feb. 22, 1987) ("The child has the right to be conceived, carried in the womb, brought into the world and brought up within marriage: it is through the secure and recognized relationship to his own parents that the child can discover his own identity and achieve his own proper human development."); The Church of Jesus Christ of Latter-day Saints, *The Family: A Proclamation to the World* (Sept. 23, 1995) ("Children are entitled to birth within the bonds of matrimony, and to be reared by a father and a mother who honor marital vows with complete fidelity.").

mother and an involved father." *Bowen v. Gilliard*, 483 U.S. 587, 614 (1987) (Brennan, J., dissenting).

In sum, the best thinking of the ages and the best scientific work combine to support Idaho's two essential conclusions: One, the greater the portion of its children who know and are raised by mother and father, the greater the degree of childhood flourishing and well-being. Two, Idaho ought to advance the best interests and fullest flourishing of children generally, even when to do so makes it impossible to treat same-sex couples the same as man-woman couples in the context of marriage.

B. By choosing the man-woman marriage institution, Idaho materially fosters a society where more rather than fewer children know and are raised by their mothers and fathers, whereas genderless marriage does just the opposite.

Idaho has come to the conclusion that the man-woman marriage institution materially fosters a society where more children know and are raised by their mothers and fathers. Idaho has also come to the conclusion that the genderless marriage institution does just the opposite. Those conclusions are based on the best developed knowledge regarding the nature of social institutions and the means and extent of their power to influence human behavior.

Each fundamental social institution, like marriage, is constituted by a unique web of public meanings and norms.[18]

Institutionalized meanings and norms powerfully teach, form, and guide *all* of us in profound ways.[19] Justice Kennedy has correctly stated this truth in connection with one fundamental institution, the law:

> One of the undoubted achievements of statutes designed to assist those with impairments is that citizens have an incentive, flowing from a legal duty, to develop a better understanding, a more decent perspective, for accepting persons with impairments or disabilities into the larger society. *The law works this way because the law can be a teacher*.

Bd. of Trustees of Univ. of Alabama v. Garrett, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring) (emphasis added).

Institutionalized meanings guide our behavior by supplying identities, purposes, practices, and ideals.[20] The fact that we are largely oblivious to social

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[18] *See, e.g.*, ER 593; *see also* Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision*, 1 Duke J. Const. L. & Pub. Pol'y 1, 8–28 (2006) ("*Institutional Realities*"); Victor Nee & Paul Ingram, *Embeddedness and Beyond: Institutions, Exchange, and Social Structure*, *in* The New Institutionalism in Sociology 19 (Mary C. Brinton & Victor Nee eds., 1998) ("An institution is a *web of interrelated norms*—formal and informal—governing social relationships.").

[19] *See, e.g.*, ER 112–53; Helen Reece, *Divorcing Responsibly* 185 (2003); ER 163; Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 Can. J. Fam. L. 11 (2004) ("*Judicial Redefinition*"); *see also* Richard R. Clayton, *The Family, Marriage, and Social Change* 19, 22 (2d ed. 1979); Monte Neil Stewart, *Eliding in Washington and California*, 42 Gonzaga L. Rev. 501, 503 (2007).

[20] *See supra* note 19.

institutions and their powerful influences on us does not diminish the reality of either those influences or that power.[21]

In virtually all societies since pre-history, "the union of a man and a woman" has been a core, constitutive meaning of the marriage institution.[22] *See Windsor*, 133 S. Ct. at 2689 ("marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization").

The man-woman meaning at the core of the marriage institution, reinforced by the law, has always recognized, valorized, and made normative the roles of "mother" and "father" and their uniting, complementary roles in raising their offspring. *See* Factual and Procedural Statement, section 2, *supra*. Societies have always perceived that that powerful, positive influence in favor of those complementary roles would result in more children who know and are raised by their mother and father and fewer children who experience the ills of fatherlessness and motherlessness. *Id.*

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[21] "We live in a sea of human institutional facts. Much of this is invisible to us. Just as it is hard for the fish to see the water in which they swim, so it is hard for us to see the institutionality in which we swim. Institutional facts are without exception constituted by language, but the functioning of language is especially hard to see. . . . [W]e are not conscious of the role of language in constituting social reality." ER 574.

[22] *See, e.g.*, ER 541–42, 511–14, 1104–09.

With its regime of "Parent A" and "Parent B," the genderless marriage institution, reinforced by the law, does just the opposite by denying any space in the law for the distinct role of "mother" or the distinct role of "father" and therefore of their united, complementary role in raising offspring.[23] Genderless marriage's core institutionalized meaning of "the union of two persons without regard to gender" teaches *everyone*—married and unmarried, gay and straight, men and women, and all the children—that a child knowing and being reared by her mother *and* father is neither socially preferred nor officially encouraged.[24] Each *married* woman-woman couple and the children connected to their relationship embody the *official* message that "fathers are not necessary or even valued in child-rearing." Each *married* man-man couple and the children connected to their relationship embody the *official* message that "mothers are not necessary or even valued in child-rearing."

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[23] ER 112–53; Margaret Somerville, *Children's human rights and unlinking child-parent biological bonds with adoption, same-sex marriage and new reproductive technologies*, 13 J. Fam. Stud. 179, 180–81 (2007) ("Same-sex marriage changes the nature of marriage as a societal institution and in doing so changes the nature of parenthood . . . . [Same-sex marriage] unlinks parenthood from biology. In doing so, it unavoidably takes away children's right to both a mother and a father and their right . . . to know and be reared within his own biological family. . . . [Same-sex marriage] breaks the automatic link between biological and legal parenthood at the institutional level and, consequently, has major impact on the societal norms, symbols and values associated with parenthood.")

[24] Somerville, *supra* note 23, at 180–81.

Idaho perceives that this message, this teaching influence, will direct adult behavior away from, rather than toward, acceptance and fulfillment of the uniting, complementary roles of mother and father in raising offspring. Over time, the result must surely be a society with fewer, rather than more, children knowing and being raised by mother and father. Over time, the result must surely be a society with greater fatherlessness and motherlessness and therefore more of the personal and social ills attendant upon those conditions. To say otherwise is to deny the power of fundamental social institutions' core public meanings to shape and direct the behavior of everyone in society. No responsible, informed voice denies that power.[25]

This profound difference between what the competing marriage institutions teach about the uniting, complementary roles of mother and father could not be otherwise: fundamentally different meanings ("the union of a man and a woman" versus "the union of two persons without regard to gender"), when magnified by institutional power and influence, produce divergent social identities, aspirations, and ways of behaving, and thus different social benefits.[26] Well-informed observers of marriage—regardless of their sexual, political, or theoretical

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[25] *See, e.g.*, *supra* note 19; Stewart, *Institutional Realities*, *supra* note 18, at 9–10 ("This profound influence ought not to be underestimated; institutions 'shape[] what those who participate in [them] think of themselves and of one another, what they believe to be important, and what they strive to achieve.'").

[26] *See, e.g.*, ER 645, 701.

orientations—uniformly acknowledge the magnitude of the differences between the two possible institutions of marriage.[27] The reality is that changing the

[27] We begin a long list (that could readily be made even longer) with the then executive director of Lambda Legal Defense and Education Fund, Thomas Stoddard, who argued that "enlarging the concept" of marriage would "necessarily transform it into something new." Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, Out/Look Nat'l Gay & Lesbian Q., Fall 1989, at 19. In addition, *e.g.*, David Blankenhorn, *The Future of Marriage* 167 (2007) ("I don't think there can be much doubt that this post-institutional view of marriage constitutes a radical redefinition. Prominent family scholars on both sides of the divide—those who favor gay marriage and those who do not—acknowledge this reality."); Daniel Cere, *War of the Ring*, *in* Divorcing Marriage: Unveiling the Dangers in Canada's New Social Experiment 9, 11–13 (Daniel Cere & Douglas Farrow eds., 2004) ("Divorcing Marriage"); Douglas Farrow, *Canada's Romantic Mistake*, *in* Divorcing Marriage, *supra*, at 1–5; Ladelle McWhorter, *Bodies and Pleasures: Foucault and the Politics of Sexual Normalization* 125 (1999); Joseph Raz, *The Morality of Freedom* 393 (1986); Judith Stacey, *In the Name of the Family: Rethinking Family Values in the Postmodern Age* 126–28 (1996); Sherif Girgis et al., *What Is Marriage? Man and Woman: A Defense* 54–55 (2012); Katherine K. Young & Paul Nathanson, *The Future of an Experiment*, *in* Divorcing Marriage, *supra*, at 48–56; Angela Bolt, *Do Wedding Dresses Come in Lavender? The Prospects and Implications of Same-Sex Marriage*, 24 Soc. Theory & Prac. 111, 114 (1998); Devon W. Carbado, *Straight Out of the Closet*, 15 Berkeley Women's L.J. 76, 95–96 (2000); Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 U. St. Thomas L.J. 33, 53 (2004) ("Many thoughtful supporters of same-sex marriage recognize that some profound shift in our whole understanding of the world is wrapped up in this legal re-engineering of the meaning of marriage."); E.J. Graff, *Retying the Knot*, The Nation, June 24, 1996, at 12; Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 Law & Sexuality 9, 12–19 (1991); Andrew Sullivan, *Recognition of Same-Sex Marriage*, 16 Quinnipiac L. Rev. 13, 15–16 (1996).

Genderless marriage proponents sometimes try to contest that genderless marriage is a profoundly different institution than man-woman marriage but their "counter-argument" is driven by expediency; because of their need to elide the argument we make here, in their public pronouncements "advocates have carefully

meaning of marriage to that of "two persons without regard to gender" will transform the institution profoundly, if not immediately then certainly over time as the new meaning is mandated in texts, in schools, and in many other parts of the public square and voluntarily published by the media and other institutions. Over time, society, especially its children, will lose the ability to discern the meanings of the old institution.

Professors Hawkins and Carroll have explained these social institutional realities in an *amici curiae* brief filed in other circuit court cases addressing the constitutionality of man-woman marriage and also made a part of the record before the district court in this case. ER 112–53. They explain that there is "no dispute among social scientists that social institutions profoundly affect human behavior" and "provide human relationships with meaning, norms, and patterns, and in so doing encourage and guide conduct." ER 120. Consequently, "when the definitions and norms that constitute a social institution change, the behaviors and interactions that the institution shapes also change." ER 121. As "society's most enduring and essential institution," marriage has always "shaped and guided sexual, domestic, and familial relations between men, women, and their children." ER 121. But to change the social meaning and understanding of marriage "will have significant consequences"; it "will change the behavior of men and women."

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minimized the impact of the change they seek." Deborah A. Widiss, *Changing the Marriage Equation*, 89 Wash. U.L. Rev. 721, 778, 781 (2012).

ER 121. This conclusion is based on "sound theory, logic, . . . common sense, [and] experience with other changes to marriage," including the law's negative impact, by way of no-fault divorce statutes, on the meaning of "permanence" formerly at the core of the marriage institution—a change that substantially increased the incidence of fatherlessness in our society. ER 121. Although acknowledging that "it is far too early to know exactly how" a move to a genderless marriage institution will affect society, Professors Hawkins and Carroll demonstrate that the change "will likely further weaken heterosexual men's connection to marriage and their children. This, in turn, will likely increase the risk that more children will be raised without the manifest benefits of having their fathers married to their mothers and involved day to day in their lives." ER 122.

The genderless marriage institution's powerful but contrary teaching about the uniting, complementary roles of mother and father in child-rearing is *not* the product of the qualities or capacities of the couples, whether man-woman or same-sex, who participate in that institution. Rather this powerful but contrary teaching is the product of the institution's core public *meaning* of "the union of two persons without regard to gender." And that *meaning* is not optional; without it, there can be no genderless marriage institution.

The non-optional core public meaning of the genderless marriage institution and the non-optional core public meaning of the man-woman marriage institution

are not compatible and cannot co-exist. Society cannot simultaneously have as shared, core, constitutive meanings of the marriage institution *both* "the union of a man and a woman" *and* "the union of any two persons"—any more than it can have monogamy as a core meaning if it also allows polygamy. Given the role of language and meaning in constituting and sustaining institutions,[28] two "coexisting" social institutions known society-wide as "marriage" amount to a factual impossibility. [29]

Thus, every society must choose. It must choose either to retain man-woman marriage or, by force of law, replace it with a profoundly different genderless marriage regime.[30] The law, with its vast and sufficient power,[31] enforces the choice, and once it does, that is what the public meaning of marriage *is* for *everyone*.

No same-sex couple can *be* married (whether by a wedding ceremony or by official recognition of their foreign marriage) in any jurisdiction and in any intelligible sense unless and until that jurisdiction's law suppresses man-woman marriage and replaces it with genderless marriage. Unless and until the legal and

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[28] *See, e.g.*, ER 574.

[29] *See, e.g*, Stewart, *Institutional Realities*, *supra* note 18, at 24.

[30] A society actually has a third option: no normative marriage institution at all. Many of the most influential advocates of genderless marriage correctly and gladly see that as leading quite naturally to no normative marriage institution at all. For a clear example of high-level advocacy for such, see ER 1071–97.

[31] *See, e.g.*, ER 163–64, 645, 701; Nancy F. Cott, *The Power of Government in Marriage*, 11 The Good Soc'y 88 (2002).

public meaning of marriage in a State is "the union of two persons," a same-sex couple cannot *be* legally and publicly married in that State.

No informed, responsible voice has contested any of these social institutional realities. Rather, the strategy has been to ignore them and to speak as if the correct and relevant comparison is between the capacities (parental and otherwise) or the interests or the longings or the worthiness of the people who can and cannot participate in man-woman marriage. But that clearly is not the correct and relevant comparison because each society's choice, and certainly Idaho's choice, is between two mutually exclusive and profoundly different marriage institutions.[32] Idaho's powerful, important, and legitimate interests that justify its choice are found in the differences between those two alternatives. And the social institutional realities make starkly clear this difference: the man-woman marriage institution materially fosters a society where more rather than fewer children know and are raised by their mothers and fathers, whereas genderless marriage does just the opposite.

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All that is presented above in this section was presented to the district court, including the reality that Idaho's choice is between two mutually exclusive and profoundly different marriage institutions—with each going in an opposite

[32] *See supra* text accompanying notes 28–31.

direction in its teaching and influence regarding the ideal of a child knowing and being reared by mother and father. Although no informed, responsible voice has contested any of the social institutional realities presented above, the Decision fails to engage them sensibly. It asserts that "[i]mportant as the child-centered vision of marriage is, Idaho's consent-based marriage regime does not *require* heterosexual couples to accept or follow this norm." ER 51 (emphasis added). Yet this assertion clearly misses the mark; although the institutionalized norm of mother and father involvement in the rearing of their children does not "require" that beneficial behavior (in the sense the Decision uses the word), the norm undoubtedly has a powerful influence that increases the general level of just such behavior. And for the law to suppress the norm is certainly to diminish the measure of the beneficial behavior resulting from it.

The Decision also asserts that "[t]here is no evidence that allowing same-sex marriages will have any effect on when, how, or why opposite-sex couples choose to marry." ER 51. This assertion ignores the social reality that man-woman marriage's child-centric norms undoubtedly have a powerful influence on how such couples behave *inside* their marriage once children join them. It further ignores Professors Hawkins and Carroll's careful analysis, including their well-demonstrated point that the law's suppression of the man-woman marriage

institution and imposition of a supplanting genderless marriage regime will most likely affect heterosexual men's choices regarding marriage and child-rearing.

Instead of genuinely engaging the social institutional argument for man-woman marriage, the Decisions speaks as if the correct and relevant comparison is between the capacities (parental and otherwise) or the interests or the longings or the worthiness of the people who can and cannot participate in man-woman marriage. ER 48–53. *Only* in this way can the Decision, with any plausibility or coherence, conclude as it does that "the link between the interest in protecting children and Idaho's Marriage Laws is so attenuated that it is not rational." ER 48. *Only* in this way can the Decision avoid acknowledging Idaho's compelling interest well served by its choice of the man-woman marriage institution over the profoundly different genderless marriage institution.

C. By choosing the man-woman marriage institution, Idaho fosters a marriage culture that is relatively but decidedly more child-centric than what the genderless marriage institution can provide.

Idaho's choice is also justified by another but related difference between the two possible marriage institutions: of the two, the man-woman marriage institution is relatively but decidedly more child-centric; the genderless marriage institution, relatively but decidedly more adult-centric.

Without any disagreement from the other justices, Justice Alito in *Windsor*, 133 S Ct. at 2718, observed that the parties there were:

> really seeking to have the Court resolve a debate between two competing views of marriage. . . . The first and older view, which I will call the "traditional" or "conjugal" view, sees marriage as an intrinsically opposite-sex institution [because, some assert] . . . the institution of marriage was created for the purpose of channeling heterosexual intercourse into a structure that supports child rearing. Others explain the basis for the institution in more philosophical terms. They argue that marriage is essentially the solemnizing of a comprehensive, exclusive, permanent union that is intrinsically ordered to producing new life, even if it does not always do so. . . . While modern cultural changes have weakened the link between marriage and procreation in the popular mind, there is no doubt that, throughout human history and across many cultures, marriage has been viewed as an exclusively opposite-sex institution and as one inextricably linked to procreation and biological kinship. . . . The other, newer view is what I will call the "consent-based" vision of marriage, a vision that primarily defines marriage as the solemnization of mutual commitment—marked by strong emotional attachment and sexual attraction—between two persons.

This is a correct summary of what sociologists have been noting for some decades—the emergence of a model of marriage that, because it is decidedly more adult-centric, differs profoundly from the more child-centric traditional model of marriage.[33] The newer model is what scholars refer to as the "close personal relationship" model of marriage, where "marriage is seen primarily as a private relationship between two people, the primary purpose of which is to satisfy the adults who enter it. Marriage . . . and children are not really connected."[34] This view is of a relationship "that has been stripped of any goal beyond the intrinsic

[33] *See, e.g.*, ER 160–61, 165–68.
[34] ER 167.

emotional, psychological, or sexual satisfaction which the relationship currently brings to the [two adult] individuals involved."[35]

Justice Alito correctly observed that genderless marriage partakes fully of the ethos of the adult-centric close personal relationship model of marriage and that, indeed, the legal arguments in favor of genderless marriage are necessarily built on the foundation of that model. 133 S. Ct. at 2718. His observation is confirmed by analyses of all the state appellate court opinions arguing that constitutional norms mandate genderless marriage; without exception, each of those opinions is premised on the close personal relationship model, or what the literature sometimes refers to as the "narrow description of marriage."[36]
By asserting that marriage is primarily or exclusively about adult relationships, the narrow description ignores much, particularly the child-centric features, encompassed by the "conjugal vision" or "broad description" of marriage. Understandably, the ethos of genderless marriage is relatively but decidedly more adult-centric and relatively but decidedly less child-centric compared to the ethos

[35] ER 168; *see also* Scott Yenor, *Family Politics: The Idea of Marriage in Modern Political Thought* 5 (2011).
[36] *See* Monte Neil Stewart et al., *Marriage, Fundamental Premises, and the California, Connecticut, and Iowa Supreme Courts*, 2012 BYU L. Rev. 193, 197 ("*Fundamental Premises*") ("Certainly in the numerous cases since the beginning of the organized and strategic effort to redefine marriage by judicial mandate . . . , proponents have uniformly advanced the narrow description as a complete and accurate depiction of contemporary marriage."); *see also id*. at 198–204.

of the man-woman marriage institution, with its centuries and volumes of accumulated meanings and ideals.

This difference between the two competing marriage institutions on the measure of child-centeredness is further illuminated by the experience in the two States where the populace most fully practices the ethos, ideals, and norms of the "conjugal vision" or "broad description" of marriage, Utah and Idaho. That is evidenced by the uncontested studies of Dr. Joseph Price. In his affidavit in Utah's marriage case, *Kitchen v. Herbert*, Case No. 13-4178, Appendix to Brief of Appellants Gary R. Herbert and Sean D. Reyes at 425 (10th Cir.), Dr. Price concluded that, "compared to children born in all the states, a child born in Utah has the best chances of knowing and being reared by his or her own married mother and father." In his affidavit in this case, Dr. Price placed Idaho right behind. ER 312–14.

Moreover, Idaho's choice to retain a decidedly more child-centric marriage institution is important to a range of parental decisions beyond ensuring that the child is raised by both her father and her mother. The citizens of Idaho perceive that the traditional marriage institution, reinforced by the law as a teacher, subtly but powerfully influences parents to forego abusing alcohol or drugs; avoid destabilizing extramarital affairs; avoid excessively demanding work schedules; or

limit time-consuming hobbies and other interests that take them away from their children.

This is not to say that others in different family arrangements cannot or do not make the same selfless, child-centric choices as a biological mother and father; they clearly can and do. But, as Justice Alito noted in *Windsor*, choosing genderless marriage would be a powerful symbolic statement that, at bottom, marriage is more about the interests of adults than the needs of children, and it would thereby undermine the self-sacrificing, child-centric model of marriage that Idaho seeks to foster. *Windsor*, 133 S. Ct. at 2715–16 n.6 (Alito, J., dissenting). That choice might result (in the short term) in a few more children living in married households—but at the price of reorienting the whole concept of marriage toward adult interests and away from the welfare of children. Idaho has chosen not to ignore this seismic shift.

In sum, Idaho has a strong basis for concluding, when confronting its choice between the two competing marriage institutions, that the man-woman marriage institution is relatively but decidedly more child-centric; the genderless marriage institution, relatively but decidedly more adult-centric. The strength of that basis is not diminished at all by an argument that Mary and Judy's family arrangement is as child-centric as that of Mark and June—or even by an argument that the family arrangements of same-sex couples generally might be as child-centric as that of

married man-woman couples generally. Idaho must choose between two mutually exclusive and profoundly different marriage institutions, and a more child-centric ethos is woven throughout the fabric of traditional man-woman marriage, just as a more adult-centric ethos is woven throughout the fabric of genderless marriage.

Faced with such a profound and very real difference between the two competing marriage institutions, Idaho has concluded that it ought to advance the best interests and fullest flourishing of children generally, even when to do so subordinates adult desires. That *ought* leads to choosing the relatively but decidedly more child-centric man-woman marriage institution.

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The Decision failed to engage sensibly this demonstrated difference between the two marriage institutions just as it failed to engage the other social institutional realities concerning marriage.

D. Idaho's choice of the man-woman marriage institution furthers the State's vital interests in preserving democratic legitimacy and a broad consensus for its marriage institution, as well as accommodating religious freedom and reducing the potential for civic strife.

Marriage is much more than a legal definition or construct.[37] It is a social institution whose meaning implicates profound overlapping interests by the State,

[37] The law did not create the marriage institution; marriage is unquestionably a pre-political institution. *See, e.g.*, John Locke, *Second Treatise of Government* 47 (Richard H. Cox ed., 1982) (1690); Seana Sugrue, *Soft Despotism and Same-Sex Marriage*, *in* The Meaning of Marriage: Family, State, Market, and Morals 172–96

its people, and voluntary associations including churches and other religious organizations. Because it serves overlapping public and private interests, the marriage institution depends to an unusual degree on broad social consensus for its continued vitality and normative power.

Idaho's Marriage Laws serve the legitimate governmental interest in preserving the broadest social consensus in support of its marriage institution. Federalism leaves space for Idahoans "to allow the formation of consensus respecting the way [they] treat each other in their daily contact and constant interaction with each other." *Windsor*, 133 S. Ct. at 2692. That is one reason why "[p]reserving our federal system is a legitimate end in itself," since it "ensures that essential choices can be made by a government more proximate to the people," which in turn leads to greater democratic legitimacy as public policies reflect the deeper judgments of the people. *LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 684–85 (1999) (Kennedy, J., dissenting).

Idaho's Marriage Laws serve not only the value of democratic legitimacy, with its preservation of broad social consensus, but an important substantive purpose as well. As Justice Powell taught, "[t]he State, representing the collective

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(Robert P. George & Jean Bethke Elshtain eds., 2006); John R. Searle, *Making the Social World: The Structure of Human Civilization* 86 (2010); *see also* Richard W. Garnett, *Taking* Pierce *Seriously: The Family, Religious Education, and Harm to Children*, 76 Notre Dame L. Rev. 109, 114 n.29 (2000) (the law's provisions regulating marriage no more "created" the marriage institution than the Rule Against Perpetuities "created" dirt).

expression of moral aspirations, has an undeniable interest in ensuring that its rules of domestic relations reflect the widely held values of its people." *Zablocki v. Redhail*, 434 U.S. 374, 399 (1978) (Powell, J., concurring). Idaho has ensured that consistency by submitting the contest between the two competing marriage institutions to Idaho's voters and defending in litigation like this the values they have expressed.

By contrast, a judicial decision that bypasses Idaho's democratic institutions and sweeps away the long-settled and deeply rooted understanding of marriage risks social controversy and divisions along religious lines. *Cf. 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."). Idaho has a profound interest in minimizing such strife on issues like marriage where the Constitution does not clearly dictate the outcome. *Cf. 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"). Democratic processes are ill-served when the judiciary steps into a debate as contentious as the contest between the man-woman marriage institution and the genderless marriage institution and labels one side as "irrational." To act so carelessly would dismiss as intolerant, and therefore as illegitimate, the personal and religious beliefs of at

least half the country. That is hardly the place or function of the judiciary. Within our constitutional system such contentious debates are properly reserved for the political branches or for the people speaking at the ballot box.

Of course the State of Idaho endorses no religious beliefs about marriage. Yet its interests are plainly advanced by the religious and other cultural institutions that support its pro-marriage culture. Broad religious support for marriage, however, exists only because man-woman marriage corresponds to the understanding of the vast majority of faith communities. Religious support for man-woman marriage is both widespread and deeply rooted in the religious texts of all three major Abrahamic faiths—Christianity, Judaism, and Islam—plus one of the other two largest world religions—Buddhism.[38] The Abrahamic faiths in particular have rich religious narratives extolling the husband-wife, child-centric meaning of marriage. Hundreds of thousands of Idahoans who accept these traditions understand marriage and sexuality as gifts from God, designed not principally for the gratification of adults, but to provide an optimal setting for bearing and raising children.[39]

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[38] *See* Pew Research Religion & Pub. Life Project, *Religious Groups' Official Positions on Same-Sex Marriage*, Dec. 7, 2012, http://www.pewforum.org/2012/12/07/religious-groups-official-positions-on-same-sex-marriage/.

[39] *See e.g.*, *Sex, Marriage and Family in World Religions* xxii–xxvii (Don S. Browning, M. Christian Green & John Witte, Jr. eds., (2009).

These beliefs about marriage are not going away. They are held by major worldwide religious bodies, with billions of believers, that are unlikely to change their doctrines based on the views of American courts. These beliefs are tied not only to theology but also to religious and family practices, deeply and sincerely held personal beliefs, and entire ways of life. They are no less integral to the dignity and identities of hundreds of thousands of Idaho citizens than Plaintiffs' sexual orientation is to them.

Judicial imposition of genderless marriage would create the potential for religion-related strife—and infringements of religious freedom—in a wide variety of government-related situations that have already arisen around the country. Scholars across the ideological spectrum agree on the threat.[40] Indeed, as a group of pro-same-sex-marriage law professors recently put it to the Illinois legislature, genderless marriage "could create a whole new set of problems for the religious liberty of those religious believers who cannot conscientiously participate in implementing the new regime."[41] To cite just a few examples:

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[40] *See generally Same-Sex Marriage and Religious Liberty: Emerging Conflicts* (Douglas Laycock et al. eds., 2008) (diverse scholars discussing issue); *see* ER 1137–38 (Professor Chai Feldblum, LGBT scholar and current commissioner of the federal EEOC, noting that there is often a "conflict . . . between laws intended to protect the liberty" of LGBT people "and the religious beliefs of some individuals whose conduct is regulated by such laws," and that sometimes "those who advocate for LGBT equality have downplayed the impact of such laws").

[41] Letter from Douglas Laycock, Michael Perry, and Mark D. Stern to Representative Michael Madigan (Mar. 11, 2013).

- Governments would likely be pressured—and perhaps agree—to force religious social service agencies to cease providing adoption and foster care services unless they agree to provide those services in a manner contrary to their doctrines and beliefs.[42]

- Governments would likely be pressured—and perhaps agree—to revoke the tax-exempt status of churches or other non-profit religious organizations that refuse on religious grounds to recognize same-sex marriages or to provide benefits to same-sex couples on the same terms as husband-wife couples.[43]

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[42] *See, e.g.*, Michelle Boorstein, *Citing Same-Sex Marriage Bill, Washington Archdiocese Ends Foster-Care Program*, Washington Post, Feb. 17, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/02/16/AR2010021604899.html; Emily Esfahani Smith, *Washington, Gay Marriage and the Catholic Church*, Wall Street Journal, Jan. 9, 2010, http://online.wsj.com/article/SB10001424052748703478704574612451567822852.html; Manya A. Brachearm, *Rockford Catholic Charities Ending Foster Care*, Chicago Tribune, May 26, 2011, http://www.chicagotribune.com/news/local/breaking/chibrknews-rockford-catholic-charities-ending-foster-care-adoptions-20110526,0,4532788.story?track=rss; Daniel Avila, *Same-Sex Adoption in Massachusetts, the Catholic Church, and the Good of the Children: The Story Behind the Controversy and the Case for Conscientious Refusals* 27 Children's Legal Rights J. 1, 11 (2007); John Garvey, Op-Ed, *State Putting Church Out of Adoption Business*, Boston Globe, Mar. 14, 2006, at A15.

[43] *Cf. Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *Religious Establishment Bigots Sound Alarm Against Loving Same-Sex Marriages*, The Daily Kos, Jan. 12, 2012, http://www.dailykos.com/story/2012/01/12/1054208/-Religious-establishment-bigots-sound-alarm-against-loving-same-sex-marriages ("These religious bigots want to receive taxpayer support for their efforts, but want to keep discriminatory practices in place. . . . Their right to be bigots isn't in question. What's in question is whether American taxpayers should subsidize that bigotry. And the answer, quite obviously, should be a resounding NO.").

- Governments would likely be pressured—and perhaps agree—to investigate, prosecute and punish people in wedding-related businesses for refusing on religious conscience grounds to assist with same-sex weddings.[44]

- Governments would likely be pressured—and perhaps agree—to punish school teachers for refusing on religious conscience grounds to endorse same-sex marriage or for expressing contrary views.[45]

- Governments would likely be pressured—and perhaps agree—to investigate and punish marital and psychological counselors for refusing, out of a good faith religious conviction, to counsel same-sex married couples on the identical terms as husband-wife couples.[46]

- Religion-based conflicts between public schools and parents would likely increase as children are taught about sexuality and marriage in ways that contravene parents' and students' deeply held religious beliefs.[47]

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[44] *See Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (upholding fine for refusing on religious grounds to photograph same-sex commitment ceremony).

[45] *See, e.g.*, Todd Starnes, *Christian Teacher Under Investigation for Opposing Homosexuality*, Fox News Radio, Oct. 19, 2011, http://radio.foxnews.com/toddstarnes/ top-stories/christian-teacher-under-investigation-for-opposing-homosexuality.html (teacher investigated for posting message on private Facebook page opposing homosexuality based on her Christian faith; statewide gay rights group demanded her removal and governor criticized her publicly).

[46] *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012).

[47] *Compare Teacher, School Sued Over Gay Fairy Tale*, NPR, April 27, 2006, http://www.npr.org/templates/story/story.php?storyId=5366521 (legalization of SSM in Massachusetts basis for reading book depicting marriage of two princes), *with* Todd Starnes, *Atty Says School Threatened, Punished Boy Who Opposed Gay Adoption*, Fox News Radio, Jan. 24, 2012, http://radio.foxnews.com/toddstarnes/top-stories/atty-says-school-threatened-punished-boy-who-opposed-gay-adoption.html (student berated by school district superintendent after writing op-ed piece in school newspaper opposing gay adoptions; boy called to superintendent's office, subjected to hours of meetings, and accused of violating the school's anti-bullying policy; superintendent threatened suspension, demanded that student admit to "regret" over column, and called student "ignorant").

- Governments would likely be pressured—and might agree—to punish religious colleges and similar institutions for adhering to their views on marriage in such things as married student housing, hiring, and curriculum.[48]

Preventing these kinds of social tensions and conflicts—and the infringements of religious freedom they could create—is an important and compelling State interest, legitimately grounded in the State's concern for public welfare. *See Bill Johnson's Restaurants*, 461 U.S. at 741. As Justice Breyer remarked in *Zelman v. Simmons-Harris*, one of the concerns underlying the federal Establishment Clause is "protecting the Nation's social fabric from religious conflict." 536 U.S. 639, 717 (2002) (Breyer, J., dissenting); *accord Van Orden v. Perry*, 545 U.S. 677, 698–99 (2005) (Breyer, J., concurring). If that is a legitimate *federal* interest, based as it is on the federal First Amendment, then surely the State has a compelling interest in doing what it can to protect the State's own social fabric from religious conflict.

Plaintiffs can be expected to argue that religious and social tensions that might arise from recognizing their asserted right to marry should have no bearing on the constitutional analysis. They may even cite the hoary but inapposite principle that constitutional rights "may not be submitted to vote; they depend on the outcome of no elections." *West Virginia State Bd. Educ. v. Barnette*, 319 U.S. 624, 638 (1943). But the existence of a right to marry a person of the same sex is

[48] *See, e.g.*, *Levin v. Yeshiva Univ.*, 754 N.E.2d 1099 (N.Y. 2001); *see generally* ER 1098–99.

precisely the dispute before this Court. The State's interests in protecting religious freedom and minimizing religion-related civic conflicts—and by implication its reasons for rejecting genderless marriage—are therefore highly relevant to the dispositive question of whether such a right exists in the first place.

Whether the Constitution protects a right to genderless marriage turns, in important part, on the "basic difference between direct state *interference* with a protected activity and state *encouragement* of an alternative activity consonant with legislative policy." *Maher v. Roe*, 432 U.S. 464, 475 (1977) (emphasis added). Idaho's marriage policy stays on the right side of that line by respecting the "moral and sexual choices the Constitution protects." *Windsor*, 133 S. Ct. at 2694. It does not dictate the intimate and private choices of an adult to commit to an exclusive, loving relationship with another person of the same sex. At the same time, Idaho's Marriage Laws encourage a familial structure that has served human societies in diverse settings for millennia as the ideal setting for rearing children. Nothing in the federal Constitution prevents Idaho's citizens, and their elected representatives, from making that choice.

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All that is presented above in this section was presented to the district court. As explained in detail in the next section, the Decision rejected Idaho's reasons pertaining to widespread support for its marriage institution, to religious liberties,

and to social strife with the dismissive assertion that those reasons are "myopic." ER 58.

E. Idaho's choice of man-woman marriage over genderless marriage is based on legislative facts robustly supported and therefore binding on this Court, regardless of the level of judicial scrutiny.

Idaho's reasons for choosing to preserve man-woman marriage reside in the realm of legislative facts, not adjudicative facts. "Adjudicative facts are facts about the parties and their activities . . . , usually answering the questions of who did what, where, when, how, why, with what motive or intent"—the types of "facts that go to a jury in a jury case," or to the fact finder in a bench trial. *Marshall v. Sawyer*, 365 F.2d 105, 111 (9th Cir. 1966) (internal quotations omitted). "Legislative facts," by contrast, "do not usually concern [only] the immediate parties but are general facts which help the tribunal decide questions of law, policy, and discretion." *Id.* "Legislative facts are . . . 'without reference to specific parties,' and 'need not be developed through evidentiary hearings.'" *Libertarian Nat'l Comm., Inc. v. FEC*, 930 F. Supp. 2d 154, 157 (D.D.C. 2013) (quoting *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1161–62 (D.C. Cir. 1979)). A legislative fact "is a question of social factors and happenings . . . ." *Dunigan v. City of Oxford, Mississippi*, 718 F.2d 738, 748 n.8 (5th Cir. 1983).

Often, the pertinent legislative facts are not contested. But sometimes legislative facts are contested in the sense that informed and thoughtful people

disagree on the validity of a proffered legislative fact. In such cases, the courts do not step in to declare one view to be true and the competing view false. Rather, if the legislative fact is fairly debatable, the courts defer to the government decision-maker's choice.

The courts do this for several important reasons. First, the courts understand and value the phenomenon of collective wisdom. Our democratic ethos privileges the reasonable understandings and conclusions reached—the legislative facts chosen—by the people through our democratic processes, not those of this or that elite no matter how confidently asserted. *See, e.g.*, *Schuette*, 134 S. Ct. at 1637 ("The respondents in this case insist that a difficult question of public policy must be taken from the reach of the voters, and thus removed from the realm of public discussion, dialogue, and debate in an election campaign. … [This insistence] is inconsistent with the underlying premises of a responsible, functioning democracy."); *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) ("We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure . . . . [T]he Constitution does not empower this Court to second-guess state officials . . . .").

A Washington State case asserting a right to assisted suicide provides a powerful example of this privileging of the reasonable legislative facts chosen through our democratic processes. Washington prohibited assisted suicide. This Court en banc held that prohibition unconstitutional. *Compassion in Dying v. Washington*, 79 F.3d 790, 798 (9th Cir. 1996) (en banc). In doing so, the court dismissed some of the State's assessments of social practices and their likely impacts. For example, the State asserted an interest in protecting the integrity and ethics of the medical profession, but this Court concluded that "the integrity of the medical profession would [not] be threatened in any way by [physician-assisted suicide]," despite the contrary assessment of the State and responsible observers of the medical profession. *Id.* at 827. The State also asserted an interest in protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes, but this Court dismissed the State's concern that disadvantaged persons might be pressured into physician-assisted suicide as "ludicrous on its face." *Id.* at 825. On these two points and others like them, the Supreme Court flatly rejected this Court's substitution of its own assessments of the relevant social practices and their likely impacts for those of the State and unanimously reversed the Ninth Circuit's judgment. *Washington v. Glucksberg*, 521 U.S. 702, 728–36 (1997). Instead, as it did recently in *Schuette*, the Supreme

Court deferred to the reasonable understandings and conclusions reached—the legislative facts chosen—by the people through democratic processes.

Second, many important legislative facts in these types of cases are really predictions of what will happen in society in the future assuming this or that present governmental action. Given the complexity of human society, one sensible prediction ought not be accepted as an objective "truth" in the face of a contrary but still rationally made prediction. *E.g.*, *FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775, 813–14 (1978) ("However, to the extent that factual determinations were involved . . . , they were primarily of a judgmental or predictive nature . . . . In such circumstances complete factual support in the record for the . . . judgment or prediction is not possible or required; 'a forecast of the direction in which future public interest lies necessarily involves deductions . . . .'") (quoting *FPC v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961)); *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 665–66 (1994) (Kennedy, J., plurality opinion) (noting that "[s]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable" and highlighting a "substantial deference" to the government decision-maker in such situations).

Third, the courts understand the limits of their own competence. "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." *Vance v. Bradley*, 440 U.S. 93, 112 (1979) (internal quotations omitted).

In rational basis review, the contest between competing legislative facts can be quite lopsided against the government and the government will still prevail. The courts uphold the challenged government action if there is any reasonably conceivable state of legislative facts that could provide a rational basis for it.[49]

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[49] *See, e.g.*, *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). The action is presumed constitutional and "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it[.]" *Heller v. Doe*, 509 U.S. 312, 320 (1993). If any basis is even minimally debatable, plaintiffs lose. The government, by contrast, has no duty "to produce evidence to sustain the rationality of a statutory classification." *Id.* "[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Commc'ns*, 508 U.S. 307, 315 (1993). Moreover, even if all defendants fail to articulate the requisite rational basis, a court will still uphold the challenged government action if it on its own can identify rational grounds. *See, e.g.*, *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 463 (1988).

This settled law has an impact on summary judgment jurisprudence. As the district court correctly observed in the Hawai'i marriage case:

> Disputes of fact that might normally preclude summary judgment in other civil cases, will generally not be substantively material in a rational basis review. That is, the question before this Court is not whether the legislative facts are true, but whether they are "at least debatable.

Even if the level of judicial scrutiny is heightened, the courts will still not step in to declare as "true" or "false" a well-contested legislative fact, but instead will use the legislative facts chosen by the government decision-maker. The reasons for such judicial deference—the limits of the courts' competence, the uncertainty of predictions of society-wide consequences, and the wisdom of respecting democratically made choices between competing legislative facts—still remain. Although under heightened scrutiny the courts may not accept some minimally plausible legislative fact conjured up in support of the challenged government action, they will defer to robustly supported legislative facts even if "opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety." *Vance*, 440 U.S. at 112.

All this is demonstrated by *Grutter v. Bollinger*, 539 U.S. 306 (2003), which applied the highest and most rigorous level of judicial scrutiny because of the presence of racial classifications. The plaintiff in that case challenged the consideration of race and ethnicity in admission decisions of the University of Michigan Law School, specifically consideration in favor of applicants from three underrepresented minority groups: African Americans, Hispanics, and Native Americans. This public law school's leaders made an "assessment that diversity

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Jackson v. Abercrombie, 884 F. Supp. 2d 1065, 1105 (D. Haw. 2012) (citations omitted).

will, *in fact*, yield educational benefits." *Id*. at 328 (emphasis added). That legislative fact chosen by the government decision-makers was vigorously contested, with many able voices making powerful showings in favor of just the opposite legislative fact, that the diversity sought did not yield educational benefits and even harmed those intended to be benefitted.[50] Nevertheless, the majority of the Supreme Court deferred, expressly and unabashedly, "to the Law School's conclusion that its racial experimentation leads to educational benefits." In the majority's words:

> The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici*. Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university.

Id. at 328. On the basis of this deference to the government decision-maker's choice of a contested legislative fact (and, necessarily, rejection of contrary assessments), the Court upheld the law school's admissions program. The Court did not anoint one assessment as "true" and the contrary assessment as "false." It deferred to the government decision-maker's choice.

The Supreme Court's approach to contested legislative facts in its very recent *Schuette* decision was the same as its approach in *Grutter*: the Court

[50] In dissent, Justice Thomas marshaled those voices and added his own. 539 U.S. at 364 (Thomas J., dissenting) (citations omitted).

deferred to the legislative facts chosen by the government decision-maker; in *Schuette* that meant the people voting on a state constitutional amendment. *Schuette*, 134 U. S. at 1638 ("we must assume" the voters' chosen legislative fact, that "a preference system [is] unwise [because] of its latent potential to become itself a source of the very resentments and hostilities based on race that this Nation seeks to put behind it. Whether those adverse results would follow is, and should be, the subject of debate.")

Thus, regardless of the level of scrutiny that this Court deploys in resolving this case, settled governing law directs this Court to defer to the legislative facts chosen by Idaho and its people in making their ultimate choice between the man-woman marriage institution and genderless marriage. That is because those legislative facts are robustly supported—as shown by the description of those legislative facts in sections I.A.–D. above and the quality of the supporting authorities.

This is particularly true and important regarding competing legislative facts bearing on the fundamental question of what marriage *is*. As noted in section I.C. above, *all* advocacy for genderless marriage is premised on the "narrow description" of marriage and on avoidance (by silence) of the "broad description" of marriage. The broad description encompasses the social realities set forth above: the understanding that "the institution of marriage was created for the

purpose of channeling heterosexual intercourse into a structure that supports child rearing;" "that marriage is essentially the solemnizing of a comprehensive, exclusive, permanent union that is intrinsically ordered to producing new life, even if it does not always do so;" and that "marriage has been viewed as an institution . . . inextricably linked to procreation and biological kinship."[51] The broad description also encompasses the understanding that marriage's social goods include "love and friendship, security for adults and their children, economic protection, and public affirmation of commitment,"[52] in addition to those described above.

In contrast to the broad description of marriage, the narrow view underlying all essential arguments for genderless marriage limits its description of the goods of marriage to love and friendship, security for adults and their children, economic protection, and public affirmation of commitment. This constricted description results from the narrow view's adherence to the adult-centric "close personal relationship" model of marriage described in section I.C. above. The narrow view thus "tend[s] to strip marriage of the features that reflect its status and importance

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[51] *United States v. Windsor*, 133 S. Ct. 2675, 2718 (2013) (Alito, J., dissenting) (citations omitted). For a more detailed explanation of the broad view of marriage, see *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 995–96 (Mass. 2003) (Cordy, J., dissenting), and ER 494–507.

[52] Linda C. McClain, *The Place of Families: Fostering Capacity, Equality, and Responsibility* 6 (2006).

as a social institution."[53] The narrow view insists that marriage is *no more than* what the narrow view describes.[54]

The contest between the broad description and the narrow view is a contest between competing legislative facts, with those supporting the broad description clearly being the stronger.[55]

That the broad description of marriage is a robustly supported legislative fact matters very much in resolving this case because the narrow vision underlies every argument the proponents of genderless marriage make.[56] These arguments invariably ignore the broad description (while at the same time generally obscuring their essential reliance on the narrow vision as such) because fair acknowledgement of the broad description is fatal to those arguments.[57]

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All that is presented above in this section was presented to the district court. Yet repeatedly the Decision both ignores many of Idaho's legislative facts and erroneously rejects others. For example, without acknowledging the institutional realities of the competing marriage institutions, the Decision nevertheless asserts that there is no causal connection between, on one hand, their very contrary

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[53] ER 167.
[54] *See* Monte Neil Stewart, *Marriage Facts*, 31 Harv. J.L. & Pub. Pol'y 313, 337 (2008).
[55] *See, e.g.*, *id.* at 350.
[56] *See* Stewart, *Fundamental Premises*, *supra* note, at 197–211.
[57] *See id.*

teachings on the uniting, complementary roles of mother and father and, on the other hand, children generally experiencing or not those roles in their homes. ER 48. The Decision then goes on to denigrate and effectively reject the robustly supported legislative facts chosen by Idaho with respect to gender complementarity. ER 49–50.

The Decision does the same with respect to the positive, child-assisting message of the child-centric man-woman marriage institution, rejecting this robustly supported legislative fact with the assertions analyzed at the end of section I.B. above.

The Decision also rejects the indisputable legislative fact that Idaho cannot have at the same time both man-woman marriage (with its unique social benefits) and genderless marriage (with its promised benefits to children connected to same-sex couples) and that Idaho, like every State, must therefore face this particularly poignant policy quandary. The Decision rejects this legislative fact with the clearly incorrect assertion that "the Governor's child welfare rationales *disregard* the welfare of children with same-sex parents." ER 52 (emphasis added).

As another example, in considering what marriage *is*, the Decision accepts the narrow description as complete and accurate and therefore rejects the more robustly supported broad description. ER 50 ("marriage in Idaho is and has long been a designedly consent-based institution. . . . Idaho law is wholly indifferent to

whether a heterosexual couple wants to marry because they share this [broad or conjugal] vision" of marriage).

As a final example, the Decision rejects the legislative facts regarding impacts on religious liberties and the likelihood of social strife with the dismissive assertion that the "Governor's argument concerning religious liberty is myopic." ER 58.

In short, the Decision throughout violates the well-settled law that a court's proper approach to contested legislative facts is to accept the robustly supported legislative facts chosen by the government decision-maker, regardless of the level of scrutiny deployed.

II. THE DUE PROCESS CLAUSE DOES NOT RECOGNIZE A FUNDAMENTAL RIGHT TO GENDERLESS MARRIAGE.

The reality that Idaho's choice is between two mutually exclusive and profoundly different marriage institutions makes quite straightforward the resolution of Plaintiffs' claim that they have a substantive due process right to *be* married in Idaho to their same-sex partner. Determining whether there is a fundamental right to a genderless marriage regime is controlled by the two-prong test articulated in *Washington v. Glucksberg*, 521 U.S. 702 (1997). The first prong is "a *careful* description of the asserted fundamental liberty interest," and the second is adding to the canon only "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in

the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id.* at 720–21 (quotations and citations omitted) (emphasis added); *see also United States v. Juvenile Male*, 670 F.3d 999 (9th Cir. 2012). Nothing in either *Windsor* or *Loving* changes that required analysis.

A. Plaintiffs' asserted right is the right to marry a person of the same-sex, which right necessarily includes the right to compel the State to suppress the man-woman marriage institution and create in its stead a genderless marriage regime.

When Plaintiffs and other same-sex couples assert that they have a "fundamental" right to marry arising from the Fourteenth Amendment's Due Process Clause, what they are *necessarily* saying is that they have a right that compels the State to suppress the man-woman marriage institution and mandate a genderless marriage regime in its stead. That is so because a same-sex couple cannot *be* married (whether by marriage ceremony or official recognition of a foreign marriage) in any real and intelligible way in a jurisdiction until that jurisdiction, by force of law, withdraws all official support from the man-woman meaning and mandates for all official and public purposes the any-two-persons meaning.

The law has the power to do that, and when it exercises that power, it ensures the de-institutionalization over time of man-woman marriage and creates and sustains genderless marriage as the new "marriage" institution. What the law has *no* power to do is usher same-sex couples into the man-woman marriage

institution; its public, institutionalized, and core man-woman meaning precludes that.

Thus, Plaintiffs' asserted "fundamental" right to marry is really the right to marry a person of the same sex—or to obtain recognition of such a marriage performed outside of Idaho—which *necessarily* encompasses the "right" to compel the State to usher them and all man-woman couples desiring officially recognized marriage into a newly created genderless marriage institution. Any other description—such as the Decision's "unembellished right to marry," Decision at 25, or "the right to marry just like any loving, committed man-woman couple"—both ignores the institutional realities of marriage, including the reality that Idaho faces a choice between competing and mutually exclusive marriage institutions and falls outside the "tradition of carefully formulating the interest at stake in substantive due-process cases." *Glucksberg*, 521 U.S. at 722.

Plaintiffs cannot save their claim by adjusting the level of generality in describing their asserted interest. The Decision's preferred description as "unembellished right to marry," Decision at 25, would apply with equal force to under-age couples, close relatives, and even polygamists. These objections can be avoided only by adjusting the level of generality to identify with some factual specificity which category of would-be spouses the asserted right affects. But with

that necessary adjustment, marriage between two persons of the same sex is clearly the constitutional novelty that history and the Supreme Court declare it to be.

B. Genderless marriage is anything but "deeply rooted" in the American scheme of ordered liberty—but the man-woman marriage institution certainly is.

It is the right to participate in the man-woman marriage institution that is "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [that right] were sacrificed." *Glucksberg*, 521 U.S. at 720–21. It is beyond the pale to claim that deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty is a "fundamental right" to compel both suppression of the man-woman marriage institution and state-creation of a supplanting genderless marriage regime. After all, thirty-three states—66% of the country—are currently governed by marriage laws like Idaho's, and no State initiated genderless marriage until 2004 (and only then by a 4-3 judicial mandate).

Plaintiffs assert, and the Decision adopted this erroneous reasoning, that they are seeking access to an *existing* right, rather than the declaration of a new one. But, again, that assertion ignores the social institutional realities of marriage. Idaho has accurately recognized that man-woman marriage and genderless marriage are mutually exclusive and profoundly *different*. As demonstrated in sections I.B.–D. above, the differences center on things fundamental and

important: the uniting, complementary roles of mother and father, a child-centric versus an adult-centric vision of marriage, and preservation of religious liberties and avoidance of social strife.

Moreover, *every* Supreme Court decision vindicating the fundamental right to marry has vindicated the right to participate in the man-woman marriage institution, not in a profoundly different genderless marriage regime. *See, e.g.*, *Zablocki*, 434 U.S. at 379; *Loving*, 388 U.S. at 2.

C. *Windsor* defeats rather than supports the Decision's due process holding.

Indeed, the Supreme Court's most recent pronouncement on the subject, *Windsor*, indicated that same-sex marriage is a "new" right, and rejected the Plaintiffs' assumption here that same-sex marriage is subsumed by the Court's "right to marry" precedents:

> It seems fair to conclude that, *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. For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization.

133 S. Ct. at 2689 (emphasis added). *Windsor* went on to note that "the limitation of lawful marriage to heterosexual couples . . . for centuries ha[s] been deemed both necessary and *fundamental*." *Id.* (emphasis added); *see also Lawrence v. Texas*, 539 U.S. 558, 567, 578 (2003) (right to intimate same-sex relationship free

of criminal penalty does not imply a right to "formal recognition" of that relationship). Under *Windsor*'s characterization, then, same-sex-marriage is the antithesis of a fundamental right. It is a "novel concept," provoking "intense democratic debate" across the nation. *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1013 (D. Nev. 2012); *see also Glucksberg*, 521 U.S. at 720 (since recognizing a fundamental right "place[s] the matter outside the arena of public debate and legislative action," court must exercise "utmost care . . . lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court") (quotations omitted).

Windsor's approach is consistent with *Glucksberg*, where the plaintiff asserted a right to assisted suicide and where the Supreme Court concluded there was no fundamental right at stake because of a "consistent and almost universal tradition that has long *rejected* the asserted right, and *continues explicitly to reject it today* . . . ." 521 U.S. at 723 (emphasis added). The same is true of the right to genderless marriage asserted by the Plaintiffs here. And it is made no less true by appeals to notions of personal autonomy. As the Court in *Glucksberg* emphasized, simply because "many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected . . . ." *Id.* at 727–28 (citation omitted).

D. *Loving* supports rather than undercuts Idaho's choice of the man-woman marriage institution.

Loving v. Virginia, 388 U.S. 1 (1967), supports Idaho's Marriage Laws and certainly provides no basis for striking them down. For one thing, *Loving* vindicated the right to participate in the man-woman marriage institution—as that right had existed at common law and indeed across the millennia, that is, without any limitation based on race. Anti-miscegenation laws—wholly unrelated to the fundamental, child-centric purposes of the man-woman marriage institution—were grafted onto the institution for the foreign purpose of advancing the doctrine of White Supremacy. *Loving*, 388 U.S. at 7, 12. In stark contrast, the core man-woman meaning, as shown above, has always been the very essence of the marriage institution and essential to its child-centric work and therefore to childhood flourishing.

For another thing, the State's *public* interest in marriage resides in binding together parents and any biological children they create.[58] Such bonds (1) reinforce the right of every child to be connected to his or her biological mother and father; (2) maintain a child-centered view of marriage that increases the

[58] Matthew B. O'Brien, *Why Liberal Neutrality Prohibits Same-Sex Marriage: Rawls, Political Liberalism, and the Family*, 1 Brit. J. Am. Legal Stud. 411 (2012), makes an in-depth examination of the supposed "public reasons" advanced to support one or the other possible marriage institutions, concluding that no valid "public reason" sustains genderless marriage but that maximizing the benefits of a child knowing and being reared by her mother and father is a valid "public reason" sustaining man-woman marriage.

likelihood that a child's biological parents stay together, rather than promoting an adult-fulfillment view of marriage that increases the likelihood of separation when adult emotions fade; and (3) reduce the risk of children experiencing the ills of fatherlessness and motherlessness. That is why Plaintiffs here and genderless marriage advocates generally go astray in invoking *Loving*: race has absolutely *nothing* to do with the State's public interest in those bonds; the man-woman union has *everything* to do with it.

In short, *Loving* has nothing to do with whether a state can conduct a "deliberative process that enable[s] its citizens to discuss and weigh arguments for and against same-sex marriage." *Windsor*, 133 S. Ct. at 2689; *see also Jackson*, 884 F. Supp. 2d at 1097 n.22 (analogy to *Loving* is unpersuasive because "*Loving* involved an invidious discrimination on the basis of race"); *Hernandez*, 855 N.E.2d at 8 ("But the historical background of *Loving* is different from the history underlying this case.").

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All that is presented above in this section was presented to the district court, including at the forefront the social institutional reality that Plaintiffs' asserted "right" is necessarily a right to compel the State to suppress the man-woman marriage institution and enforce a genderless marriage regime in its stead. In

holding that the long-established right to marry encompassed same-sex couples, the Decision ignores that presentation entirely. ER 24–33.

III. IDAHO'S MARRIAGE LAWS DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

A. Idaho did not violate the Equal Protection Clause by reaffirming the fundamental right to marry.

Before considering Plaintiffs' claim that Idaho's Marriage Laws violate the Equal Protection Clause, this Court must address a serious "threshold question[ ]." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 19 (1973). Can a State law offend the Equal Protection Clause by doing no more than codifying the definition of a fundamental right protected by the Due Process Clause? The answer is assuredly no.

One of the strikingly "unique features" of Idaho's Marriage Laws is that they reaffirm, rather than modify, existing law. *Id.* In declaring that "[a] marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state," Idaho Const. art. III, § 28, Idaho law precisely mirrors the fundamental right to marry recognized in numerous Supreme Court decisions. As discussed above, a careful description of that right demonstrates that it is limited to the right to marry one person of the opposite sex who is not otherwise disqualified by age, consanguinity, or another marriage. *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (recognizing "the right of the individual . . . to marry, establish a

home and bring up children"); *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (finding constitutional protection for "a decision to marry and raise a child in a traditional family setting"). Those limitations are inherent in the nature of the right. For it is axiomatic that "[n]o fundamental right—not even the First Amendment—is absolute. The traditional restrictions go to show the scope of the right, not its lack of fundamental character." *McDonald v. City of Chicago*, 561 U.S. 742, 130 S. Ct. 3020, 3056 (2010) (Scalia, J., concurring). Idaho's Marriage Laws merely reaffirm and codify the man-woman character of the fundamental right to marry under the Due Process Clause—a restriction that the Supreme Court's own jurisprudence has always deemed "essential to the very definition of that term and to its role and function throughout the history of civilization." *Windsor*, 133 S. Ct. at 2689.

Plaintiffs' equal protection claim cleverly reframes the essential man-woman character of marriage—an indispensable definitional attribute of the fundamental right—as an invidious classification and then challenges it as unlawful. But the Supreme Court has already set the parameters of the fundamental right to marry under the Due Process Clause, and those parameters obviously cannot themselves violate the Equal Protection Clause. Idaho's Marriage Laws do nothing more than codify those parameters.

Entertaining Plaintiffs' claim would distort Fourteenth Amendment law in at least two ways. First, it would allow Plaintiffs to win a new constitutional right to a genderless marriage regime—or, put differently, to expand the fundamental right to marry under the Due Process Clause—contrary to the rule that "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *Rodriguez*, 411 U.S. at 33; *see also Harris v. McRae*, 448 U.S. 297, 322 (1980). Second, it would allow Plaintiffs to recast their attack on an essential attribute of the fundamental right to marry as an invidious classification and thereby circumvent the "objective considerations, including history and precedent," *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 858 (1998) (Kennedy, J., concurring), that "provide the crucial guideposts for responsible decisionmaking" in the conflicted area of substantive due process. *Glucksberg*, 521 U.S. at 721 (internal quotations omitted). In essence, Plaintiffs seek an equal-protection end run around the limits the Supreme Court itself has placed on the fundamental right to marry. That is not the role of the Equal Protection Clause.

For these reasons, the Court should dismiss Plaintiffs' equal protection claim without reaching the questions of which level of review governs and whether Idaho's Marriage Laws satisfy it.

B. Idaho's Marriage Laws do not discriminate on the basis of sex.

Plaintiffs have argued that Idaho's Marriage Laws constitute sex discrimination. They do not. This is not a hard issue. First, the courts have nearly unanimously rejected that argument in the context of marriage cases.[59] The Decision did that. ER 35–36. Second, Idaho's Marriage Laws treat men as a class and women as a class equally. Third, marriage's provision of the statuses and identities of *husband* and *wife* does not constitute government endorsement of the "separate spheres tradition" or an impermissible sex-role allocation or perpetuate prescriptive sex stereotypes.[60] Fourth, the Plaintiffs' sex discrimination argument, if accepted, would have the Fourteenth Amendment's Equal Protection Clause do something—mandate genderless marriage—that the proposed Equal Rights

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[59] *E.g.*, *Sevcik v. Sandoval*, 911 F. Supp. 996, 1004–05 (D. Nev. 2012); *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1098–99 (D. Haw. 2012); *Smelt v. Orange*, 374 F. Supp. 2d 861, 876–77 (C.D. Cal. 2005); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1307–08 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123, 143 (W.D. Wash. 2004); *In re Marriage Cases*, 183 P.3d 384, 439 (Cal. 2008); *Conaway v. Deane*, 932 A.2d 571, 599 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1, 10–11 (N.Y. 2006); *Baker v. Vermont*, 744 A.2d 864, 880 n.13 (Vt. 1999); *Andersen v. King Cnty.*, 138 P.3d 963, 987–89 (Wash. 2006) (en banc); *Singer v. Hara*, 522 P.2d 1187, 1192 (Wash. App. 1974).

[60] Although some cultures and subcultures have hung various sex-roles and hence sex-role stereotypes on the pegs of *husband* and *wife*, such sex-roles and stereotypes and any resulting separate spheres tradition are not inherent in the two statuses, and nothing in Idaho's Marriage Laws reinforces sex-role stereotypes or seeks to influence husbands and wives in their decisions regarding roles and specializations. Indeed, the *husband* and *wife* statuses are the antithesis of a separate spheres ethos exactly because the man and the woman are entering into one and the same sphere—marriage.

Amendment, which was advanced to provide *greater* protection against sex discrimination than the Fourteenth Amendment provides, would *not* do. "What of the quality of debate in states that have not ratified the ERA? Some legislators . . . have explained 'nay' votes on the ground that the ERA would authorize homosexual marriage. The congressional history is explicit that *the ERA would do no such thing*." Ruth Bader Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 Tex. L. Rev. 919, 937 (1979) (emphasis added).

C. The Equal Protection Clause does not invalidate Idaho's Marriage Laws because of their treatment of same-sex couples.

1. Idaho's Marriage Laws should be subjected to rational basis review.

Idaho's Marriage Laws withstand every level of judicial scrutiny and stand as constitutionally valid—whether challenged by a theory of substantive due process, sex discrimination, sexual orientation discrimination, or *Moreno-Romer-Windsor* animus. Nevertheless, it is important for this Court to get right the level-of-judicial-scrutiny issue with respect to Plaintiffs' claim of sexual orientation discrimination. That is because until very recently this Court, in unity with nearly all the other circuit courts, held unambiguously that such a claim should be subjected to rational basis review. *See, e.g.*, *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) ("The plaintiffs assert that homosexuality should be added to the list of suspect or quasi-suspect

classifications requiring strict or heightened scrutiny. We disagree and hold that the district court erred in applying heightened scrutiny to the regulations at issue and that the proper standard is rational basis review."); *Cook v. Gates*, 528 F.3d 42, 61–62 (1st Cir. 2008) (same); *Thomasson v. Perry*, 80 F.3d 915, 927–28 (4th Cir. 1996) (same); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004) (same); *Davis v. Prison Health Servs*., 679 F.3d 433, 438 (6th Cir. 2012) (same); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) (same); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866–67 (8th Cir. 2006) (same); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113 (10th Cir. 2008) (same); *Lofton v. Sec'y of Dep't of Children & Family Servs*., 358 F.3d 804, 818 (11th Cir. 2004) (same); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) (same); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (same). Only the Second Circuit has held that "intermediate scrutiny" should apply. *Windsor* v. *United States*, 699 F.3d 169, 180–85 (2d Cir. 2012) ("Analysis of these four factors supports our conclusion that homosexuals compose a class that is subject to heightened scrutiny. We further conclude that the class is quasi-suspect (rather than suspect) . . . [and that laws discriminating against it must] survive[ ] intermediate scrutiny review."). Although the Supreme Court affirmed the Second Circuit's judgment, it did not address at all the issue of scrutiny and clearly did not adopt or endorse the Second Circuit's analysis of it.

Then in January 2014, the panel in *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481, 483 (9th Cir. 2014), entered a decision saying that "heightened scrutiny" applied to at least some instances of sexual orientation discrimination but without equating its "heightened scrutiny" to any previously recognized level of judicial scrutiny, such as intermediate scrutiny. In this way the panel decision created an intra-circuit conflict, exacerbated an inter-circuit conflict, and brought considerable uncertainty to this Court's jurisprudence in the area.

In any event, *SmithKline* "heightened scrutiny" does not apply to the claim of sexual orientation discrimination in this case because of the absence here of *Moreno-Romer-Windsor* animus. *SmithKline* involved a jury trial between private parties in which the lawyer for one party peremptorily struck a prospective juror because he was gay. The panel found that this sexual orientation discrimination was intentional and targeted. *See id.*at 478 ("counsel engaged in intentional discrimination when he exercised the strike"), 479 ("strike of Juror B was impermissibly made on the basis of his sexual orientation"). The panel then noted, however, that the Supreme Court had stated that "[p]arties may . . . exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review." *Id*. at 479 (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143 (1994)) (alteration in original) (internal quotation marks omitted).

Thus, the determinative question was whether sexual orientation discrimination was subject to rational basis review or "heightened scrutiny," a phrase always before referencing intermediate or strict scrutiny or both. *See, e.g.*, *Ahlmeyer v. Nevada Sys. of Higher Educ*., 555 F.3d 1051, 1059 n.8 (9th Cir. 2009) ("Where claims of discrimination based on race or sex are entitled to heightened scrutiny, age discrimination claims under the Constitution are subject to rational basis scrutiny.") (citation omitted). The *SmithKline* panel reasoned that, based on prior Ninth Circuit law, "we are bound here to apply rational basis review to the equal protection claim in the absence of a . . . change in the law by the Supreme Court or an en banc court." 740 F.3d at 480 (citation omitted). There clearly having been no change by an en banc court, the panel turned to *Windsor*, "the Supreme Court's most recent case on the relationship between equal protection and classifications based on sexual orientation," *id.*, and concluded that *Windsor* compelled application of "heightened scrutiny" to sexual orientation discrimination even though "*Windsor*, of course, did not expressly announce the level of scrutiny it applied to the equal protection claim at issue in that case." *Id.*

Any question about the level-of-scrutiny standard announced by *SmithKline* is resolved by a careful reading of *Windsor* because the *SmithKline* panel claimed to be doing nothing more than applying "*Windsor*'s heightened scrutiny" to the unique facts of that case. *SmithKline*, 740 F.3d at 483. *Windsor* struck down

DOMA because the Court held that it reflected a bare desire to harm a disfavored minority. In this regard, *Windsor* was actually the third in a series of Supreme Court equal protection decisions taking that approach, the first being *Moreno*[61] and the second being *Romer*.[62] In taking this approach, *Windsor* indeed looked carefully for animus, applying rigorously two steps. The first step is an inquiry into how unusual the challenged government action was. The second step is an inquiry into the proffered "benign" motives for that action. The Supreme Court's view in the *Moreno-Romer-Windsor* trilogy is that the more unusual the action and the less plausible the "benign" motives, the more likely that the classification should be explained as nothing more than a bare desire to harm an unpopular minority.

Windsor expressly took the first step, focusing on whether DOMA came within the rule that "discriminations of an *unusual character* especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." 133 S. Ct. at 2692 (emphasis added) (internal quotations omitted). DOMA qualified as "unusual" because it "depart[ed] from this history and tradition of reliance on state law to define marriage." *Id.* Only after identifying DOMA's "unusual character" did the Court proceed—two sentences later—"to address whether the resulting injury and indignity is a deprivation of an essential

[61] *Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).
[62] *Romer v. Evans*, 517 U.S. 620 (1996).

part of the liberty protected by the Fifth Amendment." *Id.* This logical progression demonstrates that DOMA warranted "careful consideration" *only because* the Court found it to be a "discrimination[ ] of an unusual character." *Id.* Nothing in *Windsor*—and thus nothing in *SmithKline*, which merely applied *Windsor's* holding without purporting to break new legal ground—remotely suggests that heightened scrutiny applies to distinctions based on sexual orientation absent "unusual" circumstances.

Windsor also expressly took the second step, holding that the "benign" motives proffered by DOMA's defenders did not square with the title of, the rhetoric behind, and the clear purpose of the statute. 133 S. Ct. at 2693–94.

SmithKline followed *Windsor's* two-step approach. The *SmithKline* panel concluded that the lawyer's peremptory challenge of the gay juror was intentional, 740 F.3d at 478 ("counsel engaged in intentional discrimination when he exercised the strike"); that the strike was made exactly because the juror was gay, that is, the lawyer targeted the juror because he was a gay man, *id.* at 479 ("strike of Juror B was impermissibly made on the basis of his sexual orientation"); and that the "benign" reasons later proffered (one at the trial and others on appeal) to justify that strike were not credible, *id.* at 478–79. Accordingly, the court concluded that the government-sanctioned peremptory challenge—just like the challenged governmental actions in *Moreno*, *Romer*, and *Windsor*—was the result of

constitutionally impermissible animus. On that basis, the panel held that its case was subject to the "heightened scrutiny" that it perceived in *Windsor*.

The key point is that *Windsor's* level of scrutiny—and *SmithKline's*—applies only to laws whose only basis is animus—not to every classification implicating sexual orientation.[63]

Plaintiffs' causes of action do not raise a plausible claim of animus. Idaho's citizens have no more chosen to preserve the vital social institution of man-woman marriage out of animus towards gay men and lesbians than they have chosen to preserve the vital social institution of private property out of animus towards people with few worldly goods.[64] This conclusion is reinforced by application of the Supreme Court's analytical approach in *Windsor*. As just noted, there the Court inquired whether DOMA's discrimination between two classes of lawfully married couples in disregard of State law was "of an unusual character" and whether DOMA was "motivated by an improper animus or purpose." *Windsor*, 133 S. Ct. at 2693 (referencing *Moreno*, 413 U.S. at 534–35, and *Romer*, 517 U.S. at 633). The Court got to a "yes" answer on both questions, while here, under the same analytical approach, "no" is without doubt the right answer to both questions.

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[63] Any other reading of *SmithKline* suggests that the panel used *Windsor* as a pretense for imposing "heightened scrutiny" on all sexual orientation discrimination claims.

[64] Regarding the connection between the institutional analyses of marriage and of private property, see Stewart, *Institutional Realities*, *supra* note 18, at 7–15, and Stewart, *Judicial Redefinition*, *supra* note 19, at 114–15.

First, as *Windsor* reaffirmed forcefully, it is for the several States to define and regulate marriage within their respective jurisdictions; their authority there is virtually plenary. Over the history of this Nation, the States *usually* have exercised that power to give the law's imprimatur and protection to the man-woman marriage institution. Indeed, before 2003, that is exactly how *every* State had always exercised that power. Since 2003, that has continued as the *usual* way, as shown by the enshrining, protecting, and perpetuating efforts of the large majority of the States.[65] Indeed, DOMA's rejection of New York's marriage definition was as *unusual* a government action as Idaho's perpetuation of man-woman marriage is a *usual* one. Those actions are literally at opposite ends of the *unusual/usual* spectrum. The absence of any *unusual* government action is strong evidence of "no," as *Windsor* teaches.

Second, large and compelling differences exist between DOMA's decision regarding New York married couples (what *Windsor* struck down) and Idaho's decision to preserve man-woman marriage (what *Windsor* supports). Most obviously, Idaho exercised, just as New York did, its sovereign powers over the marriage institution within its borders, *see, e.g.*, *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) ("[D]omestic relations [is] an area that has long been regarded as a virtually exclusive province of the States."), whereas the federal government with

[65] *See* Addendum 2.

DOMA acted without delegated authority because "'the Constitution delegated *no authority* to the Government of the United States on the subject of marriage and divorce,'" *Windsor*, 133 S. Ct. at 2691 (emphasis added) (internal quotations omitted).

Third, Idaho decided to preserve the man-woman marriage *institution*. Because of the very nature of that institution, Idaho's decision is far different, in a profoundly substantive way, from the federal government's decision in DOMA. The federal government had *no* effective or constitutional power to preserve the man-woman marriage institution in New York exactly because that State had already used its sovereign powers to mandate a genderless marriage regime and thereby de-institutionalize over time man-woman marriage. But Idaho has *both* effective and constitutional power to preserve the man-woman marriage institution and has chosen to use it. As *Windsor* pointed out in the language just quoted, DOMA had "no legitimate purpose" in infringing on New York's sovereign power over marriage in that State and on the marital status of those whom that State authorized and deemed to be married. But Idaho's project of preserving the man-woman marriage institution is far different from the DOMA project and serves powerful legitimate purposes.

Fourth, Plaintiffs cannot derive an animus conclusion from a supposed absence of legitimate reasons for the governmental action because, as shown by

robust legislative facts, *there are multiple, compelling, legitimate reasons for Idaho's Marriage Laws*. A wide and deep body of scholarly work is in full harmony with the judgments, intuitions, perceptions, assessments, and conclusions given voice in the votes of Idaho's Legislature and citizens in favor of preserving the man-woman marriage institution and the valuable benefits it materially and even uniquely provides. Those legislative facts negate the animus slander.

Because Plaintiffs' causes of action do not raise a plausible claim of animus, *SmithKline* "heightened scrutiny" does not apply in this case.

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All that is presented above in this sub-section was presented to the district court, including the demonstration that *Windsor*, the sole ground for *SmithKline*'s newly minted standard of "heightened scrutiny," must therefore be both the animating spirit and the limiting principle of that standard. Despite finding no *Moreno-Romer-Windsor* animus,[66] the Decision nevertheless held that *SmithKline* "heightened scrutiny" should apply to all claims of sexual orientation discrimination, including Plaintiffs' claim in this case. ER 37–40. Moreover, the Decision held that *SmithKline*, which *never* identified its "heightened scrutiny" as "intermediate scrutiny," must be read as holding that *Windsor*, which *never* spoke

[66] The Decision at 42 says: "Because over 280,000 Idahoans voted for Amendment 2, it is not feasible for the Court to infer a particular purpose or intent for the provision." ER 47.

of *any* level of scrutiny— "heightened," "intermediate," or otherwise— and which *never* spoke of, endorsed, or adopted the Second Circuit's choice of intermediate scrutiny in its *Windsor* decision, really adopted intermediate scrutiny for all claims of sexual orientation discrimination. ER 40–41.

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Because *SmithKline* "heightened scrutiny" does not apply to Idaho's Marriage Laws, those laws must be subjected to rational basis review, the default level of scrutiny.[67]

2. **Even if heightened scrutiny were to be used in analyzing Idaho's Marriage Laws, they would survive and stand as constitutionally valid**.

The constitutionality of Idaho's Marriage Laws, regardless of the level of judicial scrutiny deployed, is fully demonstrated in section I.A.–D. above. Idaho has powerful, compelling interests (1) in increasing the number of children generally who know and are raised by mother and father and decreasing the number of children generally who experience the ills of fatherlessness and motherlessness; (2) in doing the same by choosing a relatively but decidedly more child-centric marriage institution over one that is relatively but decidedly more

[67] *See, e.g.*, *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 260–61 (6th Cir. 2006) (in an equal protection case, after finding disparate impact, a court will proceed to review the government action under the default "rational basis" standard, unless the plaintiff claims a government action that "infringes on a class of people's fundamental rights [or] targets a member of a suspect class").

adult-centric; and (3) in preserving as broadly as possible religious liberties and avoiding social strife.

The value and importance of Idaho's interests uniquely served by the man-woman marriage institution cannot be objectively and reasonably gainsaid. They are powerful and compelling enough to satisfy any level of judicial scrutiny. Certainly judicial valuation of those interests must be based on both objectively reasonable considerations and due deference to the valuations emerging from democratic processes.[68] Such an approach leads to a high valuation of the benefits materially and even uniquely provided by the man-woman marriage institution and therefore protected and advanced by Idaho's Marriage Laws. The man-woman marriage institution is the best device humankind has yet devised to assure, to the greatest extent possible given human nature, the greatest amount of the human flourishing that results from a child knowing and being raised by her mother and father. Certainly society has a compelling interest, based in a universally shared *public* morality sensitive to the weakest among us, to assure that the greatest possible number of children generally experience that flourishing. And if the first

[68] Different people for personal and idiosyncratic reasons place different values on various social benefits. To the extent anyone personally devalues man-woman marriage's benefits, he or she will probably also devalue society's efforts to preserve and perpetuate that distinct institution. But such personal and idiosyncratic reasons have no proper place in judging. If they do so intrude, the outcome will be quite literally "lawless."

part of the First Amendment teaches anything, it is that our society and our Constitution value highly religious liberties *qua* religious liberties, thereby making their protection against the likely depredations of a genderless marriage regime both important and valuable.

The conclusion that Idaho's Marriage Laws rightly survive any level of judicial scrutiny is also based on full consideration of heightened-scrutiny jurisprudence involving "tailoring." At least in some instances, to survive heightened scrutiny a challenged state action must be "well-tailored," that is, it must not be "over-inclusive" or "under-inclusive" as to the people or the activities affected by the action. *See, e.g.*, *Jimenez v. Weinberger*, 417 U.S. 628, 637 (1974); *United States v. Thornton*, 901 F.2d 738, 739–40 (9th Cir. 1990).

Invoking this concept, genderless marriage advocates argue that it defeats man-woman marriage, which, they say, is supposedly all about child-rearing yet includes man-woman couples devoid of either the intention or the capacity to bear and rear children (or both) while excluding same-sex couples with children connected to their relationships. But this argument fails for one powerful reason. Idaho's interests find their source in the man-woman marriage institution, but those interests are further enhanced and more fully achieved to the extent that the institution is stronger and thwarted to the extent that it is weaker. *Social institutions are renewed and strengthened by use consistent with the shared public*

meanings constituting them. "[E]ach use of the institution is in a sense a renewal of that institution. Cars and shirts wear out as we use them but constant use renews and strengthens institutions such as marriage . . . ."[69] Each time a man-woman couple builds a marriage—regardless of their reproductive intentions or abilities—that act strengthens the man-woman marriage institution and thereby enhances the power of its social communications and influence. Marriage by a same-sex couple does just the opposite—exactly because a same-sex couple can only "marry" or "have their marriage recognized" in a jurisdiction where the law suppresses the man-woman marriage institution and mandates in its place a genderless marriage regime. That is why the marriage of *any* same-sex couple—just the opposite of the marriage of *any* man-woman couple—can only destroy rather than reinforce the source of the valuable social teachings and practices Idaho seeks to promote. Thus, Idaho's line drawing is neither over-inclusive nor under-inclusive but perfectly precise for the State's legitimate purpose.[70]

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[69] ER 601.

[70] The "tailoring" doctrine does not require abstract and perfect precision but only the precision practically available. *Vance v. Bradley*, 440 U.S. 93, 108 (1979) ("Even if the classification involved here is to some extent both underinclusive and overinclusive, . . . it is nevertheless the rule that in a case like this 'perfection is by no means required.'"). Even if the marriage of a man-woman couple with no capacity or intent to bear and raise children did not operate to strengthen the man-woman marriage institution (it does, as shown in the text), our society, given its commitment to ideals of privacy, has no practicable way to exclude such a couple. *See, e.g.*, Stewart, *Judicial Redefinition*, *supra* note 19, at 58–60.

All that is just set forth regarding "tailoring" and the concept's proper application in this case was presented to the district court. Yet the Decision does not engage at all that presentation. ER 51–55.

3. The Fourteenth Amendment does not require Idaho to recognize the marriage of a same-sex couple celebrated in another State.

The federal Constitution's Full Faith and Credit Clause allows Idaho to refuse recognition of a foreign marriage that contravenes Idaho's public policy, such as its policy to sustain the man-woman marriage institution. *See Nevada v. Hall*, 440 U.S. 410, 422–23 (1979) ("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 . . . Full Faith and Credit does not . . . enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it."). Section 2 of the federal Defense of Marriage Act, codified at 28 U.S.C. § 1738C, which was not reviewed in *Windsor* and not challenged by Plaintiffs' Complaint here and therefore remains fully valid and effective, allows Idaho to refuse recognition of a marriage of a same-sex couple celebrated in another State.[71] Supreme Court

[71] Section 2 provides:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a

jurisprudence expressly recognizes the authority of the States to make their own decisions and conduct their own experiments regarding forms of marriage. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003) ("A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders."); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996) ("no single State could . . . impose its own policy choice on neighboring States"); *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975) ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State"); *see also* Lynn D. Wardle, *From Slavery to Same-Sex Marriage: Comity Versus Public Policy in Inter-Jurisdictional Recognition of Controversial Domestic Relations*, 2008 BYU L. Rev. 1855, 1912, 1915; Patrick J. Borchers, Baker v. General Motors: *Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 Creighton L. Rev. 147, 150 (1998) (forcing a state to recognize same-sex marriages performed elsewhere "would be the most astonishingly undemocratic, counter-majoritarian political development in American history.").

Despite this settled law, Plaintiffs appear to be arguing that the Fourteenth Amendment requires Idaho to recognize same-sex couples' marriages celebrated in

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marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

other States. The core of the argument appears to be that because Idaho generally recognizes foreign marriages that do not contravene its public policies, Idaho's refusal to recognize same-sex couples' foreign marriages is of an "unusual character" and hence constitutes *Moreno-Romer-Windsor* animus and hence violates the Equal Protection Clause. A fair but simple analogy shows this argument to be without merit.

Suppose that Massachusetts, in its desire to be the champion of personal autonomy, eliminates monogamy (two persons) as a core meaning of marriage in that State and replaces it with the public meaning that allows polygamy. As Massachusetts residents, Jane marries Jim; the next day, she marries John. Jim Jr. and John Jr. are issue of the marriage(s). The five then move to Idaho and demand that Idaho recognize both marriages. Idaho refuses to recognize the Jane-John marriage because it can do so only by the radical move of suppressing monogamy as a core public meaning of its marriage institution for all official purposes and for all persons. Jane, John, and John Jr. feel demeaned and suffer various economic and social harms as a result of the non-recognition. They bring a § 1983 action alleging that Idaho has violated their rights under the Equal Protection Clause.

This point need not be belabored. Jane and John can no more prevail on their claim to Idaho recognition of their polygamous Massachusetts marriage than Plaintiffs can prevail on their claim to recognition of their same-sex California and

Iowa marriages. To hold otherwise is to empower one State to impose, by force of the Fourteenth Amendment's Equal Protection Clause, its own radical experiments in domestic relations on every other State and thus to leave all those other States powerless to enforce their own important policies and choices. The law is to the contrary, as shown in the first paragraph of this subsection.

IV. THE DECISION CONTRAVENES *BAKER V. NELSON*, WHICH IS BOTH CONTROLLING AND CONSISTENT WITH *WINDSOR* AND THE FEDERALISM PRINCIPLES IT REAFFIRMS.

The Decision contravenes *Baker v. Nelson*, 409 U.S. 810 (1972), which itself anticipates and mirrors the principles of federalism and popular sovereignty later reiterated in *Windsor*.

In *Baker*, the U.S. Supreme Court summarily dismissed, "for want of a substantial federal question, "an appeal by two men whom the State of Minnesota denied a marriage license "on the sole ground that petitioners were of the same sex." *Baker v. Nelson*, 191 N.W.2d 185, 185 (Minn. 1971). Such a summary dismissal is a decision on the merits by which "lower courts are bound . . . until such time as the Court informs (them) that (they) are not." *Hicks v. Miranda*, 422 U.S. 332, 344–45 (1975) (internal quotation marks omitted). A summary dismissal "without doubt reject[s] the specific challenges presented in the statement of jurisdiction," and "prevent[s] lower courts from coming to opposite conclusions [1] on the precise issues presented and [2] necessarily decided by those actions."

Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curiam). This case meets both *Mandel* prerequisites.

First, *Baker* unmistakably presented the "precise issues" ruled on by the district court here. *Baker*, 191 N.W. 2d. at 185. *Baker* plaintiffs specifically claimed that the State's denial of a marriage license "deprive[d] [them] of their liberty to marry and of their property without due process of law under the Fourteenth Amendment" and "violate[d] their rights under the equal protection clause of the Fourteenth Amendment." ER 1174.

Second, the Supreme Court summary dismissal "necessarily decided" those issues, which were fully considered by the Minnesota Supreme Court.[72]

Given the analysis in the Minnesota Supreme Court's opinion and the statement of issues in the jurisdictional statement challenging that decision, numerous courts have recognized the Supreme Court's *Baker* decision as

[72] The Minnesota Supreme Court rebuffed the claim that same-sex marriage was a fundamental right, holding that "[t]he due process clause of the Fourteenth Amendment is not a charter for restructuring [marriage] by judicial legislation." 191 N.W. 2d at 186. The court also held that equal protection was not offended by limiting marriage to a man and a woman without requiring proof of ability or willingness to procreate. According to the court, "the classification is no more than theoretically imperfect," and "'[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.'" *Id.* at 187 and n.4 (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940) (alteration in original)). The court also repudiated any analogy between the traditional definition of marriage and the anti-miscegenation laws invalidated in *Loving*: "[I]n commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex." *Id.* at 187.

controlling on the constitutionality of State laws withholding marriage from same-sex couples. *See e.g.*, *Massachusetts v. U. S. Dep't Health & Human Servs.*, 682 F.3d 1, 8 (1st Cir. 2012) ("*Baker* does not resolve our own case [under DOMA] but it does limit the arguments to ones that do not presume or rest on a constitutional right to same-sex marriage."); *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 870–71 (8th Cir. 2006) (*Baker* mandates "restraint" before concluding "a state statute or constitutional provision codifying the traditional definition of marriage violates the Equal Protection Clause or any other provision of the United States Constitution"); *Adams v. Howerton*, 673 F.2d 1036, 1039 n.2 (9th Cir. 1982) (*Baker* is "a decision on the merits") (quotation omitted); *Donaldson v. State*, 292 P.3d 364, 371 n.5 (Mont. 2012); ("The U.S. Supreme Court's action in *Baker* has been described as binding precedent.") (citations omitted). To our knowledge, no other federal circuit or State supreme court has gone the other way. The Decision likewise should have accepted *Baker* as controlling, and its failure to do so requires reversal.

Although the Decision conceded that "Baker speaks to the precise issues presented in this case," ER 21, it held that subsequent "doctrinal developments" rendered *Baker* "not controlling," ER 21–24. For two reasons, that is incorrect.

First, lower federal courts do not have the option of departing from binding precedent simply because they believe it has been undercut by later "doctrinal

developments." In *Rodriquez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989), the Supreme Court held in no uncertain terms: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions," lower courts "should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.* at 484. There is no doubt that *Baker* "directly controls" here.

Second, and more fundamentally, *Windsor* did not undercut *Baker*. The *Windsor* majority expressly disclaimed any intention to reach the issue decided in *Baker*, stating that its "opinion and its holding are confined to those lawful marriages" *already* authorized by state law. 133 S. Ct. at 2696. That is why the majority did not even address *Baker*. Similarly, neither *Romer v. Evans*, 517 U.S. 620 (1996), nor *Lawrence v. Texas*, 539 U.S. 558 (2003), addressed the constitutionality of state marriage laws, and neither mentions *Baker*.

Nor is there any inconsistency between *Baker* and *Windsor*'s legal analysis, as shown in the analyses of *Windsor* in the sections above. When read together, *Baker* and *Windsor* establish a principled, federalism-based resolution to the difficult question of same-sex marriage: *Baker* leaves the definition of marriage for every State to decide for itself, while *Windsor* prohibits the federal government from interfering in the decision to allow same-sex marriage.

The Decision should have respected the principled compromise that the Supreme Court reached in *Baker* and *Windsor*, one that permits a diversity of outcomes on the question of marriage rather than mandating a uniform national answer. The Decision's failure to respect that compromise—and its consequent refusal to follow *Baker*—requires reversal.

CONCLUSION

For all the reasons set forth above, Governor Otter respectfully requests that this Court reverse the Decision and the final judgment entered in the district court and dismiss Plaintiffs' claims in their entirety.

Date: June 19, 2014

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

STATEMENT OF RELATED CASES

Sevcik v. Sandoval, No. 12-17668 (Nevada), pending in this Court, raises as does this case what we hereafter refer to as the Marriage Issue: whether the Due Process and/or Equal Protection Clauses of the Fourteenth Amendment require a State to change the core legal meaning of marriage from "the union of a man and a woman" to "the union of two persons."

Jackson v. Rosen (formerly *Jackson v. Fuddy*), Nos. 12-16995, 12-16998, 12-17668 (Hawaii), is also pending before this Court and also raises the Marriage Issue but this Court has asked for briefing on whether the case is moot because of enactment of legislation in Hawaii changing the legal definition of marriage.

Geiger v. Kitzhaber, No. 14-35427 (Oregon), is also pending before this Court and also raises the Marriage Issue but no party in the district court appealed; the appeal was lodged by an entity seeking to intervene, and that entity's party status has not yet been resolved.

Perry v. Brown, Nos. 10-16696, 11-16577 (California), also raised the Marriage Issue and resulted in a panel decision, 671 F.3d 1052 (9th Cir. 2012), that subsequently was vacated by the United States Supreme Court because of lack of Article III jurisdiction, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), and consequently has no precedential value. *See League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1305 n. 5 (9th Cir. 1997) ("[W]e note that the Ninth

Circuit's decision . . . was *vacated* by the Supreme Court, and is thus wholly without precedential authority.") (emphasis in original); *see also O'Connor v. Donaldson,* 422 U.S. 563, 577 n. 12 (1975) ("Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect . . . .").

The following cases now pending in other Circuits also raise in whole or in part the Marriage Issue:

Whitewood v. Wolf, Case Nos. 14-2871, 14-3048 (3rd Cir.) (Pennsylvania);

Bostic v. Harris, Case No. 14-1167 (4th Cir.) (Virginia);

DeLeon v. Perry, Case No. 14-50196 (5th Cir.) (Texas);

DeBoer v. Snyder, Case No. 14-1341 (6th Cir.) (Michigan);

Obergefell v. Himes, Case No. 14-3057 (6th Cir.) (Ohio);

Bourke v. Beshear, Case No. 14-5291 (6th Cir.) (Kentucky);

Tanco v. Haslam, Case No. 14-5297(6th Cir.) (Tennessee);

Wolf v. Walker, Case No. 14-2266 (7th Cir.) (Wisconsin);

Kitchen v. Herbert, Case No. 13-4178 (10th Cir.) (Utah); and

Bishop v. Smith, Case No. 14-5003 (10th Cir.) (Oklahoma).

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

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-4, 29-2(c)(2) and (3), 32-2 or 32-4[1] for Case Number 14-35420

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Signature of Attorney or Unrepresented Litigant: s/ Thomas C. Perry

("s/" plus typed name is acceptable for electronically-filed documents)

Date: June 19, 2014

[1] If filing a brief that falls within the length limitations set forth at Fed. R. App. P. 32(a)(7)(B), use Form 6, Federal Rules of Appellate Procedure.

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ADDENDUM 1

Pertinent Legal Authorities

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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.

Idaho Const. art. III, § 28

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) 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. Consent alone will not constitute marriage; it must be followed by the issuance of a license and a solemnization as authorized and provided by law. Marriage created by a mutual assumption of marital rights, duties or obligations shall not be recognized as a lawful marriage.

(2) The provisions of subsection (1) of this section requiring the issuance of a license and a solemnization shall not invalidate any marriage contract in effect prior to January 1, 1996, created by consenting parties through a mutual assumption of marital rights, duties or obligations.

Idaho Code § 32-209

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.

ADDENDUM 2

The Definition of Marriage: Ballot Measures

Alabama: 2006; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 81%/19%

Alaska: 1998; to amend constitution to enshrine man-woman marriage; legislature initiated; passed 68%/31%

Arizona: 2006; to amend constitution to enshrine man-woman marriage and prohibit civil unions; voter initiated; failed 48%/52%

Arizona: 2008; to amend constitution to enshrine man-woman marriage; legislature initiated; passed 56%/44%

Arkansas: 2004; to amend constitution to enshrine man-woman marriage and prohibit civil unions; voter initiated; passed 75%/25%

California: 2000; to enact super-legislation to enshrine man-woman marriage; voter initiated; passed 61%/39%

California: 2008; to amend constitution to restore man-woman marriage; voter initiated; passed 52%/48%

Colorado: 2006; to amend constitution to enshrine man-woman marriage; voter initiated; passed 55%/45%

Florida: 2008; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 62%/38%

Georgia: 2004; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 76%/24%

***Hawaii:** 1998; to amend constitution to give legislature sole power to define marriage; legislature initiated; passed 69%/31%

Idaho: 2006; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 63%/37%

Kansas: 2005; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 70%/30%

Kentucky: 2004; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 75%/25%

Louisiana: 2004; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 78%/22%

Maine: 2009; to preserve man-woman marriage; voter initiated following legislature vote to approve genderless marriage; passed 53%/47%

Maine: 2012; to approve genderless marriage via referendum; voter initiated; passed 53%/47%

Maryland: 2012; to approve genderless marriage legislation; voter initiated following legislature vote to approve genderless marriage; passed 52%/48%

Michigan: 2004; to amend constitution to enshrine man-woman marriage and prohibit civil unions; voter initiated; passed 59%/41%

***Minnesota:** 2012; to amend constitution to enshrine man-woman marriage; legislature initiated; failed 47%/53%

Mississippi: 2004; to amend constitution to enshrine man-woman marriage; legislature initiated; passed 86%/14%

Missouri: 2004; to amend constitution to enshrine man-woman marriage; legislature initiated; passed 71%/29%

Montana: 2004; to amend constitution to enshrine man-woman marriage; voter initiated; passed 67%/33%

Nebraska: 2000; to amend constitution to enshrine man-woman marriage and prohibit civil unions; voter initiated; passed 70%/30%

Nevada: 2000; to amend constitution to enshrine man-woman marriage; voter initiated; passed 70%/30%

Nevada: 2002; to amend constitution to enshrine man-woman marriage; voter initiated; passed 67%/33%

North Carolina: 2012; to amend constitution to enshrine man-woman marriage; legislature initiated; passed 61%/39%

North Dakota: 2004; to amend constitution to enshrine man-woman marriage and prohibit civil unions; voter initiated; passed 73%/27%

Ohio: 2004; to amend constitution to enshrine man-woman marriage and prohibit civil unions; voter initiated; passed 62%/38%

Oklahoma: 2004; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 76%/24%

Oregon: 2004; to amend constitution to enshrine man-woman marriage; voter initiated; passed 57%/43%

South Carolina: 2006; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 78%/22%

South Dakota: 2006; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 52%/48%

Tennessee: 2006; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 81%/19%

Texas: 2005; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 76%/24%

Utah: 2004; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 66%/34%

Virginia: 2006; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 57%/43%

Washington: 2012; to approve genderless marriage legislation; voter initiated following legislature vote to approve genderless marriage; passed 54%/46%

Wisconsin: 2006; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 59%/41%

*Note: In Hawaii and Minnesota, a blank vote counts in essence as a "no" vote. For purposes of this addendum, in those two states, blank votes were counted as if they were "no" votes.

ADDENDUM 3

The Definition of Marriage: Statutory and State Constitutional Provisions

Alabama: Ala. Const. amend. 774 (man-woman)

Alaska: Alaska Const. art. I, § 25 (man-woman)

Arizona: Ariz. Const. art. XXX (man-woman)

Arkansas: Ark. Const. amend. LXXXII, §1 (man-woman)

California: Cal. Const. art. I, § 7.5 (man-woman) struck down as unconstitutional by *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (purportedly binding as appeals were vacated or did not address merits) (genderless)

Colorado: Colo. Const. art. II, § 31 (man-woman)

Connecticut: *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); Conn. Gen. Stat. § 46b-20 (genderless)

Delaware: Del. Code tit. 13, § 101 (genderless)

District of Columbia: D.C. Code § 46-401 (genderless)

Florida: Fla. Const. art. I, § 27 (man-woman)

Georgia: Ga. Const. art. I, § 4 ¶ 1 (man-woman)

Hawaii: Haw. Rev. Stat. § 572-1 (genderless)

Idaho: Idaho Const. art. III, § 28 (man-woman)

Illinois: 750 Ill. Comp. Stat. 5/201 (genderless)

Indiana: Ind. Code Ann. § 31-11-1-1 (man-woman)

Iowa: *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (genderless)

Kansas: Kan. Const. art. XV, § 16 (man-woman)

Kentucky: Ky. Const. § 233A (man-woman)

Louisiana: La. Const. art. XII, § 15 (man-woman)

Maine: Me. Rev. Stat. tit. 19-A, § 650, 701 (genderless)

Maryland: Md. Code, Fam. Law § 2-201 (genderless)

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New Hampshire: N.H. Rev. Stat. § 457:1-a (genderless)

New Jersey: *Garden State Equality v. Dow*, 79 A.3d 1036 (N.J. 2013) (genderless)

New Mexico: *Griego v. Oliver*, 316 P.3d 865 (N.M. 2013) (genderless)

New York: N.Y. Dom. Rel. Law § 10-a (genderless)

North Carolina: N.C. Const. art. XIV, § 6 (man-woman)

North Dakota: N.D. Const. art. XI, § 28 (man-woman)

Ohio: Ohio Const. art. XV, § 11 (man-woman)

Oklahoma: Okla. Const. art. II, § 35 (man-woman)

Oregon: Or. Const. art. XV, § 5a (man-woman)

Pennsylvania: 23 Pa. Cons. Stat. § 1704 (man-woman)

Rhode Island: R.I. Gen. Laws § 15-1-1 *et seq.* (genderless)

South Carolina: S.C. Const. art. XVII, § 15 (man-woman)

South Dakota: S.D. Const. art. XXI, § 9 (man-woman)

Tennessee: Tenn. Const. art. XI, § 18 (man-woman)

Texas: Tex. Const. art. I, § 32 (man-woman)

Utah: Utah Const. art. I, § 29 (man-woman)

Vermont: Vt. Stat. tit. 15, § 8 (genderless)

Virginia: Va. Const. art. I, § 15-A (man-woman)

Washington: Wash. Rev. Code § 26.04.020 *et. seq.* (genderless)

West Virginia: W. Va. Code § 48-2-104(c) (man-woman)

Wisconsin: Wis. Const. art. XIII, § 13 (man-woman)

Wyoming: Wyo. Stat. § 20-1-101 (man-woman)

ADDENDUM 4

Language of State Constitutional Bans on Domestic Partnerships and other Non-Marital Unions

Alabama: 2006; "A union replicating marriage of or between persons of the same sex in the state of Alabama or in any other jurisdiction shall be considered and treated in all respects as having no legal force of effect in this state and shall not be recognized by this state as a marriage or other union replicating marriage" Ala. Const. amend. 774.

Arkansas: 2004; "Legal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized in Arkansas . . ." Ark Const. amend. LXXXII, §1.

Florida: 2008; "Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized." Fla. Const. art. I, § 27.

Georgia: 2004; "This state shall not give effect to any public act, record, or judicial proceeding of any other state or jurisdiction respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state or jurisdiction." Ga. Const. art. I, § 4 ¶ 1.

Idaho: 2006; "A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state." Idaho Const. art. III, sec. 28.

Kansas: 2005; "No relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage." Kan. Const. art. XV, § 16.

Kentucky: 2004; "A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized." Ky. Const., § 233A.

Louisiana: 2004; "A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized." La. Const. art. XII, § 15.

Michigan: 2004; "To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose." Mich. Const. art. I, § 25.

Nebraska: 2000; "The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska." Neb. Const. art. I, § 29.

North Dakota: 2004; "No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect." N.D. Const. art. XI, § 28.

Ohio: 2004; " This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage." Ohio Const. art. XV, § 11

Oklahoma: 2004; "Neither this Constitution nor any other provision of law shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups." Okla. Const. art. II, § 35.

South Carolina: 2006; "A marriage between one man and one woman is the only lawful domestic union that shall be valid or recognized in this State. This State and its political subdivisions shall not create a legal status, right or claim respecting any other domestic union, however denominated. This State and its political subdivisions shall not recognize or give effect to a legal status, right or claim created by another jurisdiction respecting any other domestic union, however denominated. Nothing in this section shall impair any right or benefit extended by the State or its political subdivisions other than a right or benefit arising from a domestic union that is not valid or recognized in this State. This section shall not

prohibit or limit parties, other than the State or its political subdivisions, from entering into contracts or other legal instruments." S.C. Const. art. XVII, § 15.

South Dakota: 2006; "The uniting of two or more persons in a civil union, domestic partnership, or other quasi-marital relationship shall not be valid or recognized." S.D. Const. art. XXI, § 9.

Texas: 2005; "This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage." Texas Const. art. I, § 32.

Utah: 2004; "No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect." Utah Const. art. I, § 29.

Virginia: 2006; "This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage." Virginia Const. art. I, § 15-A.

Wisconsin: 2006; "Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state." Wisconsin Const. art. XIII, § 13.

ADDENDUM 5

Pending Cases Addressing in Whole or in Part the Marriage Issue

State	Case Name	Current Court	Case Number
Alabama	*Hard v. Bentley*	U.S.D.C. M.D. Ala.	2:13-cv-922
	Searcy v. Bentley	U.S.D.C. S.D. Ala.	1:14-cv-00208
Alaska	*Harris v. Millennium Hotel*	Alaska Supreme Court	S15230
	Hamby v. Parnell	U.S.D.C. D. Ark.	3:14-cv-00089
Arizona	*Connolly v. Roche*	U.S.D.C. D. Ariz.	2:14-cv-00024
	Majors v. Horne	U.S.D.C. D. Ariz.	2:14-CV-00518
Arkansas	*Jernigan v. Crane*	U.S.D.C. E.D. Ark.	4:13-cv-00410
	Wright v. State of Arkansas	Circuit Court of Pulaski County Second Division (Little Rock)	60CV-13-2662
Colorado	*Brinkman v. Long*	Adams County District Court	2013CV32572
	McDaniel-Miccio v. Colorado	Denver County District Court	2014CV30731
Florida	*Pareto v. Ruvin*	11th Circuit (Miami-Dade County)	2014-1661-CA-01
	Brenner v. Scott	U.S.D.C. N.D. Fla.	4:14-cv-00107
	Grimsley v. Scott (consolidated with *Brenner*)	U.S.D.C. N.D. Fla.	4:14-cv-00138

Georgia	*Inniss et al. v. Aderhold*	U.S.D. C. N. D. Ga.	1:14-cv-01180
Idaho	*Latta v. Otter*	9th Circuit	14-3520; 14-3521
Indiana	*Brennon v. MilbyProductions*	Indiana Court of Appeals	49A02-1401-ct-00020
	Love v. Pence	U.S.D.C. S.D. Ind.	4:14-cv-00015
	Baskin v. Bogan	U.S.D.C. S.D. Ind.	1:14-cv-00355
	Fuji v. Governor, State of Indiana	U.S.D.C. S.D. Ind.	1:14-cv-00404
	Bowling v. Pence	U.S.D.C. S.D. Ind.	1:14-cv-00405
	Lee v. Pence	U.S.D.C. S.D. Ind.	1:14-cv-00406
Kansas	*Nelson v. Kansas Dept. of Revenue*	Shawnee County District Court, Kan.	13-c-001465
Kentucky	*Bourke v. Beshear*	6th Circuit	14-5291
	Love v. Beshear	U.S.D.C., W.D. Ky.	3:13-cv-00750
	Franklin v. Beshear (transferred to W.D. Ky and consolidated with *Bourke v. Beshear*)	6th Circuit	14-5291
	Romero v. Romero	Jefferson Family Court	13 CI 503351

Louisiana	*Robicheaux v. Caldwell*	U.S.D.C. E.D. La.	2:13-cv-05090
	Robicheaux v. George (consolidated with *Robicheaux v. Caldwell*)	U.S.D.C. E.D. La.	2:14-cv-00097 (consolidated with 2:13-cv-05090)
	Forum for Equality v. Barfield (consolidated with *Robicheaux v. Caldwell*)	U.S.D.C. E.D. La.	2:14-cv-00327 (consolidated with 2:13-cv-05090)
	In re Angela Costanza and Chastity Brewer	3rd Circuit Louisiana Court of Appeals	13-01049
	In re Nicholas Ashton Costanza Brewer	3rd Circuit Louisiana Court of Appeals	JAC14-314
Michigan	*DeBoer v. Snyder*	6th Circuit	14-1341
Mississippi	*Czekala-Chatham v. Melancon*	DeSoto County Chancery Court	13-CV-1702
Missouri	*Barrier v. Vasterling*	16th Judicial District of Jackson County	1416-cv-03892
Montana	*Donaldson v. State of Montana*	Montana First Judicial District Court Lewis and Clark County	BDV-2010-702

Nebraska	*Nichols v. Nichols*	Nebraska Court of Appeals	S-13-0841
Nevada	*Sevcik v. Sandoval*	9th Circuit	12-17668
North Carolina	*Fisher-Borne v. Smith*	U.S.D.C. M.D. N.C.	1:12-cv-00589
	Gerber v. Cooper	U.S.D.C. M.D. N.C.	1:14-cv-00299
North Dakota	*Ramsay v. Dalrymple*	U.S.D.C. N.D.	3:14-cv-00057
Ohio	*Obergefell v. Himes*	6th Circuit	14-3057
	Henry v. Ohio Dept. of Health	6th Circuit	14-3464
Oklahoma	*Bishop v. Oklahoma*	10th Circuit	4-5003; 14-5006
Oregon	*Geiger v. Kitzhaber & Rummell v. Kitzhaber* (consolidated)	9th Circuit	14-35427
Pennsylvania	*Whitewood v. Wolf*	3rd Circuit	14-2871
	Palladino v. Corbett	U.S.D.C. E.D. Pa.	2:13-cv-05641
	Cucinotta v. Commonwealth of Pennsylvania	Commonwealth Court of Pa.	451 M.D. 2013
	Ballen v. Corbett (listed as related to *Cucinotta*)	Commonwealth Court of Pa.	481 M.D. 2013
	Commonwealth of PA v. Hanes	Supreme Court of Pennsylvania	77 MAP 2013
	In re estate of Catherine Burgi-Rios	Northhampton County's Orphans Court	2012-1310
	Ankney v. Allegheny Intermediate Unit	Allegheny County Court of Common Pleas	GD-13-005851

South Carolina	*Bradacs v. Haley*	U.S.D.C. S.C.	3:13-cv-02351
South Dakota	*Rosenbrahn v. Daugaard*	U.S.D.C. S.D.	4:14-cv-04081
Tennessee	*Tanco v. Haslam*	6th Circuit	14-5297
Texas	*In the Matter of J.B and H.B*	Supreme Court of Texas	11-0024
	State of Texas v. Naylor	Supreme Court of Texas	11-0114
	DeLeon v. Perry	5th Circuit	14-50196
	Pidgeon v. Parker	U.S.D.C. S.D. Tex.	4:13 -cv-03768
	Freeman v. Parker	U.S.D.C. S.D. Tex.	4:13-cv-03755
	Zahrn v. Perry	U.S.D.C. W.D. Tex.	1:13-cv-00955
	McNosky v. Perry	U.S.D.C. W.D. Tex.	1:13-cv-00631
Utah	*Kitchen v. Herbert*	10th Circuit	13-4178
	Evans v. Utah	U.S.D.C. D. Utah	2:14-cv-00055
Virginia	*Bostic v. Schaefer*	4th Circuit	14-1167
	Harris v. Rainey	U.S.D.C. W.D. Va.	5:13-cv-00077
West Virginia	*McGee v. Cole*	U.S.D.C. S.D. W.Va.	3:13-cv-24068
Wisconsin	*Wolf v. Walker*	7th Circuit	14-2266
	Appling v. Walker	Wis. Supreme Court	2011AP001572

Wyoming	*Courage v. State of Wyoming*	First Judicial District Court, Laramie County, Wyoming	182-262

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 19, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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