NOS. 14-35420 & 13-35421

DECIDED OCTOBER 7, 2014
(JUDGES STEPHEN REINHARDT, RONALD GOULD & MARSHA BERZON)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUSAN LATTA, et al.,
Plaintiffs-Appellees,

v.

C. L. "Butch" OTTER,
Defendant-Appellant,

CHRISTOPHER RICH,
Defendant,
and

STATE OF IDAHO,
Intervenor-Defendant.

On Appeal from United States District Court for the District of Idaho
Case No. 1:13-cv-00482-CWD (Honorable Candy W. Dale, Magistrate Judge)

PETITION OF DEFENDANT-APPELLANT GOVERNOR C.L. "BUTCH" OTTER FOR REHEARING EN BANC

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INTRODUCTION
(And FRAP 35(b)(1) Statement)

Less than twenty years after the ratification of the very Fourteenth Amendment on which the panel relies in this case, the Supreme Court embraced a model of marriage that at the time seemed obvious to everyone: "[N]o legislation," the Court held, "can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth … 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 in the [] estate of matrimony...*" *Murphy v. Ramsey,* 114 U.S. 15, 45 (1885) (emphasis added). To be sure, the Court has recently held that the States are free to depart from that model of marriage—and hence from the Court's own expressed view of the compelling governmental interests that underlie it. *See United States v. Windsor,* 133 S. Ct. 2675, 2693-94 (2013). But the Court has been equally emphatic that the *States* retain the "historic and essential authority to define the marital relation," in part because that authority is "the foundation of the State's broader authority to regulate the subject of domestic relations … " *Id.* at 2692, 2691.

In holding that Idaho's marriage laws violate the Fourteenth

Amendment to the extent they limit marriages to man-woman unions, the panel violated these bedrock principles. The panel held that those laws violate that amendment because they: (1) "classify" on the basis of sexual orientation; (2) are subject to the "heightened scrutiny" standard that this Court recently adopted (in *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 484 (9th Cir. 2014), *reh'g en banc denied*, 759 F.3d 990 (9th Cir. 2014)) for assessing such classifications; and (3) do not satisfy that standard. Opinion at 13-28. In so holding, the panel has resolved three questions of exceptional importance—two of which were not present in the other marriage cases in which the Supreme Court recently denied certiorari—and has done so in a way that departs from controlling authorities of the Supreme Court, this Circuit and others:

1. **Did the people of Idaho violate the Fourteenth Amendment when they limited marriage to man-woman unions?** The panel's holding on this ultimate issue conflicts directly with the Supreme Court's decision in *Baker v. Nelson*, 409 U.S. 810 (1972), and the Eighth Circuit's decision in *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), and conflicts in principle with *Murphy, Windsor* and a host of other decisions reiterating the States' broad authority over marriage and domestic relations.

2. **For Fourteenth Amendment purposes, are classifications based on sexual orientation subject to some form of "heightened scrutiny?"** Although the panel's holding on this point followed *SmithKline*, it was incorrect—and in conflict with controlling

decisions of the Supreme Court and other courts[1]—for reasons explained in Judge O'Scannlain's dissent from denial of rehearing in that case. That holding also imposes additional burdens and risks on Idaho that merit reconsideration here.

3. **Assuming *SmithKline* was correct, can a law like Idaho's marriage law be deemed to "classify" or "facially discriminate" based on sexual *orientation* merely because it distinguishes between opposite-sex couples and all other types of relationships, including same-sex couples?** On this point the panel's decision conflicts with, for example, the decision of the Supreme Court in *International Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991), which holds that facial discrimination depends on "the explicit terms" of the allegedly discriminatory provision.

Each of these is an "exceptional" issue warranting *en banc* review. *See* FRAP 35(b)(1)(B). In addition, as to each issue, consideration by the full Court is necessary to ensure uniformity with this Court's prior decisions as well as decisions of the Supreme Court. *See* FRAP 35(b)(1)(A).

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[1] *See, e.g., Cook v. Gates*, 528 F.3d 42, 61-62 (1st Cir. 2008); *Thomasson* v. *Perry,* 80 F.3d 915, 927-28 (4th Cir. 1996); *Johnson* v. *Johnson,* 385 F.3d 503, 532 (5th Cir. 2004); *Davis* v. *Prison Health Servs.,* 679 F.3d 433, 438 (6th Cir. 2012); *Citizens for Equal Prot.* v. *Bruning,* 455 F.3d 859, 866-67 (8th Cir. 2006); *Price-Cornelison* v. *Brooks,* 524 F.3d 1103, 1113 (10th Cir. 2008); *Lofton* v. *Sec'y of Dep't of Children & Family Servs.,* 358 F.3d 804, 818 (11th Cir. 2004); *Padula* v. *Webster,* 822 F.2d 97, 103 (D.C. Cir. 1987); *Woodward* v. *United States,* 871 F.2d 1068, 1076 (Fed. Cir. 1989).

REASONS FOR GRANTING REHEARING EN BANC

I. *En Banc* Review Is Warranted Because Of The Panel's Departure From *Baker* and *Bruning* As Well As The Significant Risks The Panel's Forced Redefinition of Marriage Imposes On Idaho And Its Citizens, Especially Children Of Heterosexuals.

The overriding issue in this case—the validity of Idaho's man-woman marriage laws—is undoubtedly "exceptional" because of the unique and critically important societal norms those laws encourage and promote. *See* Governor Otter's Opening Brief ("OB"), Dkt No. 22-2 at 26-56 (and Excerpts of Record "ER" cited therein).[2] Accordingly, *en banc* review is critical not only because, as a legal matter, the panel decision conflicts with *Baker* and *Bruning*. *See* OB 97-99; Appellants Christopher Rich and State of Idaho's Opening Brief ("Rich Brief"), Dkt No. 21-1, at 10-17, 25-26. This issue is also exceptional because, as a *practical* matter, redefining marriage by judicial fiat will undermine these social norms and likely lead to significant long-term harms to Idaho and its citizens, especially the children of heterosexuals.

1. As Governor Otter repeatedly explained before the district

[2] For space reasons, references to the parties' briefing should be understood to incorporate also the record materials cited in that briefing.

court and the panel, marriage is a complex social institution that pre-exists the law, but which is supported by it in virtually all human societies. OB at 10-11 (citing among others ER 1107-08); Governor Otter's Reply Brief ("Reply Brief"), Dkt No. 157, at 7. And a principal purpose of marriage in virtually all societies was to ensure, or at least increase the likelihood, that any children born would have a known mother and father with responsibility for caring for them. OB at 9-10. Indeed, Bertrand Russell—no friend of traditional sexual mores—once remarked, "But for children, there would be no need of any institution concerned with sex." *See* Memo in Support of SJ, 13-482-CWD, Dkt No. 57-2, at 35 (D. Idaho Feb. 18, 2014).

As Idaho also explained to the district court and the panel, the man-woman definition of marriage is integral not only to the social institution of marriage that Idaho's marriage laws are intended to support, but also to Idaho's *purposes* in providing that support—which it does at considerable cost. Throughout its history, Idaho has rejected what Justice Alito has aptly called (without any disagreement from other Justices) the relatively but decidedly adult-centric, "consent-based" view of marriage, and has embraced instead the more child-centric, "conjugal"

view. *See Windsor,* 133 S. Ct. at 2718 (Alito, J., dissenting); *see also* OB at 12. And Idaho has repeatedly implemented that view of marriage by explicitly retaining the man-woman definition despite decisions by other States, acting "as laboratories of democracy," to redefine marriage as the union of any two otherwise qualified "persons."[3]

By itself, the man-woman definition conveys that marriage—as understood in Idaho—is centered on children, which man-woman couples are uniquely capable of producing. OB at 18-19, 26; *see also* Rich Brief, at 21-23, 27, and 31-35. That definition also conveys that one of the purposes of marriage is to provide a structure by which to care for any children that may be created accidentally—an issue that, again, is unique to man-woman couples. *Id.* at 27, 31-35. And most obviously, by requiring a man and a woman, that definition indicates that this structure will ideally have both a "masculine" and a "feminine" aspect.

By implicitly referencing children, accidental procreation, masculinity and femininity, the man-woman definition also "teaches" or reinforces certain child-centered "norms" or expectations. OB at 26, 32-35. Because only man-woman couples are capable of producing children

[3] *See, e.g.,* Marriage Equality Act (NY), AB A08354 (June 24, 2011); Civil Marriage Protection Act (MD), House Bill 438 (March 1, 2012).

together, either deliberately or accidentally, these norms are directed principally at heterosexuals, and include the following:

- Where possible, every child has a right to be reared by and to bond with her own biological father *and* mother (the "bonding" norm). OB at 27, 30-32, 35 n.23 (citing ER 112-53); 36-39; ER 750.

- Where possible, every child has a right to be supported financially and emotionally by the man and woman who brought her into the world (the "maintenance" norm). (This norm is reinforced by the State's creating and supporting in its marriage laws a legal structure conducive to the provision of such support). *See* OB at 31; *see also* Memo in Support of SJ at 5 n.2.

- Where possible, a child should be raised by *a* mother and father, even where she cannot be raised by both her biological parents (the "gender-diversity" norm). OB at 27-28; ER 735, and at 35. (Note that this norm does not directly speak to parenting by gays and lesbians, who may not realistically have the option of raising their children with the other biological parent.)

- Heterosexual men and women should treat marriage, and fatherhood and motherhood within marriage, as an important expression of their masculinity or femininity (the "marital masculinity" or "femininity" norm). OB at 38-39, 42; ER 112-53.

- In all their decisions, parents should put the long-term interests of their children ahead of their own personal interests (the "child-centricity" norm). OB at 43-47.

The evidence presented below also established that Idaho and its citizens receive enormous benefits when man-woman couples heed these norms associated with the conjugal vision and definition of marriage. Common sense and a wealth of social-science data teach that children do

best emotionally, socially, intellectually and economically when reared in an intact home by both biological parents. OB at 27, ER 533. Such arrangements benefit children of opposite-sex couples both by (a) harnessing the biological connections that parents and children naturally feel for each other, and (b) providing what experts have called "gender complementarity" in parenting.[4] OB at 27-28, ER 712, ER 735. Compared with children of opposite-sex couples raised in any other environment, children raised by their two biological parents in a married family are less likely to commit crimes, engage in substance abuse, and suffer from mental illness, and more likely to support themselves and their own children successfully in the future. OB at 29 n. 15, OB at 30. Accordingly, such children pose a lower risk of needing State assistance,

[4] The Supreme Court has itself recognized the inherent benefits of gender complementariness, and the fact that gender is not interchangeable: "Physical differences between men and women … are enduring: '[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.' 'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quoting *Ballard v. United States,* 329 U.S. 187, 193 (1946)). Replace "community" with "marriage" (for what is marriage but the most foundational community of society?), and the Supreme Court's observation is no less true here.

and a higher long-term likelihood of contributing to the State's economic and tax base. Rich Brief, Dkt No. 21-1, at 31-35.

Similarly, parents who follow the norms of child-centricity, maintenance and marital masculinity (or femininity) are less likely to engage in the kinds of behaviors—such as child abuse or neglect, or divorce—that typically require State assistance or intervention. OB at 28, 39. And again, each of these norms is closely associated with—and reinforced by—the man-woman definition of marriage.

2. It is thus easy to see why so many informed commentators on both sides of the debate have predicted that redefining marriage to accommodate same-sex couples—which requires removing the man-woman definition—will change the institution of marriage, not just superficially, but profoundly. Writing not long ago, Judge Posner described same-sex marriage as "a radical social policy." Richard A. Posner, Should There Be Homosexual Marriage? And If So, Who Should Decide? 95 Mich. L. Rev. 1578, 1584 (1997). And in more measured terms, Oxford's prominent liberal legal philosopher Joseph Raz observed that "the recognition of gay marriage will effect as great a transformation in the nature of marriage as that from polygamous to

monogamous or from arranged to unarranged marriage." Gov. Otter's Response Brief, 13-482-CWD, Dkt No. 81, at 9 n. 18.

For heterosexual couples, as Idaho repeatedly explained in the district court and to the panel, the major effect of that "transformation" will be the erosion or elimination of each of the norms that depend upon or are reinforced by the man-woman definition of marriage. For example, as Professors Hawkins and Carroll have explained, the redefinition of marriage puts in place a legal structure in which two women (or two men) can easily raise children together as a married couple, and places the law's authoritative stamp of approval on such child-rearing arrangements. And for heterosexual men—who generally need more encouragement than women—that legal change undermines the "marital masculinity" norm because it suggests that society no longer needs men to form well-functioning families or to raise happy, well-adjusted children. OB at 38-39; ER 122; Otter Reply Brief, Dkt No. 157, at 8; *see generally* Steven L. Nock, *Marriage in Men's Lives* (1998).

For similar reasons, such a redefinition teaches heterosexuals that society no longer values biological connections and gender diversity in parenting—at least to the extent it did before the change. *Id.* And a

redefinition weakens the expectation that biological parents will take financial responsibility for any children they participate in creating (since sperm donors and surrogate moms aren't expected to do that), and that parents will put their children's interests ahead of their own (since the redefinition is being driven largely by a desire to accommodate the interests of adults).

Furthermore, just as those norms benefit the State and society, their removal or weakening can be expected to harm the State's interests and its citizens. For example, as fewer heterosexual parents embrace the norms of biological connection, gender complementary, maintenance and marital masculinity, more children will be raised without a mother or a father—usually a father. That in turn will mean more children being raised in poverty; more children who experience psychological or emotional problems; and more children and young adults committing crimes—all at significant cost to the State. OB at 28-29. Similarly, as fewer heterosexual parents embrace the norm of child-centricity, more will make choices driven by personal interests rather than the interests of their children. Many of these choices will likewise impose substantial costs on the State. Rich Opening Brief, Dkt No. 21-1, at 33-34.

In short, the man-woman definition of marriage is like a critical thread running throughout a hanging tapestry: Remove that thread, and the rest of the tapestry dissolves into a pile of yarn.

3. To its credit, the panel (at 15-28) devotes some thirteen pages in an attempt to rebut some of these points. But the panel simply ignores the principal point, which is that redefining marriage in genderless terms will change the *social institution* of marriage in a way that will adversely affect the behavior of *heterosexuals*—whether or not they choose to get (and stay) "married" under the new genderless-marriage regime. The panel thus does not deny that the specific norms discussed above are part of the marriage institution as it currently exists in Idaho, that Idaho has a compelling interest in the maintenance of those norms among heterosexuals, or that a redefinition will itself destroy or weaken those norms for that population. Instead, the panel engages in two main diversions.

First, the panel says (at15-16) that the State's defense of the man-woman definition is based on the idea that "allowing same-sex *marriages* will adversely affect opposite-sex marriage …." That is false. It's not the *existence* of same-sex marriages that is of principal concern. It's the

redefinition of marriage that such marriages requires—i.e., replacing the man-woman definition with an "any qualified persons" definition—and the resulting impact of that redefinition on the *institution* of marriage, especially as perceived and understood by the heterosexual population.

This misunderstanding of Idaho's defense is reflected throughout the panel's analysis—as it was in the recent opinions by the Fourth, Seventh and Tenth Circuits.[5] For example, in addressing the possibility that same-sex marriage will reduce the desire of heterosexual males to marry, the panel summarily dismisses as "crass and callous" the idea

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[5] *See Baskin v. Bogan*, 766 F.3d 648, 666, 668-69 (7th Cir. 2014) *cert. denied*, No. 14-277, 2014 WL 4425162 (U.S. Oct. 6, 2014) and *cert. denied sub nom. Walker v. Wolf*, No. 14-278, 2014 WL 4425163 (U.S. Oct. 6, 2014) (superficially contending that there is no evidence that same-sex marriages are less child-centric compared to the childless marriages of heterosexuals, and noting the State had pointed to no study that showed the deleterious effects of same-sex marriages on man-woman marriage); *Bostic v. Schaefer*, 760 F.3d 352, 381 (4th Cir. 2014) *cert. denied sub nom. Rainey v. Bostic,* No. 14-153, 2014 WL 3924685 (U.S. Oct. 6, 2014) and *cert. denied*, No. 14-225, 2014 WL 4230092 (U.S. Oct. 6, 2014) and *cert. denied sub nom. McQuigg v. Bostic*, No. 14-251, 2014 WL 4354536 (U.S. Oct. 6, 2014) (briefly finding "no reason to think that legalizing same-sex marriage will have a similar destabilizing effect" to no-fault divorce, and contending that "it is more logical" that allowing same-sex couples to marry "will strengthen the institution of marriage"); *Kitchen v. Herbert*, 755 F.3d 1193, 1224 (10th Cir. 2014) *cert. denied*, No. 14-124, 2014 WL 3841263 (U.S. Oct. 6, 2014) (noting in passing that "it is wholly illogical to believe that state recognition of the love and commitment between same-sex *couples* will alter the most intimate and personal decisions of opposite-sex couples").

that "a father will see a child being raised by two women and deduce that because the state has said it is unnecessary for that child … to have a father, it is also unnecessary for *his* child to have a father." Opinion at 19 (emphasis added). But according to the evidence submitted in the district court and to the panel, *see* ER 112-53, it's not the fact that the father "will *see* a child being raised by two [married] women" that is likely to reduce his enthusiasm for marriage. It's the fact that marriage will have already been redefined—legally and institutionally—in a way that makes his involvement seem less important and valuable than before the redefinition. *See, e.g., Univ. of Alabama v. Garrett*, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring) (noting important role of law as a teacher). And although not all heterosexual fathers or potential fathers will have less interest in marriage as a result of that change, *some* of them—especially those at the margins of commitment to marriage and fatherhood—will undoubtedly do so. Like the other circuits that have recently ruled the same way, the panel simply has no answer for this dispositive point.

Second, on several points the panel rejects the State's institutional defense because, in its view, that defense "is, fundamentally, … about

the suitability of same-sex couples, married or not, as parents, adoptive or otherwise." Opinion at 27. Not so. While two limited aspects of that defense—the norms of biological connection and gender complementarity—might have some conceivable bearing on policies toward parenting by gay and lesbian citizens, Idaho's point here is different: It's about the impact of removing the man-woman definition on the marriage institution—i.e., the public meaning of marriage—and the impact of that change on heterosexuals. Like the other circuits that have recently invalidated state marriage laws, the panel has no answer to the reality that replacing that definition with an "any qualified persons" definition will (a) weaken or eliminate the norms of biologically connected and gender-diverse parenting (and other norms) that are currently part of Idaho's definition and vision of marriage, and (b) in turn lead at least some heterosexuals to place less value on those norms when making personal decisions about the upbringing of *their* children—and thus lead to more of *their* children being raised by a single parent. Whatever the outcome of the "gay versus straight parenting" debate, *that* will be an unmitigated tragedy for the children of heterosexuals.

This misunderstanding of Governor Otter's defense is likewise

evident in the panel's reaction to the point that "[b]ecause opposite-sex couples can accidentally conceive … marriage is important because it serves to bind such couples together and to their children." Opinion at 21. After acknowledging that this "makes some sense," the panel dismisses the point because (it says) Idaho has "suggest[ed] that marriage's stabilizing and unifying force is unnecessary for same-sex couples …" *Id.* at 21-22. But again, that is not the point. Idaho has never disputed that same-sex couples or their children would benefit from an "any two persons" redefinition, especially in the short run. Yet Idaho—based on only a decade's worth of information about genderless marriage—cannot responsibly ignore the potential impact of that redefinition on the far larger percentage of the population composed of heterosexuals, or on their children, who (regardless of the definition of marriage) are likely to constitute the vast majority of children born in the foreseeable future. Like many other States, Idaho adopted no-fault divorce without waiting to observe its effects in other jurisdictions. It should not be forced to make the same mistake again.

4. In response to the social risks that would result from removing the man-woman definition (and social understanding) of

marriage, the panel cites a single study suggesting that Massachusetts' decision to adopt same-sex marriage in 2004 had no *immediate* impact on marriage or divorce rates in that state. Opinion at 18. But the conclusions of that study have been hotly disputed, and indeed the evidence clearly shows a longer-term *increase* in divorce in the wake of Massachusetts' decision—and a *decrease* in marriage rates.[6] Furthermore, a recent study of the Netherlands, which had same-sex marriage before Massachusetts, shows a clear decline in marriage rates among man-woman couples in urban areas after the passage of same-sex marriage laws.[7]

More important, as discussed by Justice Alito in *Windsor*, any empirical analysis of the effects of redefining marriage calls for "[judicial]

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[6] *See* Centers for Disease Control and Prevention, "Divorce Rates by State," (available at http://www.cdc.gov/nchs/data/dvs/divorce_rates_90_95_99-11.pdf) (divorce rates in Massachusetts increased 8% from 2003 to 2011, and were the highest in 2011—the last year of available data—in twenty years); Centers for Disease Control and Prevention, "Marriage Rates by State," (available at http://www.cdc.gov/nchs/data/dvs/marriage rates_90_95_99-11.pdf) (marriage rates in Massachusetts were lower in 2011—the last year of available data—than in 2003—the year before same-sex marriage started, and were the lowest in over twenty years).

[7] *See* Mircea Trandafir, *The Effect of Same-Sex Marriage Laws on Different-Sex Marriage: Evidence from the Netherlands* at 28-29 (2009) (available at http://www.iza.org/conference files/TAM2010/trandafir m6039.pdf).

caution and humility." 133 S. Ct. at 2715. As he pointed out, same-sex marriage is still far too new—and the institution of marriage too complex—for a redefinition's full impact to have registered in a measurable way. *Id.* at 2715-16. Accordingly, as Justice Kennedy pointed out during oral argument in *Perry,* redefining marriage is akin to jumping off a cliff—it is impossible to see with complete accuracy all the dangers one might encounter when one arrives at the bottom. *See* Oral Argument at 47:19-24, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2012) (No. 12-144).

5. Based upon the foregoing analysis of the benefits conferred on the State and its citizens by the man-woman definition of marriage, and the harms—or at least risks—the State and its citizens would face by eliminating that definition, Idaho's decision to retain it passes muster under any standard, including strict scrutiny. For there can be no doubt that the man-woman definition substantially advances compelling interests—including Idaho's overall interest in the welfare of the vast majority of its children, that is, those of opposite-sex couples. That is not to say that Idaho is unconcerned with same-sex couples or the children they raise together. But the State cannot responsibly ignore the long-

term welfare of the many when asked to make a major change that will confer a short-term benefit on the few.

The panel responds to Governor Otter's showing on this point, not by disputing the importance of the State's interests, but by claiming that Idaho is pursuing them in a manner that is "grossly over- and under-inclusive …" Opinion at 23. But that argument, also relied upon by the Seventh Circuit, is irrelevant for two reasons.

First, the panel once again ignores the real issue, which is the impact of redefining marriage on the *institution* itself. Idaho can easily allow infertile couples to marry (and avoid invading their privacy) without having to change the existing man-woman definition of marriage and thus lose the benefits that definition and the associated norms provide. *Cf.* Opinion at 24 n. 14. Indeed, allowing infertile and elderly man-woman couples to marry still reinforces the norms of marriage for man-woman couples who can reproduce accidentally. Conversely, taking *other* measures in pursuit of the State interests underlying the man-woman definition—like "rescind[ing] the right of no-fault divorce, or to divorce altogether" (Opinion at 24)—would not materially reduce the adverse impact on the marriage institution of removing the man-woman

definition, or the resulting harm and risks to Idaho's children and the State itself. Again, because many of the norms and social benefits associated with marriage flow from that definition, removing it will have adverse consequences no matter what else Idaho might do in an effort to strengthen the institution of marriage.

Second, like the Fourth and Tenth Circuits (which also applied a form of heightened scrutiny), the panel ignores that the choice Idaho faces with respect to the definition of marriage is binary: Either preserve the man-woman definition, or replace it with an "any two qualified persons" definition. Idaho can thus *either* preserve the benefits the man-woman definition provides, *or* it can risk losing those benefits. It cannot do both. Idaho's choice to preserve the man-woman definition is thus narrowly tailored—indeed, perfectly tailored—to its interest in preserving those benefits and in avoiding the enormous societal risks accompanying a genderless-marriage regime. Under a proper means-ends analysis, therefore, the fact that the State might have done things differently in other, related areas of the law is irrelevant—especially given that neither the panel nor the Plaintiffs dispute that the interests Idaho has articulated are compelling, or that the risks to those interests

are real. *See, e.g.*, *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 requiring "substantial deference" to the government decision-maker in such situations, even under heightened scrutiny).

For all these reasons, those risks—to the institution of marriage and consequently to Idaho's children and the State itself—make the issue presented here "exceptionally" important, and thus amply deserving of *en banc* review.

II. *En Banc* Review Is Warranted To Review The Holding Of *SmithKline* In The Context Of Marriage Laws, And In Light Of The Potential Of That Holding To Create Religious Strife.

The panel's decision is also exceptionally important because it is the first decision to apply this Court's *SmithKline* holding—i.e., that sexual orientation is a suspect or quasi-suspect class—in the critical context of State marriage laws. Recognizing that this Court has already denied *en banc* review in *SmithKline* itself, we simply reiterate Judge O'Scannlain's explanation of why *SmithKline's* holding is both wrong

and corrosive, *see* 759 F.3d at 990-91, 994-95 (O'Scannlain, J., dissenting from denial)—and note again that *SmithKline* widened a 9-2 circuit split on the question it decided. *See supra* note 1.

In addition to those reasons for review, application of *SmithKline's* heightened scrutiny standard to Idaho's marriage laws marks an unprecedented intrusion by the United States into Idaho's "historic and essential authority to define the marital relation." *Windsor*, 133 S. Ct. at 2692. That intrusion stands in substantial tension (to say the least) with the principle of federalism, on which *Windsor* directly relied, and which affirms that few matters so firmly belong within State authority as laws determining who is eligible to marry—"an area to which States lay claim by right of history and expertise." *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring); *accord Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (collecting cases).

Avoiding damage to federalism is one reason the Supreme Court has been especially cautious in adjudicating novel claims under the Fourteenth Amendment. *See, e.g., District Attorney's Office v. Osborne*, 557 U.S. 52, 72-74 (2009); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 44 (1973). Yet by applying *SmithKline* in the marriage

context, the panel has now imposed heightened scrutiny on an area of law—domestic relations—that was previously governed by rational basis review. In this crucial area, then, the panel has thus departed from the standard that is a "paradigm of judicial restraint" under which courts have no "license … to judge the wisdom, fairness, or logic of the legislative choices," *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-14 (1993); *see also Bruning*, 455 F.3d at 867 (because "the institution of marriage has always been, in our federal system, the predominant concern of state government . . . rational-basis review must be particularly deferential" in this context). Replacing that customary deference with heightened scrutiny not only contravenes federalism, but also demeans the "fundamental right" of Idaho voters to decide the question of same-sex marriage for themselves. *Schuette v. BAMN*, 134 S. Ct. 1623, 1637 (2014).

As Judge O'Scannlain pointed out, moreover, *SmithKline's* "unprecedented application of heightened scrutiny" has "significant implications" not only "for the same-sex marriage debate," but also "for other laws that may give rise to distinctions based on sexual orientation." 759 F.3d at 990-91 (emphasis added). For example, the

panel is only partially correct when it states at footnote 17 that "Nevada law currently prohibits discrimination based on sexual orientation in public accommodations, while Idaho law does not." Opinion at 30. In fact, at least ten Idaho cities have adopted local ordinances prohibiting discrimination on the basis of sexual orientation and gender identity. When applied to those statutes—as it likely will be—the panel's call for heightened scrutiny will lead to far-reaching litigation and additional liability in employment, housing, taxation, inheritance, government benefits and other areas of domestic relations.

In addition, throughout this litigation, Governor Otter has detailed situations in which applying heightened scrutiny to classifications based on sexual orientation would amplify the likelihood of religion-related strife and infringements of religious freedom in a wide variety of foreseeable situations. *See* OB 52-56. Idaho, as explained to both the district court and the panel, has a profound interest in minimizing such strife on issues, like marriage, that the U.S. Constitution does not clearly dictate the outcome. *Cf. Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983) (referring to "the State's compelling interest in the maintenance of domestic peace").

Yet, like the *SmithKline* panel, the panel here fails to grapple with these consequences. Instead it dismisses them, remarking that "[w]hether a Catholic hospital must provide the same health care benefits to its employees' same-sex spouses as it does their opposite-sex spouses, and whether a baker is civilly liable for refusing to make a cake for a same-sex wedding, turn on state public accommodation law, federal anti-discrimination law, and the protections of the First Amendment. These questions are not before us." Opinion at 30. This invitation to litigate such contentious questions invites serious conflicts with religious liberties. And it misses the critical point that Idaho's decision to retain its definition of marriage is justified, in part, by the legitimate purpose of avoiding conflicts between the State's domestic relations law and the First Amendment's guarantee of religious liberty.

III. *En Banc* Review Is Warranted To Review The Panel's Extraordinary Holding That A Classification Based Upon A *Couple's* Same-Sex Or Opposite-Sex Configuration Ipso Facto Constitutes A Classification Based Upon Sexual Orientation.

Assuming *SmithKline* was correct, the panel's rationale for holding that Idaho's laws trigger heightened scrutiny under that decision independently merits *en banc* review. Idaho has long maintained that,

although it has a disparate impact on gays and lesbians, its man-woman definition does not classify or discriminate on the basis of sexual orientation. Indeed, that definition does not even mention sexual orientation, gays, or lesbians. Rather, it simply draws a distinction between opposite-sex couples and every other type of relationship. It follows that gays and lesbians are *allowed* to marry someone of the opposite sex if they so choose, and heterosexuals (who might have tax or financial reasons for such a choice) are likewise *forbidden* from marrying someone of the same sex. As Judge Posner has noted, under definitions like Idaho's, "[t]here is no legal barrier to homosexuals marrying persons of the opposite sex; in this respect there is already perfect formal equality between homosexuals and heterosexuals." Posner, *Should There Be Homosexual Marriage?* at 1582.

But in a single cursory paragraph, the panel sweeps that point aside. It holds instead that, because Idaho's laws "distinguish on their face between opposite-sex *couples* … and same-sex *couples*," those laws amount to "classifications on the basis of sexual orientation"—and are *ipso facto* subject to review under *SmithKline's* heightened scrutiny standard. Opinion at 13, 15, 28, 33. And that holding enables the panel

to avoid the disparate impact branch of equal protection law, with its two-part requirement that, to run afoul of the Fourteenth Amendment, a neutral law must have both a discriminatory effect and a discriminatory purpose.[8] Undoubtedly, the panel was aware that the disparate impact test requiring both of these elements has been reiterated dozens of times across five decades by the Supreme Court,[9] and by every Circuit,

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[8] *See, e.g., Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979) (finding that "even if a neutral law has a disproportionately adverse effect upon a [protected class], it is unconstitutional under the Equal Protection Clause *only if* that impact can be traced to a discriminatory purpose.") (emphasis added); *Rosenbaum v. City & Cnty. of San Francisco,* 484 F.3d 1142, 1152 (9th Cir. 2007) (holding that "[t]o prevail on its claim under the equal protection clause of the Fourteenth Amendment, a plaintiff must demonstrate that enforcement had a discriminatory effect and the [government was] motivated by a discriminatory purpose.").

[9] *See, e.g., Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (declaring that "[p]roof of [] discriminatory intent or purpose is required to show a violation of the Equal Protection Clause"); *Hernandez v. New York*, 500 U.S. 352, 359-60 (1991) (quoting *Arlington Heights*, 429 U.S. at 264, and finding that "[a] court [undertaking equal protection analysis] must keep in mind the fundamental principle that 'official action will not be held unconstitutional *solely* because it results in a [] disproportionate impact.'") (emphasis added); *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 372-73 (2001) (noting that "disparate impact …alone is insufficient even where the Fourteenth Amendment subjects state action to strict scrutiny"); *Crawford v. Board of Ed. of Los Angeles*, 458 U.S. 527, 537-38 (1982) (holding that "even when a neutral law has a disproportionately adverse effect on a [suspect class], the Fourteenth Amendment is violated only if a discriminatory purpose can be shown").

including this Court.[10] Indeed, just last term Justice Scalia reminded the legal community that "[f]ew equal protection theories have been so squarely and soundly rejected" as "the proposition that a facially neutral law may deny equal protection solely because it has a disparate [] impact." *Schuette,* 134 S. Ct. at 1647 (Scalia, J., concurring in the judgment). The panel also undoubtedly realized that it would be incredible to find that Idaho's marriage laws, stemming from the 1860s, had anything to do with gays and lesbians, much less were animated by animus or a desire to discriminate against them.[11]

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[10] *E.g., McLean v. Crabtree*, 173 F.3d 1176, 1185 (9th Cir. 1999), as amended on denial of reh'g and reh'g en banc (Apr. 17, 1999) (finding that "[p]roof of discriminatory intent is required to show that state action having a disparate impact violates the Equal Protection Clause"); *Martin v. Int'l Olympic Comm.*, 740 F.2d 670, 678 (9th Cir. 1984) ("The disproportionate impact of a statute or regulation alone, however, does not violate the equal protection clause. To succeed on their equal protection claim, the [plaintiffs] must show that the allegedly disproportionate impact of [the law] on [the suspect class] reflects a discriminatory purpose."); *PMG Int'l Div. L.L.C. v. Rumsfeld*, 303 F.3d 1163, 1172-73 (9th Cir. 2002) (holding that "a disparate impact claim challenging a facially neutral-statute requires showing of discriminatory intent"); *Rosenbaum v. City & Cnty. of San Francisco,* 484 F.3d 1142, 1152 (9th Cir. 2007) (noting that "[t]o prevail on its claim under the equal protection clause of the Fourteenth Amendment, a plaintiff must demonstrate that enforcement had a discriminatory effect and the [government was] motivated by a discriminatory purpose").

[11] Judge Holmes noted in his concurrence in *Bishop v. Smith* that most courts have "declined to rely upon animus doctrine in striking down" state laws defining marriage as between a man and a woman, and urged

But whatever its purpose, the panel's "classification" holding departs from settled law—and in a way that merits review by the *en banc* Court. Specifically, although the panel *quotes* the Supreme Court's admonition that facial discrimination depends on "the explicit terms" of the provision at issue, *International Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991), the panel's analysis flatly ignores that crucial requirement: Unlike the Supreme Court in *United Auto Workers,* nowhere does the panel examine the "explicit terms" of the pertinent Idaho laws to determine whether they actually "classify" on the basis of sexual orientation.

If those laws said, for example, that "gay men and lesbian women may not marry," that would establish a classification based on sexual orientation. But the pertinent laws say nothing of the kind. For example, Art. III, Section 28 of the Idaho Constitution simply states that "[a] marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state"—without saying

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that such a ruling would be highly inappropriate. 760 F.3d 1070, 1096-97 (10th Cir. 2014), *cert. denied*, No. 14-136, 2014 WL 3854318 (U.S. Oct. 6, 2014).

anything about the sexual orientation of the participants. By contrast, the fetal-protection policy at issue in *United Auto Workers expressly* classified based on the employees' sex, thereby warranting the Court's (unanimous) conclusion that it was indeed a "sex-based classification"—and therefore that the plaintiffs there need not establish a disparate impact *or* a discriminatory purpose. *See* 499 U.S. at 198.[12]

Moreover, the panel's approach—treating a distinction between man-woman couples and every other sort of relationship as *ipso facto* "discrimination based on sexual orientation," Opinion at 13—will be highly problematic in future cases. Indeed, as various states within this Circuit begin to accommodate same-sex couples in their domestic relations and other laws, there may be situations in which state or local governments believe they have legitimate reasons, unrelated to sexual orientation, for treating same-sex couples differently from opposite-sex

[12] Other decisions in this Circuit have likewise made clear that, to escape the requirement of showing discriminatory purpose, a plaintiff must establish that the triggering classification is contained in the "explicit terms" of the challenged law or policy. *See, e.g., Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1048 (9th Cir. 2007) (applying *United Auto Workers* and finding that "[a] facially discriminatory policy is one which on its face applies less favorably to a protected group" and that "[t]he men-only policy at Community House is facially discriminatory because it *explicitly* treats women … different from men")

couples. For example, a state might decide to charge lower insurance premiums to an employee married to a same-sex partner (regardless of their sexual orientations) than to an employee married to an opposite-sex partner, given the reduced risk of accidental pregnancy. Under the panel's analysis, such a policy would constitute a "classification based on sexual orientation," and thus automatically subject to heightened scrutiny—even though the state's purpose is to provide a fair financial *benefit* to same-sex couples.

A recent example from Coeur d'Alene, Idaho illustrates the perils created by the panel's decision. The example involves Donald and Evelyn Knapp, ordained ministers who own and operate "one of the most well-known chapels in the Inland Northwest," but who will not perform same-sex marriages because of their religious beliefs. Coeur d'Alene also has an ordinance that bans sexual orientation discrimination in public accommodations. Coeur d'Alene Code, Chapter 9.56.030.A. Initially a deputy city attorney—echoing the panel's flawed conflation of classifications based on the gender composition of a couple with facial sexual-orientation discrimination—stated that if the Knapps turn away same-sex couples, they will be in violation of the ordinance, regardless of

the purpose of their policy. This week, amid enormous public outcry, the city attorney clarified that Coeur d'Alene will not prosecute nonprofit religious corporations that are legitimately classified as such, which the Hitching Post claims to be. But the city attorney did not disavow the earlier statements by his deputy, apparently in light of the panel's ruling, that the non-discrimination ordinance is "broad enough that it would capture [wedding] activity" and that it views as facially discriminatory a policy that treats opposite-sex pairings differently from every other kind of relationship.[13]

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[13] *See* Caiti Currey, "Hitching Post Owners Will Close Before Performing Same-Sex Marriages," KXLY.com (May 15, 2014) (available at http://www.kxly.com/news/north-idaho-news/hitching-post-owners-will-close-before-performing-samesex-marriages/26006066); Scott Maben, "Ministers Diverge in Opinion on Lifting of Idaho's Gay Marriage Ban," The Spokesman Review (May 15, 2014) (available at http://www.spokesman.com/stories/2014/may/15/ministers-diverge-in-opinion-on-lifting-of-idahos/); Scott Maben, "Christian Right Targets Coeur d'Alene Law," The Spokesman-Review (October 21, 2014) (available at http://www.spokesman.com/stories/2014/oct/21/christian-right-targets-coeur-dalene-law/). On October 15, 2015, just two days after the panel lifted its stay of the district court's order in this case, the Knapps were contacted and asked if they would perform a gay marriage ceremony, which they declined on religious grounds. *Knapp v. Coeur d'Alene*, Case 2:14-cv-00441-PEB, Verified Complaint, Document 1, at 2. Absent a religious exemption (which the City apparently is now considering), for every day the Knapps continue to refuse to perform that particular wedding, they could face up to 180 days in jail and a $1,000 fine. *Id.*

For all these reasons, review by the *en banc* Court is necessary to ensure uniform adherence to the rule of *United Auto Workers*, which requires that facial discrimination be determined based on "the explicit terms" of the allegedly discriminatory law or policy.

CONCLUSION

The panel's decision appears to be judicial policymaking masquerading as law. But it is bad law, conflicting with numerous decisions of this Court, other circuits and the Supreme Court. And it is even worse policy, creating enormous risks to Idaho's present and future children—including serious risks of increased fatherlessness, reduced parental financial and emotional support, increased crime, and greater psychological problems—with their attendant costs to Idaho and its citizens. For all these reasons, the panel decision merits *en banc* review.

DATED: October 21, 2014

By /s *Gene C. Schaerr*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 21, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 07 2014

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

SUSAN LATTA; TRACI EHLERS; LORI WATSEN; SHARENE WATSEN; SHELIA ROBERTSON; ANDREA ALTMAYER; AMBER BEIERLE; RACHAEL ROBERTSON,

Plaintiffs - Appellees,

v.

C. L. OTTER, "Butch"; Governor of the State of Idaho, in his official capacity,

Defendant - Appellant,

And

CHRISTOPHER RICH, Recorder of Ada County, Idaho, in his official capacity,

Defendant,

STATE OF IDAHO,

Intervenor-Defendant.

No. 14-35420

D.C. No. 1:13-cv-00482-CWD

OPINION

SUSAN LATTA; TRACI EHLERS; LORI WATSEN; SHARENE WATSEN; SHELIA ROBERTSON; ANDREA ALTMAYER; AMBER BEIERLE; RACHAEL ROBERTSON,

Plaintiffs - Appellees,

v.

C. L. OTTER, "Butch"; Governor of the State of Idaho, in his official capacity,

Defendant,

And

CHRISTOPHER RICH, Recorder of Ada County, Idaho, in his official capacity,

Defendant - Appellant,

STATE OF IDAHO,

Intervenor-Defendant - Appellant.

No. 14-35421

D.C. No. 1:13-cv-00482-CWD

Appeal from the United States District Court
for the District of Idaho
Candy W. Dale, Magistrate Judge, Presiding

BEVERLY SEVCIK; MARY BARANOVICH; ANTIOCO CARRILLO; THEODORE SMALL; KAREN GOODY; KAREN VIBE; FLETCHER WHITWELL; GREG FLAMER; MIKYLA MILLER; KATRINA MILLER; ADELE TERRANOVA; TARA NEWBERRY; CAREN CAFFERATA-JENKINS; FARRELL CAFFERATA-JENKINS; MEGAN LANZ; SARA GEIGER,

Plaintiffs - Appellants,

v.

BRIAN SANDOVAL, in his official capacity as Governor of the State of Nevada; DIANA ALBA, in her official capacity as the County Clerk and Commissioner of Civil Marriages for Clark County, Nevada; AMY HARVEY, in her official capacity as the County Clerk and Commissioner of Civil Marriages for Washoe County, Nevada; ALAN GLOVER, in his official capacity as the Clerk Recorder for Carson City, Nevada,

Defendants - Appellees,

And

COALITION FOR THE PROTECTION

No. 12-17668

D.C. No. 2:12-cv-00578-RCJ-PAL

OPINION

OF MARRIAGE,

Intervenor-Defendant - Appellee.

Appeal from the United States District Court
for the District of Nevada
Robert Clive Jones, District Judge, Presiding

Argued and Submitted September 8, 2014[1]
San Francisco, California

Before: REINHARDT, GOULD, and BERZON, Circuit Judges.

Opinion by Judge Reinhardt:

Both Idaho and Nevada have passed statutes and enacted constitutional amendments preventing same-sex couples from marrying and refusing to recognize same-sex marriages validly performed elsewhere.[2] Plaintiffs, same-sex couples

[1]A disposition in *Jackson v. Abercrombie*, Nos. 12-16995 & 12-16998, is forthcoming separately.

[2]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 ("Marriage is a personal relation arising out of a civil contract between a man and a woman . . . ."), 32-202 (identifying as qualified to marry "[a]ny unmarried male . . . and unmarried female" of a certain age and "not otherwise disqualified."); 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 marriage, and marriages entered into under the laws of another state or

(continued...)

who live in Idaho and Nevada and wish either to marry there or to have marriages entered into elsewhere recognized in their home states, have sued for declaratory relief and to enjoin the enforcement of these laws. They argue that the laws are subject to heightened scrutiny because they deprive plaintiffs of the fundamental due process right to marriage, and because they deny them equal protection of the law by discriminating against them on the bases of their sexual orientation and their sex. In response, Governor Otter, Recorder Rich, and the State of Idaho, along with the Nevada intervenors, the Coalition for the Protection of Marriage ("the Coalition"), argue that their laws survive heightened scrutiny, primarily because the states have a compelling interest in sending a message of support for the institution of opposite-sex marriage. They argue that permitting same-sex marriage will seriously undermine this message, and contend that the institution of opposite-sex marriage is important because it encourages people who procreate to be responsible parents, and because opposite-sex parents are better for children than same-sex parents.

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[2](...continued)
country with the intent to evade the prohibitions of the marriage laws of this state."); Nev. Const. Art. 1, § 21 ("Only a marriage between a male and female person shall be recognized and given effect in this state."); Nev. Rev. Stat. § 122.020(1) ("[A] male and female person . . . may be joined in marriage.").

Without the benefit of our decision in *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014), *reh'g en banc denied*, 759 F.3d 990 (9th Cir. 2014), the *Sevcik* district court applied rational basis review and upheld Nevada's laws. *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012). After we decided *SmithKline*, the *Latta* district court concluded that heightened scrutiny applied to Idaho's laws because they discriminated based on sexual orientation, and invalidated them.[3] *Latta v. Otter*, No. 1:13-CV-00482-CWD, 2014 WL 1909999, at *14–18 (D. Idaho May 13, 2014). We hold that the Idaho and Nevada laws at issue violate the Equal Protection Clause of the Fourteenth Amendment because they deny lesbians and gays[4] who wish to marry persons of the same sex a right they afford to individuals who wish to marry persons of the opposite sex, and do not satisfy the heightened scrutiny standard we adopted in *SmithKline*.

I.

[3]The *Latta* court also found a due process violation because, it concluded, the laws curtailed plaintiffs' fundamental right to marry. *Latta v. Otter*, No. 1:13-CV-00482-CWD, 2014 WL 1909999, at *9–13 (D. Idaho May 13, 2014).

[4]We have recognized that "[s]exual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them." *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1093 (9th Cir. 2000), *overruled on other grounds by Thomas v. Gonzales*, 409 F.3d 1177, 1187 (9th Cir. 2005), *vacated*, 547 U.S. 183 (2006).

Before we reach the merits, we must address two preliminary matters: first, whether an Article III case or controversy still exists in *Sevcik*, since Nevada's government officials have ceased to defend their laws' constitutionality; and second, whether the Supreme Court's summary dismissal in *Baker v. Nelson*, 409 U.S. 810 (1972), is controlling precedent that precludes us from considering plaintiffs' claims.

A.

Governor Sandoval and Clerk-Recorder Glover initially defended Nevada's laws in the district court. However, they have since withdrawn their answering briefs from consideration by this Court, in light of our decision in *SmithKline*, 740 F.3d at 480-81 (holding heightened scrutiny applicable). Governor Sandoval now asserts that *United States v. Windsor*, 133 S. Ct. 2675 (2013), "signifies that discrimination against same-sex couples is unconstitutional," and that "[a]ny uncertainty regarding the interpretation of *Windsor* was . . . dispelled" by *SmithKline*. As a result, we have not considered those briefs, and the Governor and Clerk-Recorder were not heard at oral argument, pursuant to Fed. R. App. P. 31(c).

The Nevada Governor and Clerk Recorder remain parties, however, and continue to enforce the laws at issue on the basis of a judgment in their favor below. As a result, we are still presented with a live case or controversy in need of

resolution. Despite the fact that Nevada "largely agree[s] with the opposing party on the merits of the controversy, there is sufficient adverseness and an adequate basis for jurisdiction in the fact the [state] intend[s] to enforce the challenged law against that party." *Windsor*, 133 S. Ct. at 2686–87 (citation and quotation marks omitted). Although the state defendants withdrew their briefs, we are required to ascertain and rule on the merits arguments in the case, rather than ruling automatically in favor of plaintiffs-appellants. *See Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 887 n.7 (9th Cir. 2010) ("[Defendant's] failure to file a brief does not compel a ruling in [plaintiff's] favor, given that the only sanction for failure to file an answering brief is forfeiture of oral argument.").

There remains a question of identifying the appropriate parties to the case before us—specifically, whether we should consider the arguments put forward by the Nevada intervenor, the Coalition for the Protection of Marriage. As plaintiffs consented to their intervention in the district court—at a point in the litigation before Governor Sandoval and Clerk-Recorder Glover indicated that they would no longer argue in support of the laws—and continue to so consent, the propriety of the intervenor's participation has never been adjudicated.

Because the state defendants have withdrawn their merits briefs, we face a situation akin to that in *Windsor*. There, a case or controversy remained between

Windsor and the United States, which agreed with her that the Defense of Marriage Act was unconstitutional but nonetheless refused to refund the estate tax she had paid. Here as there, the state defendants' "agreement with [plaintiffs'] legal argument raises the risk that instead of a real, earnest and vital controversy, the Court faces a friendly, non-adversary proceeding . . . ." 133 S. Ct. at 2687 (citations and quotation marks omitted). Hearing from the Coalition helps us "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). As a result, we consider the briefs and oral argument offered by the Coalition, which, Governor Sandoval believes, "canvass the arguments against the Appellants' position and the related policy considerations."[5]

B.

Defendants argue that we are precluded from hearing this case by *Baker*, 409 U.S. 810. In that case, the Minnesota Supreme Court had rejected due process and equal protection challenges to a state law limiting marriage to a man and a woman.

[5]For the sake of convenience, we refer throughout this opinion to arguments advanced generally by "defendants"; by this we mean the parties that continue actively to argue in defense of the laws—the Idaho defendants and the Nevada intervenor—and not Governor Sandoval and Clerk-Recorder Glover.

191 N.W.2d 185, 186–87 (Minn. 1971). The United States Supreme Court summarily dismissed an appeal from that decision "for want of a substantial federal question." *Baker*, 409 U.S. at 810. Such summary dismissals "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions," *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam), until "doctrinal developments indicate otherwise," *Hicks v. Miranda*, 422 U.S. 332, 343–44 (1975) (citation and quotation marks omitted). Defendants contend that this decades-old case is still good law, and therefore bars us from concluding that same-sex couples have a due process or equal protection right to marriage.

However, "subsequent decisions of the Supreme Court" not only "suggest" but make clear that the claims before us present substantial federal questions.[6] *Wright v. Lane Cnty. Dist. Ct.*, 647 F.2d 940, 941 (9th Cir. 1981); *see Windsor*,

[6]To be sure, the Court made explicit in *Windsor* and *Lawrence* that it was not deciding whether states were required to allow same-sex couples to marry. *Windsor*, 133 S. Ct. at 2696 ("This opinion and its holding are confined to those lawful marriages [recognized by states]."); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("The present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."). The Court did not reach the question we decide here because it was not presented to it. Although these cases did not tell us the *answers* to the federal questions before us, *Windsor* and *Lawrence* make clear that these are substantial federal *questions* we, as federal judges, must hear and decide.

133 S. Ct. at 2694–96 (holding unconstitutional under the Fifth Amendment a federal law recognizing opposite-sex-sex but not same-sex marriages because its "principal purpose [was] to impose inequality, not for other reasons like governmental efficiency"); *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (recognizing a due process right to engage in intimate conduct, including with a partner of the same sex); *Romer v. Evans*, 517 U.S. 620, 631–34 (1996) (invalidating as an irrational denial of equal protection a state law barring protection of lesbians and gays under state or local anti-discrimination legislation or administrative policies). Three other circuits have issued opinions striking down laws like those at issue here since *Windsor*, and all agree that *Baker* no longer precludes review. *Accord Baskin v. Bogan*, No. 14-2386, 2014 WL 4359059, at *7 (7th Cir. Sept. 4, 2014); *Bostic v. Schaefer*, 760 F.3d 352, 373–75 (4th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1204–08 (10th Cir. 2014). As any observer of the Supreme Court cannot help but realize, this case and others like it present not only substantial but pressing federal questions.

II.

Plaintiffs are ordinary Idahoans and Nevadans. One teaches deaf children. Another is a warehouse manager. A third is an historian. Most are parents. Like all human beings, their lives are given greater meaning by their intimate, loving,

committed relationships with their partners and children. "The common vocabulary of family life and belonging that other[s] [] may take for granted" is, as the Idaho plaintiffs put it, denied to them—as are all of the concrete legal rights, responsibilities, and financial benefits afforded opposite-sex married couples by state and federal law[7]—merely because of their sexual orientation.

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[7]Nevada, unlike Idaho, has enacted a domestic partnership regime. Since 2009, both same-sex and opposite-sex couples have been allowed to register as domestic partners. Nev. Rev. Stat. §§ 122A.100, 122A.010 *et seq.* Domestic partners are generally treated like married couples for purposes of rights and responsibilities—including with respect to children—under state law. However, domestic partners are denied nearly all of the benefits afforded married couples under federal law—including, since *Windsor*, same-sex couples married under state law.

The fact that Nevada has seen fit to give same-sex couples the opportunity to enjoy the benefits afforded married couples by state law makes its case for the constitutionality of its regime even weaker than Idaho's. With the concrete differences in treatment gone, all that is left is a message of disfavor. The Supreme Court has "repeatedly emphasized [that] discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants," can cause serious "injuries to those who are denied equal treatment solely because of their membership in a disfavored group." *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984) (citation omitted).

If Nevada were concerned, as the Coalition purports it to be, that state recognition of same-sex unions would make the institution of marriage "genderless" and thereby undermine opposite-sex spouses' commitments to each other and their children, it would be ill-advised to permit opposite-sex couples to participate in the alternative domestic partnership regime it has established. However, Nevada does just that.

Defendants argue that their same-sex marriage bans do not discriminate on the basis of sexual orientation, but rather on the basis of procreative capacity. Effectively if not explicitly, they assert that while these laws may disadvantage same-sex couples and their children, heightened scrutiny is not appropriate because differential treatment by sexual orientation is an incidental effect of, but not the reason for, those laws. However, the laws at issue distinguish on their face between opposite-sex couples, who are permitted to marry and whose out-of-state marriages are recognized, and same-sex couples, who are not permitted to marry and whose marriages are not recognized. Whether facial discrimination exists "does not depend on why" a policy discriminates, "but rather on the explicit terms of the discrimination." *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991). Hence, while the procreative capacity distinction that defendants seek to draw could in theory represent a *justification* for the discrimination worked by the laws, it cannot overcome the inescapable conclusion that Idaho and Nevada do discriminate on the basis of sexual orientation.

In *SmithKline*, we held that classifications on the basis of sexual orientation are subject to heightened scrutiny. 740 F.3d at 474. We explained:

> In its words and its deed, *Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review. In other words, *Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation.

Id. at 481.

Windsor, we reasoned, applied heightened scrutiny in considering not the Defense of Marriage Act's hypothetical rationales but its actual, motivating purposes.[8] *SmithKline*, 740 F.3d at 481. We also noted that *Windsor* declined to adopt the strong presumption in favor of constitutionality and the heavy deference to legislative judgments characteristic of rational basis review. *Id.* at 483. We concluded:

> *Windsor* requires that when state action discriminates on the basis of sexual orientation, we must examine its actual purposes and carefully consider the resulting inequality to ensure that our most fundamental institutions neither send nor reinforce messages of stigma or second-class status.

Id.

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[8]Although as discussed in the text, *SmithKline* instructs us to consider the states' actual reasons, and not post-hoc justifications, for enacting the laws at issue, these actual reasons are hard to ascertain in this case. Some of the statutory and constitutional provisions before us were enacted by state legislatures and some were enacted by voters, and we have been informed by all parties that the legislative histories are sparse. We shall assume, therefore, that the justifications offered in defendants' briefs were in fact the actual motivations for the laws.

We proceed by applying the law of our circuit regarding the applicable level of scrutiny. Because Idaho and Nevada's laws discriminate on the basis of sexual orientation, that level is heightened scrutiny.

III.

Defendants argue that their marriage laws survive heightened scrutiny because they promote child welfare by encouraging optimal parenting. Governor Otter argues that same-sex marriage "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." Governor Otter seeks to have the state send the opposite message to all Idahoans: that a child reared by its biological parents *is* socially preferred and officially encouraged.

This argument takes two related forms: First, defendants make a "procreative channeling" argument: that the norms of opposite-sex marriage ensure that as many children as possible are raised by their married biological mothers and fathers. They claim that same-sex marriage will undermine those existing norms, which encourage people in opposite-sex relationships to place their children's interests above their own and preserve intact family units, instead of pursuing their own emotional and sexual needs elsewhere. In short, they argue that allowing

same-sex marriages will adversely affect opposite-sex marriage by reducing its appeal to heterosexuals, and will reduce the chance that accidental pregnancy will lead to marriage. Second, Governor Otter and the Coalition (but not the state of Idaho) argue that limiting marriage to opposite-sex couples promotes child welfare because children are most likely to thrive if raised by two parents of opposite sexes, since, they assert, mothers and fathers have "complementary" approaches to parenting.[9] Thus, they contend, children raised by opposite-sex couples receive a better upbringing.

A.

We pause briefly before considering the substance of defendants' arguments to address the contention that their conclusions about the future effects of same-sex marriage on parenting are legislative facts entitled to deference. Defendants have not demonstrated that the Idaho and Nevada legislatures actually found the facts asserted in their briefs; even if they had, deference would not be warranted.

[9]These arguments are not novel. The Bipartisan Legal Advisory Group (BLAG) relied in part on similar contentions about procreative channeling and gender complementarity in its attempt to justify the federal Defense of Marriage Act, but the Court did not credit them. Brief on the Merits for Respondent BLAG at 44-49, *Windsor*, 133 S. Ct. 2675 (No. 12-307), 2013 U.S. S. Ct. Briefs LEXIS 280 at *74–82.

Unsupported legislative conclusions as to whether particular policies will have societal effects of the sort at issue in this case—determinations which often, as here, implicate constitutional rights—have not been afforded deference by the Court. To the contrary, we "retain[] an independent constitutional duty to review factual findings where constitutional rights are at stake. . . . Uncritical deference to [legislatures'] factual findings in these cases is inappropriate." *Gonzales v. Carhart*, 550 U.S. 124, 165–66 (2007); *see also Hodgson v. Minnesota*, 497 U.S. 417, 450–55 (1990).

B.

Marriage, the Coalition argues, is an "institution directed to certain great social tasks, with many of those involving a man and a woman united in the begetting, rearing, and education of children"; it is being "torn away," they claim, "from its ancient social purposes and transformed into a government-endorsed celebration of the private desires of two adults (regardless of gender) to unite their lives sexually, emotionally, and socially for as long as those personal desires last." Defendants struggle, however, to identify any means by which same-sex marriages will undermine these social purposes. They argue vehemently that same-sex marriage will harm existing and especially future opposite-sex couples and their

children because the message communicated by the social institution of marriage will be lost.

As one of the Nevada plaintiffs' experts testified, there is no empirical support for the idea that legalizing same-sex marriage would harm—or indeed, affect—opposite-sex marriages or relationships. That expert presented data from Massachusetts, a state which has permitted same-sex marriage since 2004, showing no decrease in marriage rates or increase in divorce rates in the past decade.[10] *See* Amicus Brief of Massachusetts et al. 23–27; *see also* Amicus Brief of American Psychological Association et al. 8–13. It would seem that allowing couples who want to marry so badly that they have endured years of litigation to win the right to do so would reaffirm the state's endorsement, without reservation, of spousal and parental commitment. From which aspect of same-sex marriages, then, will opposite-sex couples intuit the destructive message defendants fear? Defendants offer only unpersuasive suggestions.

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[10]The Coalition takes issue with this conclusion, arguing that the effects of same-sex marriage might not manifest themselves for decades, because "something as massive and pervasive in our society and humanity as the man-woman marriage institution, like a massive ocean-going ship, does not stop or turn in a short space or a short time." Given that the discriminatory impact on individuals because of their sexual orientation is so harmful to them and their families, such unsupported speculation cannot justify the indefinite continuation of that discrimination.

First, they argue that since same-sex families will not include both a father and a mother, a man who has a child with a woman will conclude that his involvement in that child's life is not essential. They appear to contend that such a father will see a child being raised by two women and deduce that because the state has said it is unnecessary for that child—who has two parents—to have a father, it is also unnecessary for *his* child to have a father. This proposition reflects a crass and callous view of parental love and the parental bond that is not worthy of response. We reject it out of hand. *Accord Kitchen*, 755 F.3d at 1223 (concluding that it was "wholly illogical" to think that same-sex marriage would affect opposite-sex couples' choices); *Windsor v. United States*, 699 F.3d 169, 188 (2d Cir. 2012); *Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 998 (N.D. Cal. 2012); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 972 (N.D. Cal. 2010).

Defendants also propose another possible means by which endorsing same-sex marriage could discourage opposite-sex marriage, albeit less explicitly: opposite-sex couples who disapprove of same-sex marriage will opt less frequently or enthusiastically to participate in an institution that allows same-sex couples to participate. However, the fear that an established institution will be undermined due to private opposition to its inclusive shift is not a legitimate basis for retaining the status quo. In *United States v. Virginia*, the Court explained:

> The notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved, a prediction hardly different from other "self-fulfilling prophec[ies]," *see Mississippi Univ. for Women* [*v. Hogan*], 458 U.S. [718,] 730 [(1982)], once routinely used to deny rights or opportunities.
> . . .
> A like fear, according to a 1925 report, accounted for Columbia Law School's resistance to women's admission, although "[t]he faculty . . . never maintained that women could not master legal learning.[11] . . . No, its argument has been . . . more practical. If women were admitted to the Columbia Law School, [the faculty] said, then the choicer, more manly and red-blooded graduates of our great universities would go to the Harvard Law School!" The Nation, Feb. 18, 1925, p. 173.

518 U.S. 515, 542–44 (1996); *see also Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."). The *Sevcik* district court thus erred in crediting the argument that "a meaningful percentage of heterosexual persons would cease to value the civil institution as highly as they previously had and hence enter it less frequently . . . because they no longer wish to be associated with the civil institution as redefined," both because defendants failed to produce any support for

[11]Likewise, Governor Otter assures us that Idaho's laws were not motivated by judgments about the relative emotional commitments of same-sex and opposite-sex couples; his argument is about an "ethos," he claims, and so is not weakened by the fact that same-sex couples may, as he admits, be just as child-oriented.

that prediction, and because private disapproval is a categorically inadequate justification for public injustice. *Sevcik*, 911 F. Supp. 2d at 1016.

Same-sex marriage, Governor Otter asserts, is part of a shift towards a consent-based, personal relationship model of marriage, which is more adult-centric and less child-centric.[12] The *Latta* district court was correct in concluding, however, that "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 vision" of conjugal marriage. *Latta*, 2014 WL 1909999, at *23.

Idaho focuses on another aspect of the procreative channeling claim. Because opposite-sex couples can accidentally conceive (and women may choose not to terminate unplanned pregnancies), so the argument goes, marriage is important because it serves to bind such couples together and to their children. This makes some sense. Defendants' argument runs off the rails, however, when they suggest that marriage's stabilizing and unifying force is unnecessary for same-

[12]He also states, in conclusory fashion, that allowing same-sex marriage will lead opposite-sex couples to abuse alcohol and drugs, engage in extramarital affairs, take on demanding work schedules, and participate in time-consuming hobbies. We seriously doubt that allowing committed same-sex couples to settle down in legally recognized marriages will drive opposite-sex couples to sex, drugs, and rock-and-roll.

sex couples, because they always choose to conceive or adopt a child.[13] As they themselves acknowledge, marriage not only brings a couple together at the initial moment of union; it helps to keep them together, "from [that] day forward, for better, for worse, for richer, for poorer, in sickness and in health." Raising children is hard; marriage supports same-sex couples in parenting their children, just as it does opposite-sex couples.

> Moreover, marriage is not simply about procreation, but as much about
>
> expressions of emotional support and public commitment . . . . [M]any religions recognize marriage as having spiritual significance; . . . therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication . . . . [M]arital status often is a precondition to the receipt of government benefits (e. g., Social Security benefits), property rights (e. g., tenancy by the entirety,

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[13] As Judge Richard Posner put it, bluntly:

> [These states] think[] that straight couples tend to be sexually irresponsible, producing unwanted children by the carload, and so must be pressured . . . to marry, but that gay couples, unable as they are to produce children wanted or unwanted, are model parents—model citizens really—so have no need for marriage. Heterosexuals get drunk and pregnant, producing unwanted children; their reward is to be allowed to marry. Homosexual couples do not produce unwanted children; their reward is to be denied the right to marry. Go figure.

Baskin, 2014 WL 4359059, at *10 (7th Cir. Sept. 4, 2014).

Idaho and Nevada's laws are both over- and under-inclusive with respect to parental fitness. A man and a woman who have been convicted of abusing their children are allowed to marry; same-sex partners who have been adjudicated to be fit parents in an adoption proceeding are not.

> inheritance rights), and other, less tangible benefits (e. g., legitimation of children born out of wedlock).

Turner v. Safley, 482 U.S. 78, 95–96 (1987) (recognizing that prisoners, too, enjoyed the right to marry, even though they were not allowed to have sex, and even if they did not already have children).

Although many married couples have children, marriage is at its essence an "association that promotes . . . a bilateral loyalty, not commercial or social projects." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (recognizing that married couples have a privacy right to use contraception in order to prevent procreation). Just as "it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse," *Lawrence*, 539 U.S. at 567, it demeans married couples—especially those who are childless—to say that marriage is simply about the capacity to procreate.

Additionally, as plaintiffs argue persuasively, Idaho and Nevada's laws are grossly over- and under-inclusive with respect to procreative capacity. Both states give marriage licenses to many opposite-sex couples who cannot or will not reproduce—as Justice Scalia put it, in dissent, "the sterile and the elderly are

allowed to marry," *Lawrence*, 539 U.S. at 604–05—but not to same-sex couples who already have children or are in the process of having or adopting them.[14]

A few of Idaho and Nevada's other laws, if altered, would directly increase the number of children raised by their married biological parents. We mention them to illustrate, by contrast, just how tenuous any potential connection between a ban on same-sex marriage and defendants' asserted aims is. For that reason alone, laws so poorly tailored as those before us cannot survive heightened scrutiny.

If defendants really wished to ensure that as many children as possible had *married* parents, they would do well to rescind the right to no-fault divorce, or to divorce altogether. Neither has done so. Such reforms might face constitutional difficulties of their own, but they would at least further the states' asserted interest in solidifying marriage. Likewise, if Idaho and Nevada want to increase the percentage of children being raised by their two *biological* parents, they might do better to ban assisted reproduction using donor sperm or eggs, gestational surrogacy, and adoption, by both opposite-sex and same-sex couples, as well as by

[14]Defendants acknowledge this, but argue that it would be unconstitutionally intrusive to determine procreative capacity or intent for opposite-sex couples, and that the states must therefore paint with a broad brush to ensure that any couple that could possibly procreate can marry. However, Idaho and Nevada grant the right to marry even to those whose inability to procreate is obvious, such as the elderly.

single people. Neither state does. *See* Idaho Code §§ 39-5401 *et seq.*; Nev. Rev. Stat. §§ 122A.200(1)(d), 126.051(1)(a), 126.510 *et seq.*, 127.040; *see also* Carla Spivack, *The Law of Surrogate Motherhood in the United States*, 58 Am. J. Comp. L. 97, 102 & n.15 (2010); *Idaho is a destination for surrogacy*, KTVB.com (Dec. 5, 2013).

In extending the benefits of marriage only to people who have the capacity to procreate, while denying those same benefits to people who already have children, Idaho and Nevada materially harm and demean same-sex couples and their children.[15] *Windsor*, 133 S. Ct. at 2694. Denying children resources and stigmatizing their families on this basis is "illogical and unjust." *Plyler v. Doe*, 457 U.S. 202, 220 (1982) (citation omitted). It is counterproductive, and it is unconstitutional.

C.

[15]Idaho attempts to rebut testimony by the Idaho plaintiffs' expert that children of unmarried same-sex couples do just as well as those of married opposite-sex couples; the state mistakenly argues that this evidence shows that the children of same-sex couples are not harmed when the state withholds from their parents the right to marry. A more likely explanation for this expert's findings is that when same-sex couples raise children, whether adopted or conceived through the use of assisted reproductive technology, they have necessarily chosen to assume the financial, temporal, and emotional obligations of parenthood. This does not lead, however, to the conclusion that these children, too, would not benefit from their parents' marriage, just as children with opposite-sex parents do.

Governor Otter and the Coalition, but not the state of Idaho, also argue that children should be raised by both a male parent and a female parent. They assert that their marriage laws have "recognized, valorized and made normative the roles of 'mother' and 'father' and their uniting, complementary roles in raising their offspring," and insist that allowing same-sex couples to marry would send the message that "men and women are interchangeable [and that a] child does not need a mother and a father."

However, as we explained in *SmithKline*, *Windsor* "forbid[s] state action from 'denoting the inferiority'" of same-sex couples. 740 F.3d at 482 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954)).

> It is the identification of such a class by the law for a separate and lesser public status that "make[s] them unequal." *Windsor*, 133 S. Ct. at 2694. DOMA was "practically a brand upon them, affixed by the law, an assertion of their inferiority." *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879). *Windsor* requires that classifications based on sexual orientation that impose inequality on gays and lesbians and send a message of second-class status be justified by some legitimate purpose.

SmithKline, 740 F.3d at 482. *Windsor* makes clear that the defendants' explicit desire to express a preference for opposite-sex couples over same-sex couples is a categorically inadequate justification for discrimination. Expressing such a preference is precisely what they *may not do*.

Defendants' argument is, fundamentally, non-responsive to plaintiffs' claims to *marriage* rights; instead, it is about the suitability of same-sex couples, married or not, as parents, adoptive or otherwise. That it is simply an ill-reasoned excuse for unconstitutional discrimination is evident from the fact that Idaho and Nevada already allow adoption by lesbians and gays. The Idaho Supreme Court has determined that "sexual orientation [is] wholly irrelevant" to a person's fitness or ability to adopt children. *In re Adoption of Doe*, 326 P.3d 347, 353 (Idaho 2014). "In a state where the privilege of becoming a child's adoptive parent does not hinge on a person's sexual orientation, it is impossible to fathom how hypothetical concerns about the same person's parental fitness could possibly relate to civil marriage." *Latta*, 2014 WL 1909999, at *23. By enacting a domestic partnership law, Nevada, too, has already acknowledged that no harm will come of treating same-sex couples the same as opposite-sex couples with regard to parenting. Nev. Rev. Stat. § 122A.200(1)(d) affords same-sex domestic partners parenting rights identical to those of married couples, including those related to adoption, custody and visitation, and child support. *See also St. Mary v. Damon*, 309 P.3d 1027, 1033 (Nev. 2013) (en banc) ("Both the Legislature and this court have acknowledged that, generally, a child's best interest is served by maintaining two actively involved parents. To that end, the Legislature has recognized that the children of

same-sex domestic partners bear no lesser rights to the enjoyment and support of two parents than children born to married heterosexual parents.").

To allow same-sex couples to adopt children and then to label their families as second-class because the adoptive parents are of the same sex is cruel as well as unconstitutional. Classifying some families, and especially their children, as of lesser value should be repugnant to all those in this nation who profess to believe in "family values." In any event, Idaho and Nevada's asserted preference for opposite-sex parents does not, under heightened scrutiny, come close to justifying unequal treatment on the basis of sexual orientation.

Thus, we need not address the constitutional restraints the Supreme Court has long imposed on sex-role stereotyping, which may provide another potentially persuasive answer to defendants' theory. *See Virginia*, 518 U.S. at 533 (explaining that justifications which "rely on overbroad generalizations about the different talents, capacities, or preferences of males and females" are inadequate to survive heightened scrutiny); *see also Caban v. Mohammed*, 441 U.S. 380, 389 (1979) (rejecting the claim that "any universal difference between maternal and paternal relations at every phase of a child's development" justified sex-based distinctions in adoption laws). We note, in addition, that defendants have offered no probative evidence in support of their "complementarity" argument.

IV.

Both the Idaho defendants and the Coalition advance a few additional justifications, though all are unpersuasive.[16] First, they argue that the population of each state is entitled to exercise its democratic will in regulating marriage as it sees fit. Each state "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). True enough. But a primary purpose of the Constitution is to protect minorities from oppression by majorities. As *Windsor* itself made clear, "state laws defining and regulating marriage, of course, must respect the constitutional rights of persons." 133 S. Ct. at 2691 (citing *Loving v. Virginia*, 388 U.S. 1 (1967)). Thus, considerations of federalism cannot carry the day for defendants. They must instead rely on the substantive arguments that we find lacking herein.

Second, defendants argue that allowing same-sex couples to marry would threaten the religious liberty of institutions and people in Idaho and Nevada.

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[16]None of the arguments advanced by other states in defense of their bans is any more persuasive. In particular, we agree with the Seventh Circuit that states may not "go slow" in extending to same-sex couples the right to marry; "it is sufficiently implausible that allowing same-sex marriage would cause palpable harm to family, society, or civilization to require the state to tender evidence justifying [if not proving] its fears; it has provided none." *Baskin*, 2014 WL 4359059, at *16–17.

Whether a Catholic hospital must provide the same health care benefits to its employees' same-sex spouses as it does their opposite-sex spouses, and whether a baker is civilly liable for refusing to make a cake for a same-sex wedding, turn on state public accommodations law, federal anti-discrimination law, and the protections of the First Amendment.[17] These questions are not before us. We merely note that avoiding the enforcement of anti-discrimination laws that "serv[e] compelling state interests of the highest order" cannot justify perpetuation of an otherwise unconstitutionally discriminatory marriage regime. *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (citation omitted).

Third, the Coalition argues that Nevada's ban is justified by the state's interest in protecting "the traditional institution of marriage."[18] Modern marriage

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[17] *See, e.g., Elane Photography, LLC v. Willock*, 284 P.3d 428 (N.M. 2012) (holding that a wedding photographer was liable for discrimination against a same-sex couple under state public accommodations law, and that this law did not violate the First Amendment), *cert. denied*, 134 S. Ct. 1787 (2014). Nevada law currently prohibits discrimination based on sexual orientation in public accommodations, while Idaho law does not. Nev. Rev. Stat. §§ 651.050(3), 651.070; Dan Popkey, *Idaho doesn't protect gays from discrimination, but Otter says that does not make the state anti-gay*, Idaho Statesman (Feb. 23, 2014).

We note also that an increasing number of religious denominations do sanctify same-sex marriages. Amicus Brief of Bishops of the Episcopal Church in Idaho et al. 8–9. Some religious organizations prohibit or discourage interfaith and interracial marriage, but it would obviously not be constitutional for a state to do so. Amicus Brief of the Anti-Defamation League et al. 23–25.

[18] This argument was not advanced to this Court by the Idaho defendants.

regimes, however, have evolved considerably; within the past century, married women had no right to own property, enter into contracts, retain wages, make decisions about children, or pursue rape allegations against their husbands. *See generally* Claudia Zaher, *When A Woman's Marital Status Determined Her Legal Status: A Reserach Guide on the Common Law Doctrine of Coverture*, 94 Law Libr. J. 459, 460–61 (2002) *("*"Under coverture, a wife simply had no legal existence. She became . . . 'civilly dead.'"). Women lost their citizenship when they married foreign men. *See* Kristin Collins, *When Father's Rights Are Mothers' Duties*, 109 Yale L.J. 1669, 1686–89 (2000). (In fact, women, married or not, were not allowed to serve on juries or even to vote. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 131–35 (1994).). Before no-fault divorce laws were enacted, separated spouses had to fabricate adulterous affairs in order to end their marriages. Lawrence M. Friedman, *A History of American Law* 577–78 (2005). As plaintiffs note, Nevada has been a veritable pioneer in changing these practices, enacting (and benefitting economically from) laws that made it among the easiest places in the country to get married and un-married. Both Idaho and Nevada's marriage regimes, as they exist today, bear little resemblance to those in place a century ago. As a result, defendants cannot credibly argue that their laws protect a

"traditional institution"; at most, they preserve the status quo with respect to one aspect of marriage—exclusion of same-sex couples.

Certainly, the exclusion of same-sex couples from marriage is longstanding. However, "it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been." *Goodridge v. Dep't of Pub. Health*, 798 N.E. 2d 941, 961 n.23 (Mass. 2003). The anti-miscegenation laws struck down in *Loving* were longstanding. Here as there, however, "neither history nor tradition [can] save [the laws] from constitutional attack." *Lawrence*, 539 U.S. at 577–78 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

V.

Idaho and Nevada's marriage laws, by preventing same-sex couples from marrying and refusing to recognize same-sex marriages celebrated elsewhere,[19] impose profound legal, financial, social and psychic harms on numerous citizens of those states. These harms are not inflicted on opposite-sex couples, who may, if

[19]Because we hold that Idaho and Nevada may not discriminate against same-sex couples in administering their own marriage laws, it follows that they may not discriminate with respect to marriages entered into elsewhere. Neither state advances, nor can we imagine, any different—much less more persuasive—justification for refusing to recognize same-sex marriages performed in other states or countries.

they wish, enjoy the rights and assume the responsibilities of marriage. Laws that treat people differently based on sexual orientation are unconstitutional unless a "legitimate purpose . . . overcome[s]" the injury inflicted by the law on lesbians and gays and their families. *SmithKline*, 740 F.3d at 481–82.

Defendants' essential contention is that bans on same-sex marriage promote the welfare of children, by encouraging good parenting in stable opposite-sex families. Heightened scrutiny, however, demands more than speculation and conclusory assertions, especially when the assertions are of such little merit. Defendants have presented no evidence of any such effect. Indeed, they cannot even explain the manner in which, as they predict, children of opposite-sex couples will be harmed. Their other contentions are equally without merit. Because defendants have failed to demonstrate that these laws further any legitimate purpose, they unjustifiably discriminate on the basis of sexual orientation, and are in violation of the Equal Protection Clause.

The official message of support that Governor Otter and the Coalition wish to send in favor of opposite-sex marriage is equally unconstitutional, in that it necessarily serves to convey a message of disfavor towards same-sex couples and their families. This is a message that Idaho and Nevada simply may not send.

The lessons of our constitutional history are clear: inclusion strengthens, rather than weakens, our most important institutions. When we integrated our schools, education improved. *See Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 492–95 (1954). When we opened our juries to women, our democracy became more vital. *See Taylor v. Louisiana*, 419 U.S. 522, 535–37 (1975). When we allowed lesbian and gay soldiers to serve openly in uniform, it enhanced unit cohesion. *See Witt v. Dep't of Air Force*, 527 F.3d 806, 821 n.11 (9th Cir. 2008). When same-sex couples are married, just as when opposite-sex couples are married, they serve as models of loving commitment to all.

The judgment of the district court in *Latta v. Otter* is AFFIRMED. The judgment of the district court in *Sevcik v. Sandoval* is REVERSED, and the case is REMANDED to the district court for the prompt issuance of an injunction permanently enjoining the state, its political subdivisions, and its officers, employees, and agents, from enforcing any constitutional provision, statute, regulation or policy preventing otherwise qualified same-sex couples from marrying, or denying recognition to marriages celebrated in other jurisdictions which, if the spouses were not of the same sex, would be valid under the laws of the state.

AFFIRMED REVERSED and REMANDED.

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