NO. A14-_____

In the

Supreme Court of the United States

C.L. "Butch" Otter, in his official capacity as Governor of Idaho, Christopher Rich in his official capacity of Recorder of Ada County, Idaho, and the State of Idaho,
Petitioners,

v.

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

Emergency Application of Governor C.L. "Butch" Otter to Stay Mandate Pending Disposition of Applications for Stay Pending Rehearing And Certiorari

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

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To the Honorable Anthony M. Kennedy, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Applicant respectfully applies for a temporary, immediate stay of the Ninth Circuit's mandate pending disposition of an emergency stay application now pending before the Ninth Circuit and, if necessary, a full application for stay pending certiorari to be filed in this Court. The application now pending before the Ninth Circuit seeks to stay that court's mandate affirming a district court order that invalidated and enjoined enforcement of Idaho's marriage laws to the extent they limit marriage to man-woman unions. Absent an emergency stay from this Court, state and county officials subject to the supervision of the applicant will be required by the Ninth Circuit's mandate to begin issuing marriage licenses to same-sex couples—in violation of Idaho law—this morning at 8:00 a.m. Mountain time, or 10:00 a.m. Eastern time.

INTRODUCTION

Although this case bears some similarity to the marriage cases in which this Court denied review earlier this week, it is fundamentally different in two respects. First, this case merits this Court's review independent of the marriage context in which it arises. That is because the Ninth Circuit's decision exacerbates a deep and mature circuit split on the general question whether discrimination on the basis of sexual orientation triggers some form of "heightened scrutiny." Here, the Ninth Circuit applied its recent (and unreviewed) holding 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), that such discrimination requires heightened scrutiny, and it was on that basis that the court invalidated Idaho's marriage laws. While the Second Circuit has agreed that heightened scrutiny applies to sexual-orientation discrimination, the Ninth Circuit's holding on that general point squarely conflicts with decisions of the First, Fourth, Fifth, Sixth, Eighth, Tenth, Eleventh, District of Columbia, and Federal Circuits.

Second, this case will not require the Court to resolve conclusively the broad, fundamental question whether traditional man-woman marriage laws are within the States' authority under the Fourteenth Amendment. To be sure, Idaho and its elected officials would welcome a ruling rejecting the Ninth Circuit's analysis as well as all of the Plaintiffs' alternative grounds for affirmance. But in fact, all this case will require the Court to do is to resolve one or two subsidiary questions—the heightened scrutiny point just discussed and the question whether man-woman marriage laws discriminate based on sexual orientation at all. The Court will then have the option of remanding to the Ninth Circuit for resolution of the Plaintiffs' remaining challenges to Idaho's marriage laws, challenges that do not depend on their sexual-orientation discrimination theory or on the Ninth Circuit's holding on that point.

Still, though, like previous decisions invalidating state marriage laws, and like Section 3 of the Defense of Marriage Act (DOMA) that was invalidated by this Court in *United States* v. *Windsor,* 570 U.S. ___, 133 S.Ct. 2675 (2013), the Ninth Circuit's decision represents an enormous "federal intrusion on state power" to define marriage. *Id.* at 2692. Indeed, this case involves not just a refusal by the federal

government to *accommodate* a State's definition of marriage, as in *Windsor,* but an outright *abrogation* of such a definition—by a federal court wielding a federal injunction and acting under the banner of the federal Constitution. If *Windsor* and its companion case, *Hollingsworth* v. *Perry*, 570 U.S. ___, 133 S.Ct. 2652 (2013), warranted this Court's review, surely there is a likelihood that this case will too. And if DOMA's non-recognition was an impermissible "federal intrusion on state power" to define marriage, surely there is at least a good prospect that a majority of this Court will ultimately hold the Ninth Circuit's equally intrusive heightened scrutiny analysis invalid.

Remarkably, however, unlike the Ninth Circuit itself in *Hollingsworth*, 133 S. Ct. at 2652, a case that presented similar issues, the Ninth Circuit here has failed to maintain its previously issued stay pending a definitive resolution of this most basic of federalism questions. Moreover, in a stark departure from the usual practice under Federal Rule of Appellate Procedure 41.b, which generally withholds issuance of the mandate until seven days after the time for a petition for rehearing expires, the Ninth Circuit accelerated the issuance of its mandate in this case—in an apparent effort to prevent this Court from having the last word on whether same-sex marriages would occur in Idaho.

Unless stayed, the district court's injunction and the Ninth Circuit's mandate will compel Idaho officials to issue marriage licenses to same-sex couples beginning at 8:00 a.m. MDT this morning. Each same-sex marriage performed will be an affront to the interests of the State and its citizens in being able to define marriage through ordinary democratic channels. See, *e.g.*, *Schuette v. Coalition to Defend Affirmative*

Action, 134 S.Ct. 1623, 1636 (2014) ("In the federal system States 'respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times.'") (quoting *Bond v. United States*, 564 U.S. ___, 131 S. Ct. 2355, 2364 (2011)). And allowing such marriages now will undercut this Court's unique role as final arbiter of the profoundly important constitutional questions surrounding the constitutionality of State marriage laws. A stay is urgently needed to preserve these prerogatives pending disposition of the stay application currently pending before the Ninth Circuit and, if necessary, a full application for stay pending certiorari that will be filed with this Court in the event the application to the Ninth Circuit is denied. A stay is also necessary to minimize the enormous disruption to the State and its citizens of potentially having to "unwind" hundreds of same-sex marriages should this Court ultimately conclude, as the Governor strongly maintains, that the Ninth Circuit's decision and mandate exceed its constitutional authority.

BACKGROUND

Plaintiffs-Respondents' ("Plaintiffs") attack a provision of the Idaho Constitution and two associated statutes that limit marriages in Idaho to man-woman unions and refuse to recognize same-sex marriages contracted outside of Idaho. See Opinion at 4 note 2. Article III, § 28 of the Idaho Constitution, provides that "marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state." Idaho Const. art. III § 28. The Idaho Code

also defines marriage as "a personal relation arising out of a civil contract between a man and a woman." Idaho Code § 32-301. Idaho law likewise proclaims that though marriages contracted outside the State are generally valid, those marriages that "violate the public policy of the state . . . includ[ing] . . . same-sex marriages" are not valid. *Id.* § 32-309. Respondents argue that these provisions 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 basis of their sexual orientation and their sex." Opinion at 5. Respondents sought a permanent injunction enjoining enforcement by defendants of article III, section 28 of Idaho's Constitution, Idaho Code sections 32-301 and 32-309, and any other sources of state law to exclude the Unmarried Plaintiffs from Marriage or to refuse recognition of the marriages of Married Plaintiffs. *Id.* at 5.

The circuit panel heard argument on September 8, 2014, and on October 7, 2014, affirmed the district court's decision declaring Idaho's marriage laws unconstitutional. Opinion at 34. Initially, the circuit panel did not issue a mandate contemporaneously with the opinion, leaving the Applicants with the impression that they would have the time usually afforded under Federal Rules of Appellate Procedure 41 to seek additional appellate review. But following the close of business, the circuit panel at 6:00 pm MDT issued its mandate requiring issuance of same-sex marriage licenses. Absent a stay, the district court's injunction will require the issuance of marriage licenses this morning, October 8, 2014.

The circuit panel's 34-page decision in favor of Respondents ruled that Idaho's marriage laws violate the Equal Protection Clause of the Fourteenth Amendment "because they deny lesbians and gays who wish to marry persons of the same sex a right to afford individuals who wish to marry persons of the opposite sex, and do not satisfy the heightened scrutiny standard we adopted in *SmithKline*." Opinion at 6. This conclusion turned on one central holding: The court found that Idaho's Marriage Laws discriminate on the basis of sexual orientation, and according to the Ninth Circuit's decision in *SmithKline*, laws that classify on this basis are entitled to heightened constitutional scrutiny. Opinion at 13-14. Armed with a determination that Idaho's laws are subject to heightened scrutiny, the panel concluded that the state's asserted interests in man-woman marriage were unsatisfactory. Opinion at 28 ("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."). Responding to the issuance of the mandate, Governor Otter has filed an emergency stay request with the Ninth Circuit. That motion remains pending. With only hours before the circuit court's mandate becomes effective, this application followed.

JURISDICTION

Applicants seek a stay pending rehearing and certiorari of the Ninth Circuit's decision, dated October 7, 2014, on federal claims that were properly preserved in the courts below. The final judgment of the Ninth Circuit on appeal is subject to review

by this Court under 28 U.S.C. § 1254 (1), and this Court therefore has jurisdiction to entertain and grant a request for a stay pending appeal under 28 U.S.C. § 2101 (f). See, *e.g.*, *San Diegans for the Mt. Soledad Nat'l War Memorial* v. *Paulson*, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers). In addition, this Court has authority to issue stays and injunctions in aid of its jurisdiction under 28 U.S.C. § 1651 (a).

REASONS FOR GRANTING THE EMERGENCY STAY

The standards for granting a stay pending review are "well settled." *Deauer* v. *United States*, 483 U.S. 1301, 1302 (1987) (Rehnquist, C.J., in chambers). Preliminarily, this Court's rules require a showing that "the relief is not available from any other court or judge," Sup. Ct. R. 23.3—a conclusion established here by the fact that the Ninth Circuit issued its mandate immediately without even giving the State and its elected officials a single day to seek a stay before it went into effect. A stay is then appropriate if there is at least "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth* v. *Perry*, 558 U.S. 183, 189 (2010) (per curiam). Moreover, "[i]n close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id.* (citing *Lucas* v. *Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers); *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers)); *accord, e.g.*, *Conkright* v. *Frommert*,

556 U.S. 1401, 1401 (2009) (Ginsburg, J., in chambers); *Barnes* v. *E-Systems, Inc. Group Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1302, 1305 (1991) (Scalia, J., in chambers). In short, on an application for stay pending appeal, a Circuit Justice must "try to predict whether four Justices would vote to grant certiorari should the Court of Appeals affirm the District Court order without modification; try to predict whether the Court would then set the order aside; and balance the so-called 'stay equities.'" *San Diegans*, 548 U.S. at 1302 (granting stay pending appeal and quoting *INS* v. *Legalization Assistance Project of Los Angeles County Fed'n of Labor*, 510 U.S. 1301, 1304 (1993) (O'Connor, J., in chambers)). Each of these considerations points decisively toward issuing a stay, as does the fact that this Court has consistently issued stays as necessary to ensure that it has the final word in several other cases in which State marriage laws have been invalidated by lower courts.[1]

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

Multiple circumstances suggest a very strong likelihood that four Justices will consider the issue presented here sufficiently meritorious to warrant this Court's review.

First, the Court has already granted certiorari in another case that presented a similar but more general question—*i.e.*, whether the States may maintain the traditional definition of marriage consistent with the Fourteenth Amendment. That case, of course, was *Hollingsworth* v. *Perry*, 133 S. Ct. at 2652, which presented that

[1] See *Herbert* v. *Kitchen*, 13A687, 571 U.S. (Jan. 6, 2014); *Herbert v. Evans,* 14A65, 573 U.S. (July 18, 2014); *McQuigg v. Bostic*, 14A196, 573 U.S. (Aug. 20, 2014).

general question in the context of California's Proposition 8, which, like Idaho law, involved an effort by the people of California to preserve the traditional definition of marriage through a state constitutional amendment. Although the Court ultimately held that jurisdictional problems prevented resolution of the issue in that case, this case presents no such jurisdictional defect. Unlike the situation in *Hollingsworth*, where the Governor and Attorney General declined to defend Proposition 8, Idaho's Governor is vigorously defending the State laws challenged here.

Second, the likelihood of review is further enhanced by the fact that the Ninth Circuit's decision here deepens a 9-3 split among the circuits on the equal-protection standard for claims of sexual orientation discrimination. Central to its decision was the panel's holding that Idaho's marriage laws violate the Equal Protection Clause because those laws "do not satisfy the heightened scrutiny standard [the Ninth Circuit] adopted in *SmithKline*." *Latta* v. *Otter*, No. 14-35420, slip op. at 6 (9th Cir. Oct. 6, 2014) (footnote omitted). *SmithKline* established that the peremptory challenge of a prospective juror because he was openly gay violated *Batson* v. *Kentucky*, 476 U.S. 79 (1986), but the panel here cited *SmithKline* for a broader principle: "'*Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation.'" Slip op. at 14 (quoting *SmithKline*, 740 F.3d at 481). Such scrutiny, the panel explained, 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.* at 14 (quoting *SmithKline*, 740 F.3d at 483). Applying this standard as "the law

of our circuit regarding the applicable level of scrutiny," the panel found that "Idaho and Nevada do discriminate on the basis of sexual orientation" and concluded that because Idaho "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." *Id.* at 15, 13, 33.

By nullifying Idaho's marriage laws as unconstitutional sexual orientation discrimination, the Ninth Circuit panel decision stands in direct conflict with the judgments of nine other courts of appeals that apply rational basis review to such classifications.[2] To be sure, the Second Circuit has held that claims of sexual orientation discrimination are entitled to heightened scrutiny, see *Windsor* v. *United States,* 699 F.3d 169, 180-85 (2d Cir. 2012),[3] and the Seventh Circuit has suggested that sexual orientation *might* form the basis of a suspect class. See *Baskin* v. *Bogan*, __ F.3d __, 2014 WL 4359059 (7th Cir. Sept. 4, 2014). The panel decision thus puts the Ninth Circuit on the losing side of a 9-3 circuit split, a factor that warrants certiorari by itself.

Third, turning to the specific context of same-sex marriage, the panel decision here is utterly irreconcilable with *Bruning*, where the Eighth Circuit held that heightened scrutiny *did not* govern an equal protection challenge to Nebraska's

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[2] *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).

[3] On review, however, this Court declined to address whether sexual orientation discrimination is subject to heightened scrutiny. See *United States* v. *Windsor*, 133 S. Ct. 2675 (2013).

prohibition on same-sex marriage. See 455 F.3d at 866. Similarly, the panel decision contradicts *Baker* v. *Nelson*, 191 N.W.2d 185, 187 (Minn. 1971), where the Minnesota Supreme Court detected "no irrational or invidious discrimination" in Minnesota's laws reserving marriage for man-woman unions and this Court perceived no "substantial federal question." See 409 U.S. 810 (1972).

These circumstances suggest a very strong likelihood that four Justices will consider the question presented sufficiently meritorious to justify this Court's plenary review.

II. There is a strong likelihood that the district court's decision will be overturned and the injunction held invalid.

If the en banc Ninth Circuit does not overturn the panel decision and this Court ultimately grants review, there is likewise a strong prospect that a majority will vote to reverse the panel decision—especially its holdings on sexual-orientation discrimination.

1. The various opinions in *Windsor* itself clearly indicate such a prospect. As previously noted, the majority's decision to invalidate Section 3 of DOMA—which implemented a federal policy of refusing to recognize state laws defining marriage to include same-sex unions—was based in significant part on federalism concerns. For example, the majority emphasized that, "[b]y history and tradition the definition and regulation of marriage … has been treated as being within the authority and realm of the separate States." 133 S.Ct. at 2689-90. Citing this Court's earlier statement in *Williams* v. *North Carolina*, 317 U.S. 287, 298 (1942), that "[e]ach state as a sovereign has a rightful and legitimate concern in the marital status of persons

domiciled within its borders," the *Windsor* majority noted that "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.'" 133 S. Ct. at 2691 (quoting *Williams*, 317 U.S. at 298) (alteration in original). The *Windsor* majority further observed that "[t]he significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for 'when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.'" *Id.* (quoting *Ohio ex rel. Popovici* v. *Agler*, 280 U.S. 379, 383-84 (1930)). And the majority concluded that DOMA's refusal to respect the State's authority to define marriage as it sees fit represented a significant—and in the majority's view, unwarranted—"federal intrusion on state power." *Id.* at 2692.

Here, the Ninth Circuit not only refused to accommodate Idaho's definition for purposes of federal law, it altogether *abrogated* the decisions of the State and its citizens acting through every available democratic channel to define marriage in the traditional way. The Ninth Circuit's decision is therefore a far greater "federal intrusion on state power" than the intrusion invalidated in *Windsor*.

Moreover, although none of the Justices in the *Windsor* majority expressly tipped their hands on the precise questions presented here, three of the dissenting Justices clearly indicated a belief that the States can constitutionally retain the traditional definition of marriage. See 133 S. Ct. at 2707-08 (Scalia, J., dissenting, joined in relevant part by Thomas, J.); *id.* at 2715-16 (Alito, J., joined in relevant part

by Thomas, J.). And Chief Justice Roberts emphasized that "while '[t]he State's power in defining the marital relation is of central relevance' to the majority's decision to strike down DOMA here, … that power will come into play on the other side of the board in future cases about the constitutionality of state marriage definitions. So too will the concerns for state diversity and sovereignty that weigh against DOMA's constitutionality in this case." *Id.* at 2697 (Roberts, C.J., dissenting) (quoting majority opinion). By themselves, the views expressed by these four Justices—without any contrary expression from the Court's other Members—creates a strong prospect that, if the en banc Ninth Circuit does not do so, this Court will reverse the panel's decision in this case.

2. If this Court ultimately grants review, there is likewise a strong prospect that a majority will vote to reverse the Ninth Circuit's equal protection holdings. Contrary to the panel's ruling, settled equal protection jurisprudence does not invite federal courts to evaluate a state's marriage law by "'examin[ing] its actual purposes and carefully consider[ing] the resulting inequality to ensure that our most fundamental institutions neither send nor reinforce messages of stigma or second-class status.'" *Id.* at 14 (quoting *SmithKline*, 740 F.3d at 483). In establishing a framework that assigns "different levels of scrutiny to different types of classifications," *Clark v. Jeter*, 486 U.S. 456, 461 (1988), the Court has approved three—and only three—levels of scrutiny for equal protection claims. The panel's reliance on *SmithKline* for an indeterminate and virtually standardless form of "heightened" scrutiny thus departs from this Court's precedents.

SmithKline further erred by announcing the first new suspect class in 40 years without a whisper of guidance from this Court. See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 756-57 (2011) ("[T]he last classification accorded heightened scrutiny by the Supreme Court was that based on nonmarital parentage in 1977 …."). What's more, *SmithKline* took this momentous step without applying the criteria the Court has identified for recognizing a class as suspect, such as political powerlessness and immutability. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441-42 (1985). And it did so in the face of this Court's *refusal* to make sexual orientation a suspect class in *Windsor*—despite the urging of both the plaintiffs and the U.S. Government there.

Instead, the heightened scrutiny announced by *SmithKline*, and applied by the panel to Idaho's marriage laws, rests on a misreading of *Windsor*. Although the *SmithKline* panel baldly asserted that it was "bound by controlling, higher authority" when it adopted "*Windsor's* heightened scrutiny" or "*Windsor* scrutiny" for cases of sexual orientation discrimination, 740 F.3d at 483, Judge O'Scannlain was right that "nothing in *Windsor* compels the application of heightened scrutiny to this juror selection challenge." Order, *SmithKline Beecham Corp.* v. *Abbott Laboratories*, No. 11-17357, at 8 (9th Cir. June 24, 2014) (O'Scannlain, J., dissenting from denial of rehearing *en banc*). Still less does *Windsor* require the application of a standardless version of heightened scrutiny to the grave task of determining whether Idaho's time-honored definition of marriage satisfies the Fourteenth Amendment. Whatever else *Windsor* says, it does not hold that sexual orientation is a suspect class or that all classifications affecting it qualify for heightened scrutiny.

Readily seeing the direction that *SmithKline* might head, unless corrected, Judge O'Scannlain foresaw that "the panel has produced an opinion with far-reaching—and mischievous—consequences, for the same-sex marriage debate and for the many other laws that may give rise to distinctions based on sexual orientation, without waiting for appropriate guidance from the Supreme Court." *Id.* at 3. Yesterday's decision, which centrally relies on *SmithKline* to justify the application of heightened scrutiny to Idaho's marriage laws, bears out Judge O'Scannlain's prediction, and amply warrants this Court's review.

3. Even if *SmithKline* had articulated a correct standard of heightened scrutiny, however, it should not apply to Idaho's marriage laws because they do not facially discriminate based on sexual orientation. Article III, § 28 of the Idaho Constitution provides that "[a] marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state." If as the panel said the presence of facial discrimination depends on "'the explicit terms of the discrimination,'" slip op. at 13 (quoting *Int'l Union, United Auto, Aerospace & Agr. Implement Workers of Am., UAW* v. *Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991)), then Idaho law simply does not bear the marks of sexual orientation discrimination. It does not "classify" on the basis of sexual orientation. See, *e.g., Parents Involved* v. *Seattle*, 127 S.Ct. 2738, 2751 (2007) (a law "classifies" with respect to a particular characteristic only if it "distributes benefits or burdens" based directly on that characteristic). To the contrary, it classifies or distinguishes between *male-female* unions and all other pairings—not between *heterosexual* unions and other relationships. Indeed, Idaho law allows a gay man to marry a woman or a lesbian to

marry a man. What determines a person's eligibility to marry someone of a given sex is not her sexual orientation, but her own sex.

It follows that plaintiffs' claim of sexual orientation discrimination should have been dismissed, not relied upon as a basis—and here the only basis—for invalidating Idaho's marriage law. There is thus a fair prospect that the Ninth Circuit's ruling on this point will be reversed as well.

4. Another indication of a good prospect of reversal by this Court is that the Ninth Circuit's decision conflicts with this Court's decision in *Baker* v. *Nelson*, 409 U.S. 810 (1972). There, this Court unanimously dismissed, for want of a substantial federal question, an appeal from the Minnesota Supreme Court squarely presenting the question of whether a State's refusal to recognize same-sex relationships as marriages violates the Due Process or Equal Protection Clauses of the Fourteenth Amendment. *Id.*; see also *Baker* v. *Nelson*, No. 71-1027, Jurisdictional Statement at 3 (Oct. Term 1972); *Baker* v. *Nelson*, 191 N.W.2d 185 (Minn. 1971). This Court's dismissal of the appeal in *Baker* was a decision on the merits that constitutes "controlling precedent unless and until re-examined by *this Court*." *Tully* v. *Griffin, Inc.*, 429 U.S. 68, 74 (1976) (emphasis added).

Yet the panel below refused to follow *Baker*, believing it had been substantially undercut by the majority in *Windsor.* See Opinion at 17. Putting aside the fact that *Baker* wasn't even discussed by the *Windsor* majority, the Ninth Circuit's analysis overlooks that the precise issue presented in *Windsor*—whether the *federal* government can refuse to recognize same-sex marriages performed in States where such marriages are lawful—was very different from the question presented in *Baker*,

i.e., whether a *State* may constitutionally refuse to *authorize* same-sex marriages under State law. Because the issues presented were different, this Court simply had no occasion to address whether *Baker* was controlling or even persuasive authority in *Windsor*; it obviously was not.

In this case, however, *Baker* will be highly relevant because it decided the very issue presented here. To be sure, a dismissal of the sort at issue in *Baker* "is not here 'of the same precedential value as would be an opinion of this Court treating the question on the merits.'" *Tully*, 429 U.S. at 74 (quoting *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974)). But that implies, and practice confirms, that even in this Court such a dismissal remains of *some* "precedential value." Accordingly, even if the logic of *Windsor* (or other decisions of this Court) suggested an opposite outcome—which it does not—there is at least a reasonable prospect that a majority of this Court will elect to follow *Baker*, because of its precedential value if nothing else. And that outcome is even more likely given (a) the *Windsor* majority's emphasis on respect for State authority over marriage, and (b) the district court's pointed (and correct) refusal to find that Idaho's marriage laws (in contrast with DOMA) are rooted in animus toward gays and lesbians.

5. A final reason to believe there is a strong likelihood this Court will ultimately invalidate the district court's injunction is the large and growing body of social science research contradicting the central premise of the panel's equal protection holdings.[4] That research—some of it cited in Justice Alito's *Windsor*

[4] In citing this research we do not mean to suggest that Idaho bears the burden of proving that its views on marriage are correct or sound. To the contrary, a government has no duty to produce evidence

opinion, 133 S. Ct. at 2715 & n.6 (Alito, J., dissenting)—confirms what the State, its citizens, and indeed virtually all of society have until recently believed about the importance of providing unique encouragement and protection for man-woman unions: (a) that children do best across a range of outcomes when they are raised by their father and mother (biological or adoptive), living together in a committed relationship, and (b) that limiting the definition of marriage to man-woman unions, though it cannot guarantee that outcome, substantially increases the *likelihood* that children will be raised in such an arrangement. Indeed, these are the core "legislative facts" on which legislatures and voters throughout the Nation have relied in repeatedly limiting marriage to man-woman unions. And even when contravened by other evidence, they are not subject to second-guessing by the judiciary without a showing that no rational person could believe them. See, *e.g.*, *Vance* v. *Bradley*, 440 U.S. 93, 112 (1979) ("It makes no difference that the [legislative] facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety.") (internal quotation marks omitted)).

Accordingly, there is a good probability that this Court will avoid that result and, in so doing, reject the panel's analysis and reverse its judgment.

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to sustain the rationality of a statutory classification. *Heller* v. *Doe*, 509 U.S. 312, 320-21 (1993). And indeed "a legislative choice … may be based on rational speculation unsupported by evidence or empirical data." *FCC* v. *Beach Commc'ns*, 508 U.S. 307, 315 (1993). The research discussed here briefly sketches what Idaho and its citizens could rationally believe about the benefits of limiting marriage to man-woman unions.

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

The Ninth Circuit's mandate will also impose irreparable harm on Idaho, its elected officials and its citizens. Members of this Court, acting as Circuit Justices, repeatedly have acknowledged that "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *accord Maryland* v. *King*, 567 U.S. ___, 133 S.Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (granting a stay); *Planned Parenthood of Greater Texas Surgical Health Servs.* v. *Abbott*, 571 U.S. ___, 134 S.Ct. 506, 506 (2013) (Scalia, J., concurring in denial of application to vacate stay). That same principle supports a finding of irreparable injury in this case. For the district court's order—now affirmed by the Ninth Circuit—enjoins the State from enforcing not only an ordinary statute, but a constitutional provision approved by the people of Idaho in the core exercise of their sovereignty.

1. That States have a powerful interest in controlling the definition of marriage within their borders is indisputable. Indeed, the *Windsor* majority acknowledged that "'[e]ach state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders,'" *Windsor*, 133 S.Ct. at 2691 (quoting *Williams*, 317 U.S. at 298), and emphasized that "[t]he recognition of civil marriages is *central* to state domestic relations law applicable to its residents and citizens." *Id.* (emphasis added). Every single marriage performed between persons of the same sex as a result of the district court's injunction—and in defiance of Idaho law—is thus an affront to the sovereignty of the State and its people. Each

such marriage flouts the State's sovereign interest in controlling "the marital status of persons domiciled within its borders." *Id.*

Idaho's sovereign interest in determining who is eligible for a marriage license is bolstered by the principle of federalism, which affirms the State's constitutional authority over the entire field of family relations. As the *Windsor* majority explained, "'regulation of domestic relations' is 'an area that has long been regarded as a *virtually exclusive* province of the States.'" 133 S. Ct. at 2691 (quoting *Sosna* v. *Iowa*, 419 U.S. 393, 404 (1975)) (emphasis added). The panels' decision breaches the principle of federalism by exerting federal control over the definition of marriage—a matter within Idaho's "virtually exclusive province." *Id.*

A federal intrusion of this magnitude not only contravenes the State's sovereignty; it also infringes the right of Idahoans to government by consent within our federal system. Constitutional first principles dictate as much:

> The Constitution is based on a theory of original, and continuing, consent of the governed. Their consent depends on the understanding that the Constitution has established the federal structure, which grants the citizen the protection of two governments, the Nation and the State. Each sovereign must respect the proper sphere of the other, for the citizen has rights and duties as to both.

United States v. *Lara*, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring in the judgment); see also *Bond*, 131 S. Ct. at 2364 ("When government acts in excess of its lawful powers" under our system of federalism, the "liberty [of the individual] is at stake."). Here, the panel's extraordinary decision to overturn Idaho's marriage laws—and its refusal thus far even to stay its order pending further review—places

in jeopardy the democratic right of millions of Idahoans to choose for themselves what marriage will mean in their community.

2. Overturning Idaho's marriage laws also has grave practical consequences. Unless a stay is granted immediately, many marriage licenses will be issued to same-sex couples and the State would then confront the thorny problem of whether and how to unwind the marital status of same-sex unions if (as the Governor strongly contends) the panel decision is ultimately reversed. Considerable administrative and financial costs will be incurred to resolve that problem, and the State's burden will only increase as the number of marriage licenses issued to same-sex couples continues to grow. See *Legalization Assistance Project*, 510 U.S. at 1305-06 O'Connor, J., in chambers) (citing the "considerable administrative burden" on the government as a reason to grant the requested stay). Only a stay can prevent that indefensible result.

The State's responsibility for the welfare of *all* its citizens makes it relevant, as well, that Respondents and any other same-sex couples who choose to marry before this Court resolves this dispute on the merits will likely be irreparably harmed without a stay. They and their children will likely suffer dignitary and financial losses from the invalidation of their marriages if appellate review affirms the validity of Idaho's marriage laws. The State thus seeks a stay, in part, to avoid needless injuries to same-sex couples and their families that would follow if the marriage licenses that they obtain as a result of the panel's decision are ultimately found invalid—simply because the Ninth Circuit's mandate was not stayed pending final resolution of the central legal issues in this case.

In short, it cannot be seriously contested that the State will suffer irreparable harm from the district court's nullification of Idaho's *constitutional* definition of marriage absent a stay, given that such harm repeatedly has been found when a federal court enjoins the enforcement of ordinary statutes. See *New Motor Vehicle Bd.*, 434 U.S. at 1345 (relocation of auto dealerships); *Maryland*, 133 S.Ct. at 5 (collection of DNA samples from arrestees); *Planned Parenthood*, 134 S. Ct. at 507 (Breyer, J., dissenting from denial of application to vacate the stay) (restrictions on physicians' eligibility to perform abortions).

IV. The balance of equities favors a stay.

Although the case for a stay is not "close," here too, "the relative harms to the applicant and to the respondent" strongly tilt the balance of equities in favor of a stay. *Hollingsworth*, 558 U.S. at 190.

As previously explained, the State and its citizens will suffer irreparable injury from halting the enforcement of Idaho's definition of marriage. Every marriage performed uniting persons of the same sex is an affront to the sovereignty of the State and to the democratically expressed will of the people of Idaho; the State may incur ever-increasing administrative and financial costs to deal with the marital status of same-sex unions performed before this case is finally resolved; and same-sex couples may be irreparably harmed in their dignitary and financial interests if their marital status is retroactively voided. Any one of these injuries qualifies as irreparable. Together they establish exceptional harm.

Against all this, Respondents can be expected to recite the rule that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976). That rule is inapposite here. While violation of an *established* constitutional right certainly inflicts irreparable harm, that doctrine does not apply where, as here, Respondents seek to establish a novel constitutional right through litigation. Because neither constitutional text nor any decision by a court of last resort yet establishes their sought-after federal right to same-sex marriage, Respondents suffer no constitutional injury from awaiting a final judicial determination of their claims before receiving the marriage licenses they seek. See *Rostker*, 448 U.S. at 1310 (reasoning that the "inconvenience" of compelling Respondents to register for the draft while their constitutional challenge is finally determined does not "outweigh[ ] the gravity of the harm" to the government "should the stay requested be refused").

Nor, moreover, can Respondents change the state of the law by obtaining marriage licenses on the yet-untested authority of the panel's decision. Our constitutional tradition relies on the certainty and regularity of formal constitutional amendment, or judicial decision-making by appellate courts, which would be subverted by deriving a novel constitutional right to same-sex marriage from the number of people who assert it or the number of days its exercise goes unchecked. See George Washington, *Farewell Address* (Sept. 19, 1796), *reprinted in* GEORGE WASHINGTON: A COLLECTION 518 (W.B. Allen ed., 1988) ("The basis of our political systems is the right of the people to make and to alter their Constitutions of

Government. But the Constitution which at any time exists, 'till changed by an explicit and authentic act of the whole People, is sacredly obligatory upon all.'").

Strongly tipping the balance in favor of a stay is the public's overwhelming interest in maintaining the status quo pending a regular and orderly review of Respondents' claims by the en banc Court of Appeals and this Court. See *Hollingsworth*, 558 U.S. at 197 (granting a stay, in part, because its absence "could compromise the orderly, decorous, rational traditions that courts rely upon to ensure the integrity of their own judgments"). A stay will serve the public interest by preserving this Court's ability to address matters of vital national importance *before* irreparable injury is inflicted on the State of Idaho and its citizens.

For all these reasons, the balance of equities favors a stay.

CONCLUSION

The Applicants respectfully request that the Circuit Justice issue a temporary stay of the Ninth Circuit's mandate pending that Court's resolution of the stay application now pending before it and, if necessary, an application for a full stay pending certiorari addressed to this Court. If the Circuit Justice is either disinclined to grant the requested relief or simply wishes to have the input of the full Court on this application, Applicants respectfully request that it be referred to the full Court.

Respectfully submitted,

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