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

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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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