Nos. 14-765, 14-788

In The Supreme Court of the United States

C.L. "BUTCH" OTTER, ET AL., PETITIONERS

v.

SUSAN LATTA, ET AL.

STATE OF IDAHO, PETITIONER

v.

SUSAN LATTA, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS

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QUESTION PRESENTED

Whether a State violates the Fourteenth Amendment to the Constitution of the United States by prohibiting same-sex couples from marrying and by refusing to recognize their lawful, out-of-state marriages.

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The opinion of the court of appeals (Pet. App. 1a-82a)[1] is reported at 771 F.3d 456. A subsequent opinion of the court of appeals dissolving a stay pending appeal (Pet. App. 144a-151a) is reported at 771 F.3d 496. An order and opinion concerning denial of rehearing is available at 2015 WL 128117. The opinion of the district court (Pet. App. 83a-140a) is reported at 19 F. Supp. 3d 1054.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 2014. The petition for a writ of certiorari in No. 14-765 was filed on December 30, 2014. The petition for a writ of certiorari in No. 14-788 was filed on January 2, 2015. A petition for rehearing was denied by the court of appeals on January 9, 2015. 2015 WL 128117. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

A. Legal Framework

From its earliest history as a State, Idaho defined marriage as "a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary," requiring either a solemnization ceremony or, until 1996 (when Idaho abolished

[1] All citations to the Petition Appendix are to that filed in No. 14-765.

common law marriage), "a mutual assumption of marital rights, duties or obligations." Idaho Code § 32-201 (1995). Idaho has long had a strong public policy favoring marriage. *See Huff v. Huff*, 118 P. 1080, 1082 (Idaho 1911); *see also In re Estate of Yee*, 559 P.2d 763, 764 (Idaho 1977).

Until enactment of the provisions at issue in this case, Idaho has always recognized legal marriages from other jurisdictions, even if the marriage could not have been validly entered into in Idaho. *See* Idaho Code § 32-209 (1995) (providing that "marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, are valid in this state"). During the era in which Idaho and many other States barred interracial marriages, *see* Idaho Code § 32-206 (repealed 1959), for example, Idaho recognized interracial marriages from other states. *See* James R. Browning, *Anti-Miscegenation Laws in the United States*, 1 Duke B.J. 26, 27, 35 (1951).

This framework changed dramatically in 1996, when the Idaho legislature took action to exclude same-sex couples from marriage. The legislature amended Idaho Code § 32-201 to expressly limit marriage to opposite-sex couples. *See* 1995 Idaho Sess. Laws ch. 104, § 3 (effective Jan. 1, 1996). The legislature also amended Idaho Code § 32-209 to create the first express, categorical exception to Idaho's longstanding rule recognizing lawful marriages from other jurisdictions. *See* 1996 Idaho Sess. Laws ch. 331, § 1. The amendment carved out an exception for

marriages that "violate the public policy of this state," which are defined to include "same-sex marriages, and marriages entered into under the laws of another state or country with the intent to evade the prohibitions of the marriage laws of this state." Idaho Code § 32-209.

In addition to these statutory changes, the Idaho legislature later passed House Joint Resolution 2, which presented voters with a proposed constitutional amendment to bar same-sex couples from marriage. *See* H. Journal, 58th Leg., 2d Sess. 30-31 (Idaho 2006). The stated purpose of the amendment was to "protect marriage" and to block any attempt to confer legal status or "the legal benefits of marriage to civil unions, domestic partnerships, or any other relationship that attempts to approximate marriage." H.R.J. Res. 2, 58th Leg., 2d Sess. (Idaho 2006). Voters approved the resolution, and the Idaho Constitution was thus amended to provide that "[a] marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state." Idaho Const. art. III, § 28.

B. Factual Background

This case is about two committed couples who wished to be married in their home state of Idaho and two married couples whom Idaho refused to recognize as married. These individuals include a public school teacher of the deaf, a small business owner, and an Iraq War veteran, among others. C.A. SER 13, 65-66, 80-81. They have formed families, contributed

to their professions and communities, and chosen Idaho as their home. Yet, because they are of the same sex, and for no other reason, Idaho law barred them from marrying or from having their out-of-state marriages recognized.

1. Respondents Susan Latta and Traci Ehlers began a relationship in 2003 and married in California in 2008. C.A. SER 3-4, 14-15. Idaho refused to recognize their marriage, and that refusal demeaned and harmed them in myriad ways. For example, they were forced to file separate state income tax returns under the fiction that they were single, while filing their federal income taxes as married. C.A. SER 5, 16. Unlike other married couples in Idaho, the property they acquired together after their marriage was not community property. C.A. SER 5, 16. And, as they grew older, Traci and Sue became increasingly concerned about the ramifications of Idaho's refusal to recognize their marriage on issues such as taxes, inheritance, social security benefits, hospital visitation rights, and medical decision-making. C.A. SER 6, 17.

2. Respondents Lori Watsen and Sharene Watsen were married in October 2011 in New York City. C.A. SER 19, 23, 37, 39. While Sharene was pregnant with their son, who was born in 2013, the couple merged their last names to create a new family name that the entire family would share. SER 24-25, 40-41.

Yet because Idaho law did not recognize their marriage, the Watsens were unable to have both of their names listed as parents on their son's birth certificate. C.A. SER 26, 40. As a result, they had to go through the time-consuming, stressful, and expensive process of adoption in order for Lori to establish a legally protected parental relationship with her son. C.A. SER 26-27, 41-42. A state magistrate judge summarily dismissed their adoption petition because the couple was not considered to be married under Idaho law. C.A. SER 26, 41. It was only after the Idaho Supreme Court held that sexual orientation is not a relevant consideration for adoption, *see In re Adoption of Doe*, 326 P.3d 347 (Idaho 2014), that the Watsens were able to have a re-filed petition approved. Even after that step, which established that Lori and Sharene are both legal parents of their son, he was denied the protection and security of having his parents recognized as married. C.A. SER 27, 42-43.

3. Respondents Andrea Altmayer and Shelia Robertson have been in a committed, exclusive relationship for more than 16 years and are raising their son, who was born in 2009. C.A. SER 61, 67-68. Had Idaho law permitted it, the couple would have married before Andrea gave birth, and Shelia would have been presumed as one of his parents. C.A. SER 62, 68. Instead, Shelia was not recognized as a legal parent, which had sweeping detrimental ramifications in legal, educational, and medical settings. C.A. SER 62, 68.

Further, because they lacked the right to marry, neither their son nor Andrea could obtain health insurance coverage through Shelia's employer. C.A. SER 62, 70. And both were "deeply concerned their son [would] grow up believing there is something wrong with his family because his parents cannot marry." Pet. App. 93a; C.A. SER 62, 68.

On November 6, 2013, Shelia and Andrea went to the Ada County Recorder's Office to apply for a marriage license but were turned away. C.A. SER 63, 70.

4. Respondents Amber Beierle and Rachael Robertson[2] have been in a committed, exclusive relationship since early 2011. C.A. SER 75, 82. They want to spend the rest of their lives together, and wished to marry in Idaho. C.A. SER 76, 83. Rachael is a combat veteran who received the Army Combat Medal for her service in Iraq and was honorably discharged from the military. C.A. SER 81. Because Amber and Rachael were not married, however, they could not secure a joint loan from the Veterans Administration to finance the house they bought together. C.A. SER 77, 83. They wanted to be considered as one another's spouse for medical visitation and decision-making purposes, to file joint

[2] Rachael Robertson legally changed her name to Rachael Beierle, to reflect the permanence of their commitment to one another with a shared surname. To avoid confusion, it remains as Robertson in the briefing.

tax returns, and to have the property they have acquired together treated as community property. C.A. SER 77, 84. Rachael also wanted Amber to receive spousal veteran benefits if Rachael predeceases her. C.A. SER 84.

On November 6, 2013, Rachael and Amber went to the Ada County Recorder's Office in Boise to apply for a marriage license, but they were turned away. C.A. SER 77, 84.

C. Proceedings Below

1. Proceedings in the district court

Respondents filed suit under 42 U.S.C. § 1983 in the United States District Court for the District of Idaho against Ada County Recorder Christopher Rich and Idaho Governor C.L. "Butch" Otter. Respondents alleged that Idaho's statutory and constitutional marriage ban and anti-recognition laws violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Pet. App. 95a. The State of Idaho was granted leave to intervene as a defendant. *Ibid.* The district court granted respondents' motion for summary judgment and denied petitioners' motion to dismiss and motion for summary judgment. *Id.* at 140a.

The district court permanently enjoined the enforcement of all Idaho laws and regulations "to the extent they do not recognize same-sex marriages validly contracted outside Idaho or prohibit otherwise qualified same-sex couples from marrying in Idaho."

Ibid. The court of appeals stayed the district court's judgment pending appeal. C.A. Dkt. 11.

2. Proceedings in the court of appeals

The court of appeals unanimously affirmed. *See* Pet. App. 1a-82a. The court held that the Idaho laws at issue violate the Equal Protection Clause of the Fourteenth Amendment because they deny lesbians and gay men "who wish to marry persons of the same sex a right they afford to individuals who wish to marry persons of the opposite sex" and do not survive heightened scrutiny. *Id.* at 5a.

The court of appeals rejected petitioners' argument that this Court's summary dismissal "for want of a substantial federal question" in *Baker v. Nelson*, 409 U.S. 810, 810 (1972), dictated a result in their favor. Pet. App. 8a-9a. The court of appeals explained that "[s]uch summary dismissals 'prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions,'" *id.* at 8a (quoting *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam)), but only "until 'doctrinal developments indicate otherwise,'" *ibid.* (quoting *Hicks v. Miranda*, 422 U.S. 332, 343-344 (1975)).

The court of appeals explained that subsequent decisions of this Court "make clear that the claims before us present substantial federal questions." *Id.* at 8a-9a (citing *United States v. Windsor*, 133 S. Ct. 2675, 2694-2696 (2013); *Lawrence v. Texas*, 539 U.S.

558, 578-579 (2003); *Romer v. Evans*, 517 U.S. 620, 631-634 (1996)).

Based on circuit precedent, the court of appeals applied heightened scrutiny because the Idaho laws at issue discriminate on the basis of sexual orientation. *Id.* at 11a-12a (citing *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 474 (9th Cir. 2014)). The court of appeals rejected petitioners' argument that heightened-scrutiny review was inappropriate on the asserted ground that the Idaho laws discriminate on the basis of procreative capacity rather than sexual orientation. *Id.* at 11a. The court explained that the laws at issue distinguish "on their face between opposite-sex couples, who are permitted to marry and whose out-of-state marriages are recognized, and same-sex couples, who are not permitted to marry and whose marriages are not recognized." *Ibid.*

The court of appeals likewise rejected petitioners' proffered justification for Idaho's discrimination, namely, that the laws in question "promote child welfare by encouraging optimal parenting." *Id.* at 13a. The court was unpersuaded by petitioners' argument that permitting and recognizing only different-sex marriages ensures that as many children as possible are reared by their married biological mothers and fathers. *Ibid.* The court observed that Idaho gives "marriage licenses to many opposite-sex couples who cannot or will not reproduce * * * but not to same-sex couples who already have children or are in the process of having or adopting them." *Id.* at 20a.

In denying marriage "benefits to people who already have children," Idaho "materially harm[s] and demean[s] same-sex couples and their children" by "[d]enying children resources and stigmatizing their families." *Id.* at 21a-22a.

The court of appeals also rejected petitioners' argument that the State constitutionally may use discriminatory laws to send its citizens a "message" that the ideal form of parenting is having children reared by parents of different sexes. *Id.* at 22a. The court reasoned that "*Windsor* makes clear that the defendants' explicit desire to express a preference for opposite-sex couples over same-sex couples is a categorically inadequate justification for discrimination." *Id.* at 23a.

The court of appeals noted that the fact that Idaho allows adoption by same-sex couples makes clear that petitioners' purported justification "is simply an ill-reasoned excuse for unconstitutional discrimination." *Ibid.* Indeed, the "Idaho Supreme Court has determined that 'sexual orientation [is] wholly irrelevant' to a person's fitness or ability to adopt children." *Ibid.* (alteration in original) (quoting *In re Adoption of Doe*, 326 P.3d at 353). Idaho laws "allow same-sex couples to adopt children" but then unconstitutionally "label their families as second-class because the adoptive parents are of the same sex." *Id.* at 24a.

Finally, the court of appeals rejected two additional arguments advanced by petitioners. First,

the court found unconvincing petitioners' assertion that each State has the power, through the democratic process, to regulate marriage as it sees fit. "As *Windsor* itself made clear, 'state laws defining and regulating marriage, of course, must respect the constitutional rights of persons.'" *Id.* at 25a (quoting *Windsor*, 133 S. Ct. at 2691). Second, the court rejected petitioners' argument that allowing marriage by same-sex couples would threaten religious liberties. The court explained that whether religious institutions and small businesses must recognize the marriages of same-sex couples were not questions before the court. *Id.* at 26a.

3. Subsequent developments

On October 10, 2014, this Court denied petitioners' application for a stay of the court of appeals' mandate. *See Otter v. Latta*, 135 S. Ct. 345 (2014). On October 13, 2014, the court of appeals granted respondents' motion to dissolve its stay of the district court's judgment pending appeal, effective October 15, 2014. Pet. App. 142a-143a.

On October 15, 2014, respondents Andrea Altmayer and Sheila Robertson were married in Ada County, Idaho. That same day, Amber Beierle and Rachael Robertson were also married in Ada County.

On October 21, 2014, Governor Otter filed a petition for rehearing en banc in the court of appeals. On December 30, 2014, while his rehearing petition was still pending, Governor Otter filed a petition for

a writ of certiorari in this Court. On January 2, 2015, Idaho filed its certiorari petition.

The court of appeals denied the Governor's rehearing petition on January 9, 2015. *See Latta v. Otter*, Nos. 14-35420, 14-35421, 2015 WL 128117 (9th Cir. Jan. 9, 2015).

REASONS FOR DENYING THE PETITION

The Court has already granted four petitions for writs of certiorari to decide the questions presented in this case. There is no cause to add yet more petitions, especially ones with vehicle problems.

Nor should the Court hold these certiorari petitions pending its decision in the marriage cases from the Sixth Circuit. The Court has previously denied petitions for writs of certiorari by state officials seeking to block same-sex couples from marrying and to withhold recognition of such couples' lawful marriages performed in other States. The Court should do the same here, notwithstanding the pendency of other marriage cases. Two of the respondent-couples have already married (as have many other residents of Idaho) in reliance on the injunction issued by the district court in this case, and their marriages should no longer be subject to the uncertainty created by ongoing litigation. The petitions should be denied.

I. THERE IS NO BASIS FOR GRANTING THE PETITIONS

On January 16, 2015, the Court granted four petitions for writs of certiorari filed by same-sex couples seeking review of a judgment by the Sixth Circuit upholding state laws and constitutional provisions prohibiting those couples from marrying and barring recognition of their lawful out-of-state marriages. *See Obergefell v. Hodges*, No. 14-556 (Ohio); *Tanco v. Haslam*, No. 14-562 (Tennessee); *DeBoer v. Snyder*, No. 14-571 (Michigan); *Bourke v. Beshear*, No. 14-574 (Kentucky). The Court directed the parties to brief two questions: "1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?" and "2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?" *E.g.*, *Obergefell v. Hodges*, No. 14-556, 2015 WL 213646 (U.S. Jan. 16, 2015).

There is no need to add duplicative fifth and sixth petitions to consider the same questions. Indeed, the Court has already rejected Governor Otter's suggestion that it grant his petition along with the others. He filed an amicus brief in the Sixth Circuit cases, asking the Court to "wait until it ha[d]" his certiorari petition "before deciding which petition(s) to use as a vehicle for resolving the constitutionality of the man-woman definition of marriage." Brief of Amicus Curiae Idaho Governor C.L. "Butch"

Otter at 3, *DeBoer v. Snyder*, Nos. 14-556, 14-562, 14-571, 14-574, 14-596 (U.S. Dec. 15, 2014); *see id.* at 23. The Court declined that invitation and granted the four petitions without waiting for the Governor's.

Granting the Idaho petitions now would unnecessarily complicate this Court's resolution of the questions that it has decided to address in the previously granted cases. Moreover, there are features of these petitions that make them inferior to those already granted as vehicles for consideration of the questions presented. First, there is a question about whether these prematurely filed petitions are adequate to bring before the Court the final judgment of the court of appeals. At the time both petitions were filed, petitioner Otter's rehearing petition was still pending below. The court of appeals' judgment was therefore not final when the certiorari petitions were filed. *See Missouri v. Jenkins*, 495 U.S. 33, 46 (1990) ("[W]hile the petition for rehearing is pending, there is no 'judgment' to be reviewed."); *see also* Stephen M. Shapiro et al., Supreme Court Practice § 6.3, at 394 (10th ed. 2013) ("By * * * suspending the finality of the lower court judgment, the filing and pendency of a timely petition for rehearing * * * render premature the filing of a petition for certiorari in the Supreme Court prior to final action below on the petition for rehearing.").

Both petitions were filed before entry of final judgment by the court of appeals, but they were not styled as petitions for writs of certiorari before judgment. The court of appeals then denied the rehearing

petition—and thus entered its final judgment—*after* those certiorari petitions were filed. Whether a certiorari petition may bring before the Court a later-issued final judgment is a novel question. There is no reason to confront it here, given that the Court has already granted four petitions that do not present this problem.

The petitions here also feature a divided defense of the laws and constitutional provisions under review. The State of Idaho, represented by the Attorney General, and Governor Otter, represented by private counsel, litigated separately below; only Governor Otter filed for rehearing in the court of appeals and for a stay in this Court; and the two have now filed separate certiorari petitions.[3] Governor Otter states he would "make every effort" to file a joint merits brief with Idaho, Otter Pet. 29 n.1, but the two parties' conspicuously separate conduct of the litigation thus far does not provide grounds for optimism on that score.

For all these reasons, there is no basis for granting the certiorari petitions.

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[3] Christopher Rich, Recorder of Ada County, Idaho, was a defendant in the district court and appellant in the court of appeals. But he has not joined either petition for a writ of certiorari in this case. *See* Otter Pet. ii; Idaho Pet. ii.

II. THE PETITIONS SHOULD BE DENIED RATHER THAN HELD

Respondents acknowledge that the Court's ordinary practice is to hold a petition for a writ of certiorari when it involves the same question presented as a case already pending before the Court. The unusual circumstances of this case, however, justify a departure from that practice. The petitions should be denied, not held.

On October 6, 2014, the Court denied seven petitions for writs of certiorari materially identical to those at issue here.[4] Those petitions, like the two here, were filed by state officials seeking to overturn courts of appeals' decisions finding unconstitutional state prohibitions on marriage between same-sex couples (and state prohibitions on recognition of same-sex couples' lawful out-of-state marriages). After certiorari was denied, stays pending appeal were dissolved, and respondents in those cases (along with other couples in the relevant States) were permitted to marry. At that point, the judgments in those cases were final and no longer appealable, providing a measure of certainty to those couples.

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[4] *See Herbert v. Kitchen*, 135 S. Ct. 265 (2014); *Smith v. Bishop*, 135 S. Ct. 271 (2014); *Rainey v. Bostic*, 135 S. Ct. 286 (2014); *Schaefer v. Bostic*, 135 S. Ct. 308 (2014); *McQuigg v. Bostic*, 135 S. Ct. 314 (2014); *Bogan v. Baskin*, 135 S. Ct. 316 (2014); *Walker v. Wolf*, 135 S. Ct. 316 (2014).

As noted above, four respondents here (two couples) were married after this Court denied petitioner Otter's request for a stay and after the court of appeals dissolved its stay pending appeal. Other same-sex couples in Idaho likewise have married in reliance on the district court's injunction that was permitted to take effect, and couples have married in Alaska, Arizona, Montana, and Nevada as a result of the court of appeals' ruling. Yet, as long as the petitions for writs of certiorari remain pending in this Court, the security that marriage ordinarily brings will be subject to doubt for these couples.

Respondents here should not be deprived of the certainty now enjoyed by couples in the States at issue in the October 6 certiorari denials due solely to a quirk of timing that brought these petitions to the Court several months later. This Court has recognized that marriage is the "'most important relation in life.'" *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (quoting *Maynard v. Hill*, 125 U.S. 190, 205 (1888)). The Court has also noted that citizens' "[c]hoices about marriage * * * are among associational rights this Court has ranked as 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971)). The Court has thus been "mindful of the gravity" of state action to sever such familial bonds. *Id.* at 117.

Guided by these fundamental principles counseling against steps that might cast doubt on existing marriages, the Court should deny the certiorari petitions here. Doing so would dissipate the cloud of uncertainty that the petitions' pendency creates for respondents and their children, as well as similar families in other States within the Ninth Circuit. Denial would also provide respondents with the same status as the identically situated couples who were respondents in the cases denied in October.

III. THE COURT OF APPEALS' DECISION IS CORRECT

The court of appeals' decision is correct. Indeed, Idaho's prohibition on marriage by same-sex couples and its refusal to recognize their lawful out-of-state marriages violates the constitution in multiple respects. First, the Idaho laws deny same-sex couples the fundamental right to marry in violation of the Due Process Clause. *See* Pet. App. 42a-47a (Reinhardt, J., concurring). Second, as the court of appeals found (*id.* at 9a-29a), the laws discriminate against gays and lesbians on the basis of sexual orientation in violation of the Equal Protection Clause. Third, the laws "are classifications on the basis of gender that do not survive the level of scrutiny applicable to such classifications." *Id.* at 48a (Berzon, J., concurring). Fourth, Idaho's refusal to recognize the lawful marriages of same-sex couples also deprives them of their liberty interest in their existing marriages in violation of the Due Process Clause of the Fourteenth Amendment.

A. Idaho's Marriage Ban Denies Same-Sex Couples The Fundamental Right To Marry

This Court has long recognized that the Constitution protects the right to marry as a fundamental liberty. That right extends to same-sex couples no less than to other couples whose decisions with respect to marriage, family, and intimate relationships are protected from state interference.

1. "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). For many, marriage is "the most important relation in life." *Maynard*, 125 U.S. at 205. It is "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). For these reasons and others, this Court has held that "the decision to marry is a fundamental right." *Turner v. Safley,* 482 U.S. 78, 95 (1987). The right to marry extends to all citizens, not merely to those who have been permitted to exercise it in the past: the "right to marry is of fundamental importance for *all* individuals." *Zablocki*, 434 U.S. at 384 (emphasis added).

2. a. Petitioners attempt to reframe the freedom respondents seek as a quest for a new right to "same-sex marriage," which they contend "is not 'deeply rooted in this Nation's history and tradition.'" Otter Pet. 17 (quoting *Washington v. Glucksberg*, 521 U.S.

702, 721 (1997)); Idaho Pet. 14 (same). Respondents do not seek establishment of a new right, however, but access to the same fundamental right to marry that other individuals enjoy.

The Constitution protects "freedom of personal choice in matters of marriage and family life," *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (1974), and gay and lesbian persons "may seek autonomy for these purposes, just as heterosexual persons do," *Lawrence,* 539 U.S. at 574. The freedom to marry is defined by the need to protect life's most intimate personal decisions and relationships from unjustified government interference, not by the identity of the persons seeking to exercise this freedom or the identity of those historically denied it. For example, "neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." *Id.* at 577-578 (internal quotation marks omitted); *see also Loving*, 388 U.S. at 6 n.5. (recognizing the right of interracial couples to marry even though such marriages were illegal in 16 States and had only recently become lawful in 14 others). That same-sex couples have long been denied the freedom to marry is evidence of inequality, not of a "definition" of the outer bounds of that freedom.

b. The fundamental right to marry also does not depend on the ability or the desire to procreate. This Court has held that married couples have a fundamental right *not* to procreate, *Griswold*, 381 U.S. at 485-486, and that the freedom to marry includes those who are unable to procreate, *see Turner*, 482

U.S. at 95-96. In *Turner*, this Court identified a number of "important attributes of marriage" other than procreation, including "expressions of emotional support and public commitment," the "exercise of religious faith," the "expression of personal dedication," and access to legal benefits, which "are an important and significant aspect of the marital relationship." *Ibid*. Respondents are no less capable than other persons of participating in, and benefitting from, the constitutionally protected attributes of marriage.

c. Petitioners' invocation of "State authority to regulate domestic relations" and the right of Idaho citizens to "'act through a lawful electoral process,'" Otter Pet. 13, 15 (quoting *Schuette v. BAMN*, 134 S. Ct. 1623, 1637 (2014) (plurality)), ignores this Court's instruction that "[s]tate laws defining and regulating marriage * * * must respect the constitutional rights of persons." *Windsor*, 133 S. Ct. at 2691. Denying same-sex couples the freedom to marry deprives them of the liberty and the equal citizenship that the Constitution guarantees. "[F]undamental rights may not be submitted to vote; they depend on the outcome of no elections." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

Because Idaho's marriage ban denies same-sex couples the freedom to marry—and the dignity, self-determination, and respect that accompany it—the marriage ban cannot withstand constitutional scrutiny.

B. Idaho's Marriage Ban Discriminates On The Basis Of Sexual Orientation And Gender, In Violation Of The Equal Protection Clause

In excluding same-sex couples from marriage, Idaho's marriage ban denies the members of those couples equal protection of the laws. *See* Pet. App. 9a-29a; *see also id.* at 48a (Berzon, J., concurring). It does so on two bases: sexual orientation and gender.

1. a. In *Windsor*, this Court held that Section 3 of the Defense of Marriage Act ("DOMA") violated "basic due process and equal protection principles" because it was enacted in order to treat a particular group of citizens unequally. 133 S. Ct. at 2693. This Court found that no legitimate purpose could "overcome[ ]" its discriminatory purpose and effect. *Id.* at 2696. Consistent with *Windsor*'s approach, when considering a law that facially disadvantages same-sex couples—as Idaho's marriage ban does—courts may not simply defer to hypothetical justifications proffered by the State, but must carefully consider the purpose underlying its enactment and the actual harms it inflicts. If no "legitimate purpose overcomes" the "disability" imposed on the affected class of individuals, a court should invalidate the discriminatory measure. *Ibid.*; *see also Romer,* 517 U.S. at 633 (holding that "laws singling out a certain class of citizens for disfavored legal status or general hardships are rare," and such measures violate the requirement of equal protection in the most basic way).

Windsor concluded that "[t]he history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages" was the "essence" of the statute. 133 S. Ct. at 2693. The Court also noted that DOMA exposed same-sex couples to serious harms: "Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways * * * from the mundane to the profound." *Id.* at 2694. This differential treatment "demeans the couple." *Ibid.*

Just as the "principal purpose" and "necessary effect" of DOMA were to "impose inequality" on same-sex couples and their children, *id.* at 2694-2695, the purpose and effect of Idaho's marriage ban are to exclude same-sex couples from the legal status and protections of marriage. Like DOMA, such laws do not create any new rights or protections for opposite-sex couples; rather, their only purpose and effect are to treat same-sex couples unequally. Like DOMA, such laws require, and cannot survive, "careful consideration," because "no legitimate purpose overcomes the purpose and effect to disparage and to injure" same-sex couples and their children. *Id.* at 2692, 2696.[5]

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[5] Petitioners erroneously suggest that some independent evidence of animus or ill-will by voters or the legislature is required. *See* Otter Pet. 20; Idaho Pet. 16. *Windsor*, however, looked to the text of DOMA, the circumstances giving rise to its enactment, and its singling out of one class of married persons

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b. Although this discrimination against same-sex couples would fall under any standard of review, the court of appeals correctly applied heightened scrutiny. *See* Pet. App. 11a-12a. Classifications based on sexual orientation satisfy each of the factors this Court has previously employed to identify constitutionally suspect classifications. *See, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 684-687 (1973) (enumerating factors). Among other reasons, such classifications are suspect because our Nation has a "long and unfortunate history" of discrimination against lesbians and gay men; sexual orientation is an "immutable characteristic" central to one's identity; and one's sexual orientation "bears no relation to ability to perform or contribute to society." *Id.* at 684, 686.

c. Petitioners argue that Idaho's marriage ban does not discriminate based on sexual orientation because "the laws apply equally to heterosexual[ ] [persons] and homosexual[ ] [persons]—both may marry a person of the opposite sex, and neither may marry a person of the same sex." Otter Pet. 19; Idaho Pet. 16. This Court, however, has treated laws that target same-sex couples as discriminating based on sexual orientation. *See Windsor*, 133 S. Ct. at 2693

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for unequal treatment to conclude that the statute reflected an improper purpose to impose inequality on same-sex couples. *See Windsor*, 133 S. Ct. at 2693-2694. Because the only effect of Idaho's marriage ban is to deny same-sex couples rights and protections that are similar to those denied by DOMA, the "essence" of the ban, as with DOMA, is to impose inequality on such couples. *Id.* at 2693.

(noting that DOMA's discrimination against married same-sex couples reflects "'disapproval of homosexuality'" (quoting H.R. Rep. No. 104-664, at 16 (1996))); *see also Lawrence*, 539 U.S. at 575 (law criminalizing same-sex intimacy targets "homosexual persons"); *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 689 (2010) (rule excluding individuals from group membership based on same-sex intimacy discriminates on the basis of sexual orientation).

Idaho's laws allow individuals who are innately attracted to members of a different sex to marry the person of their choosing. Gay men and lesbians are forbidden from doing so. The marriage ban therefore is not a facially neutral law that incidentally has a disparate impact on gay and lesbian people; it is a law that directly discriminates against them as a class. *Cf. Christian Legal Soc'y,* 561 U.S. at 689 ("'A tax on wearing yarmulkes is a tax on Jews.'" (quoting *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993))).

2. a. In addition to discriminating on the basis of sexual orientation, Idaho's marriage ban creates an express gender-based classification. For example, the ban prohibited respondent Amber Beierle from marrying respondent Rachael Robertson, solely because she is a woman. If Ms. Beierle were a man, there would be no such ban. Similarly, Idaho refuses to recognize respondent Lori Watsen's lawful marriage in New York solely because she is a woman. Idaho's marriage ban therefore creates a constitutionally suspect gender-based classification.

Idaho's marriage ban also rests on gender-based expectations or stereotypes, including such gendered expectations as that a woman should marry and form a household with a man and that a man should form his most intimate personal relationship with a woman. But as this Court has stated, "overbroad generalizations about the different talents, capacities, or preferences of males and females" cannot justify gender-based classifications of individuals. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

b. That Idaho's marriage ban applies equally to men and women as groups does not alter the conclusion that those laws discriminate based on sex. In *Loving*, this Court rejected the argument that Virginia's law prohibiting interracial marriage should stand because it imposed its restrictions "equally" on members of different races. 388 U.S. at 8; *see also Powers v. Ohio*, 499 U.S. 400, 410 (1991) (holding "that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree" and that race-based peremptory challenges are invalid although they affect all races); *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964) ("Judicial inquiry under the Equal Protection Clause, therefore, does not end with a showing of equal application among the members of the class defined by the legislation."). That same reasoning applies to sex-based classifications. *See J.E.B. v. Alabama*, 511 U.S. 127, 140-142 (1994) (holding that sex-based peremptory challenges are unconstitutional even though they affect both male and female jurors).

The relevant inquiry under the Equal Protection Clause here is not whether the law treats men as a group differently than women as a group, but whether the law treats an *individual* differently because of his or her sex. *See id.* at 152-153 (Kennedy, J., concurring) (observing that the Equal Protection Clause is primarily "concern[ed] with rights of individuals, not groups"). Barring an individual's access to marriage or to recognition as a lawful spouse on the basis of sex violates the constitutional guarantee that "each person is to be judged individually and is entitled to equal justice under the law." *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982). From an individual's perspective, Idaho's laws are not gender-neutral. Accordingly, they are subject to heightened scrutiny.

3. Petitioners' proffered reasons for Idaho's marriage ban cannot withstanding rational basis review, much less the heightened scrutiny the court of appeals correctly applied.

a. Petitioners confuse the inquiry from the outset by framing the issue as whether it was rational for Idaho to permit men and women to marry each other in the first instance. But Idaho's marriage ban does not confer rights or protections on opposite-sex couples; it only denies rights and protections to same-sex couples. There is no connection between that denial and the provision of any benefit to opposite-sex couples. Idaho must have legitimate grounds to exclude same-sex couples from marriage, independent of the State's interest in allowing other couples to

marry. Petitioners have identified no such independent interest, and there is none.

b. i. Petitioners argue that Idaho's marriage ban survives constitutional scrutiny because, "'[b]y creating a status (marriage) and by subsidizing it[,] * * * the States created an incentive for two people who procreate together to stay together for purposes of rearing offspring.'" Otter Pet. 25-26 (quoting *DeBoer v. Snyder*, 772 F.3d 388, 405 (6th Cir. 2014)); *see* Idaho Pet. 13, 20 (same). Petitioners argue that States implement this incentive to "further the State's interest in encouraging stable families for child-rearing purposes." Otter Pet. 25; Idaho Pet. 20. But excluding same-sex couples from marriage does not rationally further the goal of creating stable family units. To the contrary, the exclusion *undermines* it. By treating same-sex relationships as unequal and unworthy of recognition, the State "humiliates" the children "now being raised by same-sex couples" in Idaho, bringing them "financial harm" by depriving their families of a host of benefits and "mak[ing] it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families." *Windsor*, 133 S. Ct. at 2694-2695.

Petitioners likewise rely on the Sixth Circuit's assertion that State marriage bans are justified by "'the biological reality that couples of the same sex do not have children in the same way as couples of opposite sexes and that couples of the same sex do not run the risk of unintended offspring.'" Otter

Pet. 17 (quoting *DeBoer*, 772 F.3d at 405); Idaho Pet. 13 (same). But if the creation of stable family units is the governmental interest that marriage is intended to further, *all* children, whether planned or unplanned, biological or adopted, benefit from the creation of such stable units. Prohibiting same-sex couples from marrying does not enhance the stability of families headed by married couples raising their biological children. The exclusion serves only to harm the children now being raised by same-sex couples. To the extent a purpose of marriage is to promote child welfare and family stability, there is no rational link between the exclusion of same-sex couples "and the object to be attained." *Romer*, 517 U.S. at 632.

ii. Petitioner Otter argues that the Idaho marriage ban "reinforces certain child-centered norms or expectations that form part of the social institution of marriage," such as "the value of biological connections between children and the adults who raise them." Otter Pet. 26. He contends that permitting same-sex couples to marry would alter those norms in ways that would change the behavior of opposite-sex couples with respect to their biological children, so that "more of their children will be raised without a mother or a father." Otter Pet. 27.

The court of appeals correctly rejected this argument because it is premised on the irrational suggestion that if same-sex couples are allowed to marry, "a man who has a child with a woman will conclude that his involvement in that child's life is not essential."

Pet. App. 16a; *see also Kitchen v. Herbert*, 755 F.3d 1193, 1223 (10th Cir. 2014) (holding that it was "wholly illogical" to suggest that permitting same-sex couples to marry would affect opposite-sex couples' choices). Petitioners' argument that permitting same-sex couples to marry will reduce the number of opposite-sex couples rearing their biological children together lacks any "footing in * * * realit[y]." *Heller v. Doe*, 509 U.S. 312, 321 (1993).

iii. Petitioners also argue that Idaho's marriage ban satisfies rational-basis review because a State might wish to "'wait and see before changing a norm that our society (like all others) has accepted for centuries.'" Otter Pet. 17 (quoting *DeBoer*, 772 F.3d at 406); Idaho Pet. 13 (same). As this Court has made clear, even under rational-basis review, the "[a]ncient lineage of a legal concept does not give it immunity from attack." *Heller*, 509 U.S. at 326. A law that excludes a class of persons from protection fails the rational-basis test unless it is based on a difference that is both real and rationally related to some "independent and legitimate legislative end." *Romer*, 517 U.S. at 633. Proceeding with caution and adopting a "wait and see" stance are not independent governmental objectives. As the court of appeals correctly concluded, "'it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been.'" Pet. App. 28a (quoting *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961 n.23 (Mass. 2003)); *see also Baskin v. Bogan*, 766 F.3d 648, 668-670 (7th

Cir. 2014) (rejecting "go slow" rationale as justification for state marriage bans).

iv. Petitioners' other justifications for the marriage ban also fail. Idaho's purported interest in "reducing the potential for religious conflict and church-state entanglement," Otter Pet. 29, cannot justify depriving a class of citizens of a constitutionally protected liberty. "Citizens may not be compelled to forgo their constitutional rights because officials fear public hostility * * * ." *Palmer v. Thompson*, 403 U.S. 217, 226 (1971); *see also Watson v. City of Memphis*, 373 U.S. 526, 535 (1963) (rejecting city's claim that "community confusion and turmoil" permitted it to delay desegregation of its public parks). Even under rational-basis review, "the electorate as a whole, whether by referendum or otherwise, could not order [government] action violative of the Equal Protection Clause, and the [government] may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985) (citation omitted).

Nor can Idaho's marriage ban be justified based on a purported State interest in "target[ing] its finite resources on fostering long-lived opposite-sex relationships through marital status benefits." Otter Pet. 25; Idaho Pet. 20. Even under the rational-basis standard, States may not rely on cost savings as a justification for exclusion of a particular group from protections or benefits unless the exclusion of that group in particular rationally advances governmental

interests. *See Plyler*, 457 U.S. at 229. The exclusion of same-sex couples serves no such independent and legitimate purpose.

C. Idaho's Refusal To Respect The Lawful Out-Of-State Marriages Of Same-Sex Couples Is Unconstitutional

In addition to being unconstitutional for all the reasons described above, Idaho's refusal to recognize the lawful marriages of same-sex couples also deprives them of their liberty interest in their existing marriages in violation of the Due Process Clause of the Fourteenth Amendment. In *Windsor*, this Court affirmed that lawfully married same-sex couples, like other married couples, have constitutionally protected liberty and equality interests arising from their marital relationship. 133 S. Ct. at 2695; *see also Griswold*, 381 U.S. at 485 (recognizing a right to privacy within an existing marriage). Like DOMA, Idaho's anti-recognition law unconstitutionally deprives married same-sex couples of those interests by treating their lawful marriages as if they did not exist.

As with DOMA, Idaho's non-recognition law not only denies married same-sex couples numerous rights and benefits, but also tells those "couples, and all the world, that their otherwise valid marriages are unworthy," placing these couples in the "unstable position of being in a second-tier marriage." *Windsor*, 133 S. Ct. at 2694. Also like DOMA, Idaho's non-recognition law was enacted specifically in order "to

identify a subset of state-sanctioned marriages and make them unequal." *Ibid*. Therefore, like DOMA, Idaho's law "violates basic due process and equal protection principles." *Id.* at 2693.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted,

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