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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

SUSAN LATTA and TRACI EHLERS, LORI WATSEN and SHARENE WATSEN, SHELIA ROBERTSON and ANDREA ALTMAYER, AMBER BEIERLE and RACHAEL ROBERTSON, Plaintiffs, vs. C.L. "BUTCH" OTTER, as Governor of the State of Idaho, in his official capacity, and CHRISTOPHER RICH, as Recorder of Ada County, Idaho, in his official capacity, Defendants.	Case No. 1:13-cv-00482-CWD **MEMORANDUM IN SUPPORT OF DEFENDANT CHRISTOPHER RICH'S MOTION TO DISMISS**

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I.

BACKGROUND

Plaintiffs are same-sex couples who seek to invalidate several Idaho marriage laws on the alleged ground that they violate the United States Constitution. They challenge Article III, section 28 of the Idaho Constitution; Idaho Code § 32-201; and Idaho Code § 32-209. Plaintiffs contend that these laws deprive them of due process and equal protection guaranteed by the Fourteenth Amendment.

Article III, section 28 of the Idaho Constitution provides: "A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state." Section 32-201 of the Idaho Code provides in relevant part: "Marriage is a personal relation arising out of a civil contract between a man and a woman." Section 32-209 of the Idaho Code provides:

> All marriages contracted without this state, which would be valid by the laws of the state or country in which the same were contracted, are valid in this state, unless they violate the public policy of this state. Marriages that violate the public policy of this state include, but are not limited to, same-sex marriages, and marriages entered into under the laws of another state or country with the intent to evade the prohibitions of the marriage laws of this state.

None of these provisions is of immediate vintage. Article III, section 28 was proposed by the Legislature (2006 Idaho Sess. Laws H.J.R. No. 2) and approved by the Idaho electorate as a constitutional amendment in November 2006 pursuant to Article XX, section 1. Sections 32-201 and -209 were enacted, respectively, in 1995 and 1996. 1995 Idaho Sess. Laws ch. 104, § 3; 1996 Idaho Sess. Laws ch. 331, § 1.

II.

APPLICABLE RULE 12(b)(6) STANDARDS

Under the basic Rule 12(b)(6) standard, "[a]ll allegations of material fact are accepted as true and should be construed in the light most favorable to Plaintiffs." *In re*

Syntex Corp. Sec. Litigation, 95 F.3d 922, 926 (9th Cir. 1996). Conclusory allegations of law, however, are insufficient to defeat a Rule 12(b)(6) motion. *Id.* Although generally matters outside the complaint's allegations may not be considered (*e.g., Hal Roach Studios, Inc. v. Richard Feiner and Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990)), this Circuit has recognized that "[a] court may take judicial notice of 'matters of public record' without converting a motion to dismiss into a motion for summary judgment." *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2002); *see Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994); *Mack v. South Bay Beer Distrib., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986). A court also may consider documents referred to by the complaint when authenticity is not challenged. *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994), *overruled on other grounds, Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

III.

ARGUMENT

A. *BAKER v. NELSON* BARS PLAINTIFFS' CHALLENGE TO IDAHO'S LAWS DEFINING MARRIAGE AS A UNION BETWEEN A MAN AND A WOMAN

1. *Baker*'s Presumed Controlling Status. In *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed for want of substantial federal question*, 409 U.S. 810 (1972), Minnesota interpreted its marriage statute to prohibit same-sex marriage. A same-sex couple challenged the constitutionality of the statute as applied. They argued, among other things, that they were deprived of due process and equal protection guaranteed by the Fourteenth Amendment. *Id.* at 186. The Minnesota Supreme Court rejected these arguments. It held that there is no fundamental right to marry without regard to the sex of the parties. *Id.* at 186-87. The court also held that the marriage statute did not violate the Equal Protection Clause. *Id.* at 187.

The plaintiffs appealed to the United States Supreme Court, which dismissed the

appeal for want of a substantial federal question. 409 U.S. 810. The Supreme Court's summary dismissal constituted a decision on the merits. *See Hicks v. Miranda*, 422 U.S. 332, 343-44 (1975). As such, "lower courts are bound by summary decisions by [the Supreme] Court until such time as the Court informs [them] that [they] are not." *Hicks*, 422 U.S. at 344-45 (internal quotation marks omitted); *see also Wright v. Lane County Dist. Ct.*, 647 F.2d 940, 941 (9th Cir. 1981) ("[s]ummary dismissals for want of a substantial federal question are decisions on the merits that bind lower courts until subsequent decisions of the Supreme Court suggest otherwise"). The core, and dispositive, question here is whether the Supreme Court has "inform[ed]" the lower courts that *Baker* is no longer binding. It has not.

"Summary . . . dismissals for want of a substantial federal question . . . reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam). The jurisdictional statements presented to the United States Supreme Court in *Baker* follow:

> 1. Whether appellee's refusal to sanctify appellants' marriage deprives appellants of their liberty to marry and of their property without due process of law under the Fourteenth Amendment.
>
> 2. Whether appellee's refusal, pursuant to Minnesota marriage statutes, to sanctify appellants' marriage because both are of the male sex violates their rights under the equal protection clause of the Fourteenth Amendment.
>
> 3. Whether appellee's refusal to sanctify appellants' marriage deprives appellants of their right to privacy under the Ninth and Fourteenth Amendments.

In re Kandu, 315 B.R. 123, 137 (Bankr. W.D. Wash. 2004). The first two issues presented in the jurisdictional statement in *Baker* are identical to the issues plaintiffs raise in their claims challenging Idaho's laws that limit marriage to a union between a man and a woman—*i.e.*, whether the State's refusal to permit same-sex marriage violates the

Fourteenth Amendment's Due Process and Equal Protection Clauses. Accordingly, *Baker* compels dismissal of plaintiffs' claims.

2. *Baker*'s Continued Controlling Status. Plaintiffs presumably will attempt to negate *Baker*'s precedential bar by arguing that the decision has been overruled. This Court should reject such an argument. The Supreme Court has never stated explicitly that *Baker* does not remain a settled proposition as to the questions presented in the jurisdictional statement and, indeed, has seen no need to cite, much less overrule, its opinion in subsequent cases. Not only has none of its sexual orientation decisions established a constitutional right to same-sex marriage, but those decisions also reflect, as the discussion below demonstrates, that the Court took care *not* to resolve that highly sensitive issue. In short, the task of overruling *Baker*—should that be deemed appropriate—must be performed by the Supreme Court, not this Court.

The Supreme Court has addressed substantive due process and equal protection claims involving sexual orientation three times since *Baker*: *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); and *United States v. Windsor*, 133 S. Ct. 2675 (2013). Of the three, only *Windsor* has true relevance, and its analysis supports the proposition that the Court is reserving to itself the question whether a State's limiting marriage to opposite-sex couples infringes a fundamental right or discriminates against a suspect classification of individuals—thereby requiring application of a heightened standard of review.

Romer invalidated a Colorado constitutional amendment that prohibited enactment or enforcement of any law or policy "designed to protect . . . homosexual persons or gays and lesbians." 517 U.S. at 624. The Court expressly applied the rational basis standard in reaching its holding. *Id.* at 631 ("if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end"); *id.* at 635 ("a law must bear a rational relationship to a legitimate governmental purpose, . . . and Amendment 2 does not")

(*citing Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 462 (1988)). The Court's opinion makes no mention of same-sex marriage or *Baker*.

In *Lawrence*, the Court held that a Texas statute forbidding persons of the same sex to engage in intimate sexual conduct violated the Due Process Clause. The Court noted that the case did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." 539 U.S. at 578. The decision instead focused on the right of "two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle . . . without intervention of the government." *Id.* Here, plaintiffs seek such intervention to secure access to certain governmental benefits through "formal recognition" of their private relationship through marriage.

In *Windsor*, the Court held that a federal statute, section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, was "unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution." 133 S. Ct. at 2695. DOMA's section 3 provided a federal definition of "marriage" and "spouse" that applied to all federal laws. It provided that "the word 'marriage' means only a legal union between one man and one woman as husband and wife." *Id.* at 2683. The Court noted that the "definition and regulation of marriage" is "within the authority and realm of the separate States," *id.* at 2689-90; certain States have chosen to recognize same-sex marriage; and section 3 of DOMA impermissibly deprived same-sex couples married in those States of the "rights and responsibilities" that should have come along with their state-sanctioned same-sex marriages. *Id.* at 2694; *see also id.* at 2693-94 ("[t]he Act's demonstrated purpose is to ensure that *if* any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law") (emphasis added).

Windsor did not mention *Baker*. It also did not hold that all States are required constitutionally to permit or recognize same-sex marriage. Quite the contrary, the Court

went out of its way to make clear that the flaw in section 3 was Congress' failure to give effect to a State's—there, New York's—determination as to who is eligible to enter into the marriage relationship. It neither held nor suggested that States really have no choice in the exceptionally sensitive area of whether marriage should be limited to opposite-sex couples.[1] Whatever else *Windsor* may stand for, it did not alter *Baker*'s control over the issues in this case—a control that had been acknowledged repeatedly.[2]

B. IDAHO NEED ONLY SATISFY THE RATIONAL BASIS STANDARD TO SUSTAIN THE CHALLENGED LAWS

Baker binds this Court. Even were the contrary true, plaintiffs' challenge must be measured against the rational basis standard, not any species of heightened review. This is so because neither a fundamental right protected under the Due Process Clause nor a suspect class for equal protection purposes exists here. The Idaho laws easily pass

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[1] Justice Scalia's concern about the implications of the majority's reasoning as to future challenges to provisions like Article III, section 28 and §§ 32-201 and -209 does not further plaintiffs' cause. 133 S. Ct. at 2710-11 (Scalia, J., dissenting). First, his dissent spoke only on behalf of himself and Justice Thomas as to that concern. *Id.* at 2697. Second, Justice Scalia spoke prospectively through his reference to "the view that *this* Court will take of state prohibition of same-sex marriage" as being "indicated beyond mistaking by today's opinion." *Id.* at 2709. His prediction says nothing about whether *lower* courts have leeway to ignore *Baker*.

[2] *See, e.g., Massachusetts v. Dep't of Health & Human Servs.*, 682 F.3d 1, 8 (1st Cir. 2012); *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 870 (8th Cir. 2006); *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1003 (D. Nev. 2012); *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1084-88 (D. Haw. 2012). The *Sevcik* court noted, given *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded*, 133 S. Ct. 2652 (2013), a "potentially applicable" argument that some limited portion of the plaintiffs' claims might not be barred by *Baker*. 911 F. Supp. 2d at 1003. However, *Perry*'s subsequent vacatur on subject-matter jurisdiction grounds voided the Court of Appeals' merits determination and any attendant law-of-circuit weight. Even were the contrary true, the *Perry* majority expressly distinguished *Baker* because the question as to the California constitutional amendment was "whether the people of a state may by plebiscite strip a group of a right or benefit, constitutional or otherwise, that they had previously enjoyed on terms of equality with all others in the state." 671 F.3d at 1082 n.14. The challenged Idaho constitutional and statutory provisions, in contrast, substantially predated plaintiffs' application to marry in Idaho or their marriages in California and New York. There is also no allegation that Idaho has ever authorized same-sex marriages to be contracted within its territorial jurisdiction or has ever recognized such marriages contracted to in any other State.

muster under the rational basis standard.

1. Substantive Due Process. Substantive due process challenges to state laws that do not implicate a fundamental right are subject to rational basis review. *See Washington v. Glucksberg*, 521 U.S. 702, 722 (1997) (challenged state action must "implicate a fundamental right" before courts will require "more than a reasonable relation to a legitimate state interest"). Plaintiffs' substantive due process claims are subject to rational basis review because same-sex marriage is not a fundamental right.

The doctrine of substantive due process is not favored in the law. "[B]ecause guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended," courts should be "reluctant to expand the concept of substantive due process." *Glucksberg*, 521 U.S. at 720. As the Supreme Court has explained:

> By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.

Id. (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992), and citing *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977)). Before a court will recognize a right as fundamental, it must undertake a careful, two-step analysis.

First, in order to warrant heightened protection, a right or interest must be, "objectively, deeply rooted in this Nation's history and tradition." *Glucksberg*, 521 U.S. at 720-21 (internal quotation omitted). It must be "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if [it was] sacrificed." *Id.* at 721. *Second*, the fundamental liberty interest at stake must also be subject to a "careful description." *Id.* The "crucial 'guideposts for responsible decision-making'" in evaluating the existence of a fundamental right are the nation's "history, legal traditions, and practices." *Id.* The question is whether the right is "so rooted in the traditions and

conscience of our people as to be ranked as fundamental." *Snyder v. Commonwealth*, 291 U.S. 97, 105 (1934).

Neither the Supreme Court nor the Ninth Circuit has ever held that same-sex marriage is a fundamental right. Plaintiffs may argue that, because the Supreme Court has deemed marriage between heterosexuals to be a fundamental right, *see, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967), this Court should expand that right to include same-sex marriage. This Court should reject such a request. All of the Supreme Court decisions recognizing the fundamental right to marry involved opposite-sex couples. *Jackson*, 884 F. Supp. 2d at 1095. Plaintiffs' request that this Court create a new fundamental right to same-sex marriage ignores the fact that same-sex marriage is a relatively new phenomenon first judicially sanctioned not because it involved a fundamental right but because limiting its availability to opposite-sex couples was held to be impermissible sex discrimination under a state constitution. *Baehr v. Lewin*, 852 P.2d 44, 56 (Haw. 1993) ("[t]he foregoing case law demonstrates that the federal construct of the fundamental right to marry—subsumed within the right to privacy implicitly protected by the United States Constitution—presently contemplates unions between men and women").[3] Same-sex marriage cannot satisfy the requirement that it be *deeply rooted* in the nation's history and tradition. It is instead a radical modification of such history and tradition. Accordingly, there is no historical basis for extending "fundamental" status to same-sex marriage. Lacking the necessary "crucial guideposts for responsible decisionmaking," the Court should decline plaintiffs' request to expand substantive due process in this area.

[3] The recent decision in *Kitchen v. Herbert*, No. 2:13-cv-217, 2013 WL 6697874 (D. Utah Dec. 20, 2013), relied principally upon *Lawrence* for the conclusion that the Supreme Court has "removed the only ground—moral disapproval—on which the State could have at one time relied to distinguish the rights of gay and lesbian individuals from the rights of heterosexual individuals." *Id.*, at *18. As *Glucksberg* reiterated, however, fundamental rights protected under the Due Process Clause of the Fourteenth Amendment do not suddenly arise but must be drawn with close attention to their historically settled nature. Whatever else may be said about the civil institution of marriage, it has historically been limited to heterosexual partners—a fact reflected in every Supreme Court marriage decision discussed by the *Kitchen* court. *Id.*, at *10-*13.

2. Equal Protection. Plaintiffs' equal protection claims are subject to review under the rational basis standard. When a law is challenged under the Equal Protection Clause, the rational basis standard applies unless the law burdens a fundamental right or targets a suspect class. *Romer*, 517 U.S. at 630. As discussed above, there is no fundamental right to same-sex marriage. Accordingly Idaho's marriage laws do not burden plaintiffs' fundamental rights. Nor do those laws target a suspect class.

Plaintiffs claim that Idaho's marriage laws discriminate on the basis of sexual orientation. In this Circuit, such claims are subject to rational basis review. The Court of Appeals has held that "homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny." *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990). Subsequent Ninth Circuit authority has confirmed the holding in *High Tech Gays* and continued to apply the rational basis standard in sexual orientation cases. *See, e.g., Philips v. Perry*, 106 F.3d 1420, 1425 (9th Cir. 1997) (*High Tech Gays* controlled and precluded strict scrutiny); *accord Witt v. Dep't of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008); *Mintun v. Peterson*, No. CV06-447-S-BLW, 2010 WL 1338148, at *10 (D. Idaho Mar. 30, 2010).

In an apparent effort to avoid the force of Ninth Circuit precedent requiring rational basis review of plaintiffs' claims, plaintiffs also allege that this Court should view their claims as sex discrimination claims and thereby subject the Idaho laws to heightened, "intermediate" scrutiny. *See, e.g., City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440-41 (1985). There is a fundamental flaw in plaintiffs' argument: Idaho's marriage laws do not treat men and women differently. Neither is permitted to marry a person of the same sex. Accordingly, "the vast majority of courts" considering the issue have held that "an opposite-sex definition of marriage does not constitute gender discrimination." *Jackson*, 884 F. Supp. 2d at 1098.

3. Rational Basis Standard. "[E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Commc'ns,*

Inc., 508 U.S. 307, 313 (1993). Unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Fourteenth Amendment's requirement of equal protection is satisfied so long as there is a plausible justification for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decision-maker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational. *Tutor-Saliba Corp. v. City of Hailey,* 452 F.3d 1055, 1061 (9th Cir. 2006); *see also Bd. of Natural Res. v. Brown*, 992 F.2d 937, 943 (9th Cir. 1993) ("the government's lethargy in proffering a rationale for the classification is of no significance"). The Supreme Court further 'has made clear that a legislature need not "strike at all evils at the same time or in the same way,' . . . and that a legislature 'may implement [its] program step by step, . . . adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations.'" *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981) (citation omitted)); *accord Wright v. Incline Vill. Gen. Improvement Dist.*, 665 F.3d 1128, 1142 n.8 (9th Cir. 2011).

A State, moreover, "has no obligation to produce evidence to sustain the rationality of a statutory classification" because "a legislative choice is not subject to courtroom factfinding.'" *Heller v. Doe*, 509 U.S. 312, 320 (1993). It is thus "entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Beach Commc'ns*, 508 U.S. at 315; *see also City of Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 496 (1986) (distinguishing reasonableness standards applicable to First Amendment-protected expressive conduct from those applicable to Fifth Amendment-based equal protection challenges). The test is simply whether the involved distinction or classification "is at least debatable." *Clover Leaf Creamery*, 449 U.S. at 464; *see Zager v. Lara (In re Lara),* 731 F.2d 1455, 1460 (9th Cir. 1984) (finding usury exemption for licensed real estate

brokers rational under the Fourteenth Amendment solely on the basis of legislative findings). Once plausible grounds are asserted, the "inquiry is at an end"—*i.e.*, rebuttal is not permitted. *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980); *see also Atonio v. Wards Cove Packing Co.*, 10 F.3d 1485, 1494 (9th Cir. 1993) ("[i]t is enough that plausible reasons for Congress' action exist"). The rational-basis test, in short, is a relatively relaxed standard reflecting the awareness that the drawing of lines that create distinctions is primarily a task of the legislative branch. *Silveira v. Lockyer*, 312 F.3d 1052, 1088 (9th Cir. 2002).

C. IDAHO'S INTEREST IN FURTHERING THE STABILITY OF FAMILY STRUCTURES THROUGH BENEFITS TARGETED AT COUPLES POSSESSING BIOLOGICAL PROCREATIVE CAPACITY IS SUBSTANTIAL AND EASILY SATISFIES THE RATIONAL BASIS STANDARD

Until the Hawaii Supreme Court's construction of its State's equal protection provision in *Baehr*, the notion of same-sex marriage would have been deemed oxymoronic. The reason is obvious: Marriage has served traditionally as the primary societal basis for ordering conjugal relationships whose purpose or practical effect lie in the creation of new human life. As the Supreme Court recognized in *Maynard v. Hill*, 125 U.S. 190 (1888), "[i]t is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress." *Id.* at 211. The Court reiterated this fundamental proposition in *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), with the observation that "[m]arriage and procreation are fundamental to the very existence and survival of the race." *Id.* at 541. This is not to say that the *only* purpose for heterosexual marriage lay in encouraging family stability for rearing the couple's biological offspring;[4] it is to say, however, that such stability furthers a core and

[4] *See Turner v. Safley*, 482 U.S. 78, 96 (1987) (recognizing that marriages "are expressions of emotional support and public commitment" to which "spiritual significance" and governmental benefits may be attached).

uncontested public interest in the child's wellbeing. Marriage, for present purposes, is simply another arrow in a quiver of constitutional and statutory protections used to advance that interest. The question here is whether Idaho's determination to target its limited resources on fostering long-lived opposite-sex relationships through the availability of marital status benefits is rational when those relationships produce virtually all children and also account for a sizable majority of family households in the State. That determination plainly is.

1. Relevant Idaho Demographic Data. Several demographic facts inform Idaho's marriage policy choice. *First*, 2010 Census data reflect that husband-wife households in Idaho constituted 55.3 percent of all households—the second highest of any State. Dkt. 30-2 at 10. Idaho also ranked second at 24 percent as to husband–wife households with their own children under 18 years of age, or 73.4 percent of all family households with such children. *Id.* The national averages were 20.2 and 68 percent respectively. *Id. Second*, these percentages are unsurprising because the Idaho marriage rate in 2011 was 8.6 percent—the third highest of any State in the nation if the matrimonial destination outliers of Hawaii and Nevada are excluded (Dkt. 30-4)—and its 2012 preliminary data birth rate was 14.4 percent—the fifth highest State in the nation (Dkt. 30-5 at 14). *Third*, the "preferred percentages" derived from the 2010 Census reflect that same-sex couples account for .4 percent of all households in Idaho. Dkt. 30-2 at 16. Given these data, one may conclude reasonably that a minute fraction, presumably less than .2 percent of total households, of same-sex couples in Idaho have resident children under the age of 18.[5]

The distinguishing characteristics of opposite-sex and same-sex couples for

[5] The United States Census Bureau estimated "[a]bout 0.1 percent of all households in the United States in 2010 . . . [were] same-sex partner households with own children of the householder present." Dkt. 30-2 at 9. That percentage, if applied to Idaho, equals 5795 households. *Id.* at 10.

marriage purposes are, in short, the procreative capacity of the former and the statistically minute fraction of the latter, not the participants' sexual orientation. The Idaho Legislature in 1995, as well as the Idaho electorate in 2006, thus had a rational basis to conclude that targeting the very tangible legislative benefits of marriage to opposite-sex couples would further the State's interest in encouraging stable families for child-rearing purposes and that extending such benefits to same-sex couples was not warranted in light of the miniscule number of households affected and the corresponding *de minimis* likely impact on the public interest.[6]

2. Focusing Governmental Resources to Encourage Stable Biological Parents' Households. Key to resolution of plaintiffs' substantive due process and equal protection claims is a single clearly reasonable, if not uncontested, proposition: Children generally thrive best in intact family structures where their biological parents are married. A recent report from the Institute for American Values, National Marriage Project, stated:

> **Children are less likely to thrive in cohabiting households, compared to intact, married families.** On many social, educational, and psychological outcomes, children in cohabiting households do significantly worse than children in intact, married families, and about as poorly as children living in single-parent families. And when it comes to abuse, recent federal data indicate that children in cohabiting households are markedly more likely to be physically, sexually, and emotionally abused than children in both intact, married families and single-parent families. . . . Only in the economic domain do children in cohabiting households fare consistently better than children in single-parent families.

W. Bradford Wilson *et al.*, *Why Marriage Matters: Thirty Conclusions from Social Sciences* at 7 (3d ed. 2011) (Dkt. 30-6). Others have concluded that "[r]esearch findings linking family structure and parents' marital status with children's well-being are very consistent" and that "it is not simply the presence of two parents, . . . but the presence of

[6] Census Bureau data indicate a national increase in the "preferred estimate" of same-sex couples from .03 percent in the 2000 Census to .06 percent in the 2010 Census. Dkt. 30-2 at 15. Thus, although the number of same-sex couples roughly doubled between the 2000 and 2010 Census counts, it remained a miniscule portion of all family households generally and, as explained above, an even smaller portion of those households with children under 18.

two biological parents that seems to support children's development." Kristen Anderson Moore *et al.*, *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do About It?*, Child Research Brief at 1-2 (June 2002) (Dkt. 30-7). Even if some details of the proposition remain open for further analysis, its central premise is plainly plausible. *See* Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation*, 15 Future of Children No. 2 at 79 (Fall 2005) ("Amato") ("If cohabiting parents marry after the birth of a child, is the child at any greater risk than if the parents marry before having the child? Correspondingly, do children benefit when their cohabiting parents get married? To the extent that marriage increases union stability and binds fathers more strongly to their children, marriage among cohabiting parents may improve children's long-term well-being. Few studies, however, have addressed this issue.") (Dkt. 30-8).

Correlative to this core proposition is the keen interest that States have in encouraging marriage between opposite-sex partners. As Professor Amato observed, "[s]ince social science research shows so clearly the advantages enjoyed by children raised by continuously married parents, it is no wonder that policymakers and practitioners are interested in programs to strengthen marriage and increase the proportion of children who grow up in such families." Amato, 15 Future of Children No. 2 at 85 (Dkt. 30-8). He estimated, for example, that "if the share of adolescents living with two biological parents increased to its 1960 level, the share of adolescents repeating a grade would fall to 21 percent"—or approximately 750,000 less repeaters. *Id.* at 87, 88; *id.* at 90 ("interventions that increase the share of children growing up with two continuously married biological parents will have modest effects on the *percentage* of U.S. children experiencing various problems, but could have substantial effects on the *number* of children experiencing them"). Another set of researchers has concluded that "[r]educing nonmarital childbearing and promoting marriage among unmarried parents remain important goals of federal and state policies and programs designed to improve

the well-being of children and to reduce their reliance on public assistance." Elizabeth Wildsmith *et al.*, *Childbearing Outside of Marriage: Estimates and Trends in the United States*, Child Research Brief at 5 (Nov. 2011) (Dkt. 30-9).

A third study has concluded that "[r]esearch suggests that many of the social problems and disadvantages addressed by federal and state government programs occur more frequently among children born to and/or raised by single parents than among children whose parents get and stay married" and "leads to higher costs to taxpayers through higher spending on antipoverty programs and throughout the justice and educational systems, as well as losses to government coffers in foregone tax revenues." Benjamin Scafide, Principal Investigator, *The Taxpayer Costs of Divorce and Unwed Childbearing: First Ever Estimate for the Nation and All Fifty States* at 9 (2008) (Dkt. 30-10). The study conservatively estimated family fragmentation costs to be at least $112 billion each year for the nation as a whole. *Id.* at 5. Family fragmentation, in sum, not only imposes these very substantial fiscal burdens on the public fisc but also forces federal and state policymakers to make difficult, cost-based choices that may run counter to affected children's best interests. *See Bowen v. Gilliard*, 483 U.S. 587, 615 (1987) (Brennan, J., dissenting) ("[t]he Government's insistence that a child living with an AFDC mother relinquish its child support deeply intrudes on the father-child relationship, for child support is a crucial means of sustaining the bond between a child and its father outside the home").

3. Application of Rational Basis Standard to Article III, Section 28 and § 32-201. Marriage's relationship to fostering stable environments for childrearing by biological parents constitutes a rational basis for Idaho's determination to limit the availability of marital status to opposite-sex couples. *See Jackson*, 884 F. Supp. 2d at 1072 ("the legislature could rationally conclude that defining marriage as a union between a man and woman provides an inducement for opposite-sex couples to marry, thereby decreasing the percentage of children accidentally conceived outside of a stable,

long-term relationship"). Heterosexual couples possess the unique ability to create new life and, with that ability, the responsibility for raising the offspring of their conjugal relationship. Although same-sex partners may have a child in their household biologically attributable to one member, they cannot have a child attributable to both. Distinguishing between opposite and same-sex couples under this rationale accordingly relates not to their sexual orientation but to their procreative capacity. Idaho cannot be faulted for determining to select opposite-sex couples for marital status given its function as a gateway to various governmental benefits and an incentive for those couples to create long-lived familial environments where both biological parents reside and which account for a large percentage of such households.[7]

Same-sex couples, in contrast, approach a virtual statistical null set on the demographic scale—contributing as discussed earlier to likely less than .2 percent (.002) of households with children under 18. As explained above, the rational basis standard does not require a legislature to address social and economic issues—here providing incentives for family structures conducive to children's thriving—in the most

[7] The fact that not all opposite-sex couples may desire to have children or may be incapable of having them does not negate the reasonableness of Idaho's policy choice. Any inquiry into the issue of why two persons, other than minors, wish to marry or whether they intend to raise a family would be precluded by substantive due process-based privacy rights. *See, e.g.*, *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) ("[c]hoices about marriage, family life, and the upbringing of children 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") (citation omitted); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-640 (1974) ("[t]his Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment"). Predicating the distinction on broad biological distinctions rationally attempts to walk between Scylla—the constitutional privacy right—and Charybdis—the objective of encouraging stable families composed of fathers, mothers and their biological children. *See Dandridge v. Williams*, 397 U.S. 471, 485 (1970) ("In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality.") (internal quotations omitted).

comprehensive manner so long as the manner selected is reasonably calculated to achieve the desired end. *See Skinner*, 348 U.S. at 489 ("the reform may take one step at a time, addressing itself to the phase of the problem which seems the most acute to the legislative mind"). Here, it is "fairly debatable" that the *de minimis* presence of same-sex households with children does not warrant extending the marital status incentive to those couples. *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 190 (1938) ("[w]hen the action of a Legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom, and propriety are not for the determination of courts, but for the legislative body, on which rests the duty and responsibility of decision"). The incentive's purpose, again, is directed at encouraging the child's *biological* parents to form a permanent legal union.[8]

4. Application of Rational Basis Standard to § 32-209. The challenge to § 32-209 by four plaintiffs—Latta, Ehlers, and the Watsens—fails for identical reasons.[9] That section merely complements the definition of marriage in § 32-201 and, as such,

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[8] The district court in *Kitchen* rejected what the court characterized as the "responsible procreation" justification offered by the defendants for Utah's constitutional prohibition of same-sex marriages. 2013 WL 6697874, at *25. It reasoned that the defendants had "presented no evidence that the number of opposite-sex couples choosing to marry each other is likely to be affected in any way by the ability of same-sex to marry." *Id.* Even if one ignores the lack of any duty on the defendants' part to come forward with "evidence" of the hypothesized disincentive, the analysis above focuses not on any perceived impact on opposite-sex couples' acquiring marital status from denying such status to same-sex couples but on Idaho's desire to focus its resources where they will best advance the objective of creating stable households for biological parents and their offspring.

[9] Defendant Rich has no enforcement responsibility with respect to § 32-209 because any recognition of an out-of-state marriage arises by operation of law and not issuance of a marriage license under §§ 32-401 to -404. Because no effective relief can be entered against him with respect to Plaintiffs' claim predicated on that statute, he is entitled to its dismissal as against him regardless of whether he acts as a local government or state official with respect to administration of Idaho's marriage statutes. *E.g., Los Angeles County v. Humphries*, 131 S. Ct. 447, 452 (2010) (under 42 U.S.C. § 1983, a "municipality may be held liable when execution of a government's *policy or custom* . . . inflicts the injury") (internal quotation omitted); *Coalition to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1134 (9th Cir. 2012) (under *Ex parte Young*, 209 U.S. 123 (1908), "[t]he individual state official sued must have some connection with the enforcement of the act") (internal quotation omitted).

partakes of the same legitimate purpose identified above. As a threshold matter, these Plaintiffs neither challenge section 2 of DOMA, 28 U.S.C. § 1738C, nor otherwise claim that the Full Faith and Credit Clause, U.S. Const. Art. IV, § 1, requires recognition of their out-of-state marriage. They therefore stand in no different position than other same-sex couples desiring to acquire marital status in Idaho. Indeed, a contrary conclusion would lead to the anomalous result of those couples' being able to circumvent the limitation of marriage to opposite-sex couples by simply marrying in another State. That simple workaround, in turn, would undermine and potentially eviscerate the objective of focusing availability of marital status benefits to couples with *inter sese* procreative capacity. It would also eviscerate "the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next." *Windsor*, 133 S. Ct. at 2692; *see In re Duncan*, 83 Idaho 254, 259-60, 360 P.2d 987, 990 (1961) (States possess "the power to regulate the qualifications of the contracting parties and the proceedings essential to constitute a marriage"). The challenge to § 32-209, in short, rises or falls with the validity of § 32-201.

To the extent that the ruling in *Obergefell v. Wymoyslo*, No. 1:13-cv-501, 2013 WL 6726688 (S.D. Ohio Dec. 23, 2013), found unpersuasive the argument that legislators could conclude rationally "that children raised by heterosexual couples are better off than children raised by gay or lesbian couples" because "Ohio's marriage recognition bans do not prevent gay couples from having children" (*id.*, at *20), no such claim need be resolved here. The issue, once more, is whether Idaho is constitutionally prohibited from deciding to focus its governmental resources on incentivizing couples capable of conjugal procreation to form permanent legal relationships through the civil contract of marriage. Even if children reared in same-sex households thrive equally well to those in households with married biological parents, it remains reasonable for Idaho to use marital status as a mechanism to further the stability of the latter households; *i.e.*, if

same-sex household children in fact do thrive equally well *without* marriage, less need to incentivize those households' stability exists than in the opposite-sex context where the correlation of marital status to improved outcomes is plainly plausible.

IV.

CONCLUSION

The Court should grant defendant Rich's Rule 12(b)(6) motion and dismiss plaintiffs' claims for failure to state a claim upon which relief may be granted.

DATED this 9th day of January 2014.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: */s/*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of January 2014, I electronically filed the foregoing Memorandum in Support of Defendant Christopher Rich's Motion to Dismiss with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following Persons:

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