No. _____

In the Supreme Court of the United States

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COALITION FOR THE PROTECTION OF MARRIAGE,
Petitioner,

v.

BEVERLY SEVCIK, et al.,
Respondents.

_____

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?

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?

3) Does substantial evidence of panel-packing, that is, of assigning a case to a three-judge panel of particular judges with the intent of influencing the outcome, require a federal circuit court to vacate the panel's decision, and require a rehearing, *en banc*?

PARTIES TO THE PROCEEDING

The Petitioner is Coalition for the Protection of Marriage. The Petitioner was the Intervenor-Defendant in the District Court and an Appellee in the Court of Appeals, and would be the Appellant before this Court.

Respondents Beverly Sevcik, Mary Barnovich, Antioco Carrillo, Theodore Small, Karen Goody, Karen Vibe, Fletcher Whitwell, Greg Flamer, Mikyla Miller, Katrina Miller, Adele Terranova, Tara Newberry, Caren Cafferata-Jenkins, Farrell Cafferata-Jenkins, Megan Lanz, and Sara Geiger were the Plaintiffs in the District Court, the Appellants in the Court of Appeals, and would be the Appellees before this Court ("Plaintiff Respondents").

Respondents Brian Sandoval, Governor of Nevada; Alan Glover, Clerk-Recorder of Carson City, Nevada; Diana Alba, Clerk of Clark County, Nevada; and Amy Harvey, Clerk of Washoe County, Nevada, were Defendants in the District Court and Appellees in the Court of Appeals ("Government Respondents").

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner Coalition for the Protection of Marriage is a Nevada non-profit corporation that has no parent corporation and no stockholders.

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Petitioner Coalition for the Protection of Marriage, Intervenor-Defendant in the District Court and an Appellee in the Court of Appeals, respectfully petitions for a writ of certiorari following an appeal to the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The November 26, 2012 opinion of the United States District Court for the District of Nevada, which granted final judgment in favor of the Petitioner and the Government Respondents and denied the Plaintiff Respondents' motion for summary judgment is published at *Sevcik v. Sandoval,* 911 F. Supp. 2d 996, (D. Nev. 2012). Appendix D.

The October 7, 2014 opinion of the United States Court of Appeals for the Ninth Circuit which reversed the District Court's final judgment and ruled in favor of Appellants in the Circuit Court proceedings and Plaintiff's Respondents herein, is published at *Latta v. Otter,* 771 F.3d 456 (9th Cir. 2014). Appendix A.

The Ninth Circuit's January 9, 2015 Order denying Petitioner's petition for rehearing *en banc*, together with the dissenting opinion of Judge O'Scannlain, joined by Judge Rawlinson and Judge Bea, is published at *Latta v. Otter*, 779 F.3d 902, (9th Cir. 2015). Appendix G.

JURISDICTION

The jurisdiction of the District Court was invoked under 28 U.S.C. § 1331 (general federal question jurisdiction) and 28 U.S.C. § 1343 (civil rights). The final judgment of the District Court was entered on December 3, 2012. The Plaintiff Respondents filed a Notice of Appeal on December 3, 2012. The case is docketed as No. 12-17668 (consolidated with two cases from Idaho, docket numbers 14-35420 and 14-35421) in the Court of Appeals for the Ninth Circuit, which has jurisdiction pursuant to 28 U.S.C. § 1291. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions include the following:

The Equal Protection Clause of the Fourteenth Amendment provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The Nevada Constitution, article 1, section 21, provides: "Only a marriage between a male and female person shall be recognized and given effect in this state."

Nevada Revised Statutes 122.020(1) provides: "Except as otherwise provided in this section, a male and a female person, at least 18 years of age, not nearer of kin than second cousins or cousins of the

half blood, and not having a husband or wife living, may be joined in marriage."

STATEMENT OF THE CASE

In the successive general elections of 2000 and 2002, Nevada's voters overwhelmingly approved an initiative that amended Nevada's constitution to add its article 1, section 21: "Only a marriage between a male and female person shall be recognized and given effect in this state" ("Marriage Amendment"). The Marriage Amendment gave state constitutional protection to the man-woman meaning that had been at the core of Nevada's marriage institution and of its marriage statutes since territorial days. Continuously from before statehood, the statutory definition has been the union of a man and a woman, a requirement most recently codified at Nev. Rev. Stat. § 122.020(1): "Except as otherwise provided in this section, a male and a female person . . . may be joined in marriage" ("Statute").

Plaintiff Respondents, a group of eight same-sex couples, initiated this civil action under 42 U.S.C. § 1983, claiming that the Marriage Amendment and Statute deprive them of equal protection of the laws in violation of the Fourteenth Amendment[1] and seeking by force of law to change the meaning of marriage from the union of a man and a woman to the union of any two persons so they can either be legally married in Nevada or have their foreign marriages legally recognized there. The

[1] The Complaint expressly bases its claims only on the Equal Protection Clause of the Fourteenth Amendment and makes no claim based on the Due Process Clause of that Amendment.

Complaint was filed April 10, 2012. Dkt. No. 1, *Sevcik et al. v. Sandoval et al.*, Case No. 2:12-CV-00578-RCJ (PAL).

As the proponent of the ballot initiative leading to the Marriage Amendment, the Petitioner timely moved to intervene as a party defendant. Dkt. No. 30. The District Court granted the Petitioner's motion to intervene, after Plaintiff Respondents withdrew their Opposition. Dkt. No. 67. *Id.*

The Petitioner, the Plaintiff Respondents, Governor Sandoval, and Clerk-Recorder Glover filed cross-motions for summary judgment. Dkt. Nos. 72–73, 75–84 (Petitioner); Dkt. Nos. 86–87 (Plaintiff Respondents); Dkt. No. 74 (Clerk-Recorder Glover); Dkt. No. 85 (Governor Sandoval). Governor Sandoval and Clerk-Recorder Glover also filed motions to dismiss. Dkt. Nos. 32–33.

The Plaintiff Respondents argued that (i) the Marriage Amendment and Statute constituted both sex discrimination and sexual orientation discrimination; (ii) the District Court should subject their sexual discrimination claim to heightened scrutiny; (iii) even if the District court were to engage in rational-basis review, the Marriage Amendment and Statute were not rationally related to any legitimate governmental purpose; and (iv) Nevada's 2009 enactment of its Domestic Partnership Act—which gives participating same-sex couples most of the rights, benefits, and obligations of marriage—undercut the State's reasons for the Marriage Amendment and Statute. The Plaintiff Respondents relied on the testimony (in

affidavit form) of six expert witnesses, including Prof. Nancy Cott of Harvard University and Prof. Michael Lamb of Cambridge University, and on some 548 total pages of factual materials filed with the District Court. That testimony and those materials encompassed both the standard-of-review issue and the merits.

The Petitioner argued that (i) although this Court's opinion in *Baker v. Nelson*, 409 U.S. 810 (1972), precludes any claim in the District Court that same-sex couples have a right to marry under the Fourteenth Amendment's Equal Protection Clause, for prudential reasons the District Court should also proceed to rule against the Plaintiff Respondents on the merits; (ii) the sex discrimination claim is without merit because the Marriage Amendment and Statute treat men and women equally; (iii) both binding Ninth Circuit precedent and sound analysis require application of rational-basis review to the sexual orientation discrimination claim; but (iv) in any event, perpetuation of man-woman marriage as a social institution materially advances compelling societal and hence governmental interests and does so in the only way possible. In making these arguments, the Petitioner relied on some 1,480 total pages of factual materials filed with the District Court and on numerous additional portions of the relevant scholarly literature. Those materials and portions of the scholarly literature encompassed both the standard-of-review issue and the merits.

Nevada Attorney General Catherine Cortez Masto, on behalf of Governor Sandoval, raised only *Baker v. Nelson* and a "preservation of tradition"

reason in support of the Marriage Amendment and Statute. Recorder-Clerk Glover, in addition to raising *Baker v. Nelson*, argued that the Marriage Amendment (i) "is rationally related to a legitimate interest in protecting Nevada's long-standing marriage public policy" against "a radically different marriage public policy of another state" in the context of "Full Faith and Credit Clause claims"; (ii) "preserv[es] and protect[s] the heritage of traditional man-woman marriage"; (iii) advances "the best interest of children to be raised by the biological parent of each sex within the traditional institution of marriage"; and (iv) supports marriage's role as "an inducement to man-woman couples to engage in responsible procreation." Dkt. No. 97.

After briefing and oral argument on the motions to dismiss, and after response briefs, Dkt. Nos. 95-98, but no oral argument on the cross-motions for summary judgment, the District Court took all the motions under advisement.

In an Order dated November 26, 2012, but entered on November 29, 2012, the District Court granted the summary judgment motions of the Petitioner and the two moving Government Respondents and denied the Plaintiff Respondents' summary judgment motion. Appendix A hereto. *Sevcik v. Sandoval*, 911 F.Supp. 2d 996 (D. Nev. 2012). The District Court granted the motions to dismiss in part and denied them in part: "The Complaint is dismissed as precluded by *Baker v. Nelson* with respect to the traditional equal protection challenge, but the Complaint is not dismissed with respect to the challenge under *Romer v. Evans*." *Id.* at 1021. The District Court further

ordered that the Clerk enter judgment and close the case. *Id.*

The District Court held that "the present equal protection claim is precluded by *Baker [v. Nelson]* insofar as the claim does not rely on the *Romer* line of cases . . . ." *Id.* at 1003. The District Court then said: "Although the Court finds that *Baker* precludes a large part of the present challenge, the Court will conduct a full equal protection analysis so that the Court of Appeals need not remand for further proceedings should it rule that *Baker* does not control or does not control as broadly as the Court finds." *Id.*

The District Court rejected the claim that the Plaintiff's causes of action should be reviewed as involving gender discrimination (*id.* at 1005), and instead reviewed the same as drawing a distinction based on sexual-orientation (*id.*), devoting the majority of its equal protection analysis to the level of judicial scrutiny applicable to claims of sexual orientation discrimination. Based thereon, the court applied rational-basis review (*id.* at 1014), including pursuant to the then applicable Ninth Circuit precedents (*id.* at 1006-07).

Noting that difficult problems arise when the text of a constitutional provision provides vague standards, such as "equal protection of the laws," because judges and laymen alike often disagree whether a particular law contravenes the vaguer prohibitions, the District court stated:

> Where a court considers invalidating a democratically adopted law because of a conflict with one of these vaguer clauses, it

> must tread lightly, lest its rulings appear to the People not to constitute a fair and reasonable enforcement of constitutional restrictions to which they or their ancestors have previously democratically agreed, but rather a usurpation of democratic governance via judicial whim …. Where there is no clear prohibition of discrimination according to a particular category, and where the group complaining of discrimination has meaningful political power to protect its own interests, it is inappropriate for a court to remove the issue from legislative control.

Id. at 1012.

The District Court held that preserving the traditional institution of marriage was a state interest adequate to sustain the Marriage Amendment and Statute against constitutional attack. The District Court relied particularly on the following statement from Justice O'Connor's concurring opinion in *Lawrence v. Texas*, 539 U.S. 558, 585: "[O]ther reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group." The District Court went on to state: "The *Lawrence* Court appears to have strongly implied that in an appropriate case, such as the present one, the preservation of the traditional institution of marriage should be considered a legitimate state interest rationally related to prohibiting same-sex marriage." *Id.* at 1015.

The District Court rejected the Plaintiff Respondents' argument that Nevada's Domestic

Partnership Act, enacted in 2009, somehow undercut the rational bases for man-woman marriage. That argument "would permit a plaintiff to show an equal protection violation by the very fact that a state had recently *increased* his rights in relevant respects, which is not the law." *Id.* at 1017 (emphasis in original).

Finally, the District Court rejected the argument that *Romer v. Evans*, 517 U.S. 620 (1996), required a ruling of unconstitutionality. The ballot measure invalidated in *Romer* had no legitimate (and hence no rational) basis; Nevada's laws sustaining man-woman marriage have such a basis. The District Court ruled that those laws withstand constitutional challenge, and summary judgment dismissal of the Plaintiff-Respondent's claims was appropriate:

> [b]ecause the maintenance of the traditional institution of civil marriage as between one man and one woman is a legitimate state interest, because the exclusion of same-sex couples from the institution of civil marriage is rationally related to furthering that interest, and because the challenged laws neither withdraw any existing rights nor effect a broad change in the legal status or protections of homosexuals based upon pure animus ….

Id. at 1021.

The Plaintiff Respondents filed timely notice of appeal to the United States Circuit Court for the Ninth Circuit. Appendix F. The Court of Appeals, with jurisdiction pursuant to 28 U.S.C. § 1291, has now reversed the District Court.

The Ninth Circuit Court of Appeals ruled in its October 7, 2014 decision (issued by a Ninth Circuit panel consisting of Judges Reinhardt, Gould, and Berzon) (Appendix A hereto; the "Decision") that Nevada's constitutional and statutory provisions preserving marriage as the union of a man and a woman ("Nevada's Marriage Laws") are unconstitutional. In effect, the Decision requires that the legal meaning of marriage must be revised throughout the States within the Ninth Circuit, from a union of a male husband with a female wife, to the union of any two otherwise qualifying persons regardless of gender. Moreover, the Decision held that any laws which create distinctions based on sexual orientation, are subject to "heightened scrutiny" as per the Ninth Circuit's earlier decision in *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014). Thus, in the Ninth Circuit, a heightened scrutiny analysis must now apply to all claims of sexual orientation discrimination, not just to claims falling under the *Moreno-Cleburne-Romer-Windsor*[2] animus doctrine.

By overturning the marriage laws of Nevada and Idaho, the Ninth Circuit's Decision conflicted with earlier decisions of the United States Supreme Court, *Baker v. Nelson*, 409 U.S. 810 (1972), and the Eighth Circuit, *Citizens for Equal Prot. v. Bruning*,

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[2] *See U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *Romer v. Evans*, 517 U.S. 620 (1995); *United States v. Windsor*, 133 S. Ct. 2675 (2013).

455 F.3d 859 (8th Cir. 2006).[3] The Ninth Circuit's opinion also now conflicts with the Sixth Circuit's decision in *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014)(rejecting claims that rights to due process, equal protection, and travel, under the U.S. Constitution, require recognition of same-sex marriages in Ohio, Kentucky, and Tennessee).

The constitutionality of man-woman marriage is a question of historic importance. Deciding that question based on a legal standard never endorsed by the Supreme Court for claims of sexual orientation discrimination and at odds with the rational-basis standard applied by virtually every other circuit in the country was plainly erroneous.

Following issuance of the Decision, Petitioner sought *en banc* review of the Decision (Dkt. 274-1), including on the basis of striking statistical improbabilities and anomalies with respect to certain Ninth Circuit Judges having been involved in a far higher percentage of cases involving sexual-orientation rights claims, than could reasonably be expected or anticipated from a truly neutral assignment process (DKT 274-1 at pp. 15-21). This statistical argument was supported by affidavits (Dkt. 274-2 at pp. 1-5, Appendix H hereto at pp.

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[3] The Eighth Circuit's *Bruning* decision in turn conflicts with the Tenth Circuit, *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014), the Fourth Circuit, *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), and the Seventh Circuit, *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014). The Supreme Court denied certiorari in those recent cases on October 6, 2014. *Bogan v. Baskin*, 135 S. Ct. 316 (2014).

185a–190a); and by a review of prior "Relevant Cases" as described therein (Table at Dkt. No. 274-2, at pp. 6-10)) and by a written expert analysis (Dkt-274-2 at pp. 21-28; Appendix H hereto at pp 191a-202a). This Request for *en banc* rehearing was filed on October 13, 2014, and denied on January 9, 2015 (Appendix G).

REASONS FOR GRANTING THE WRIT

The fundamental marriage issue is whether federal constitutional equality norms require that the legal definition of marriage be changed from the union of a man and a woman to the union of any two persons so as to enable otherwise eligible same-sex couples to marry. That fundamental issue may be the most nationally important and consequential issue to come before this Court in many years.

I. After decades of intense judicial and democratic engagement with the question of the public meaning of marriage, the Nation now looks to this Court to answer the federal constitutional question, of whether the United States Constitution requires the states to radically redefine marriage.

The year 2015 is the twenty-third year of an intense national engagement with the question of whether a core public meaning of the marriage institution should continue to be the union of a man and a woman ("man-woman marriage") or, by force of law, should be changed to the union of two persons regardless of gender ("genderless marriage"). During that time, various state appellate court decisions and federal, district and circuit court

decisions have addressed some aspect of the question. The voters of a large majority of states have cast their ballots on measures taking a position one way or the other on this question. Nearly every state legislature and the Congress have, in one way or other, engaged the question. The platforms of both of the two major national political parties have included planks setting forth a position.

In the midst of all this judicial and extra-judicial engagement with the legal meaning of marriage, a crucial question pressing itself upon the minds of the people is whether federal constitutional equality norms require marriage's redefinition. For the authoritative answer to that question, the people of the Nation now look to this Court.

II. The fundamental marriage issue is a question of the highest national importance and consequence, and the question is ripe for review in this case.

The intensity of the engagement with the legal meaning of marriage, the depth of the people's concern, and the nationwide nature of both speaks volumes about the issue's high national importance.

This case's record makes a powerful demonstration of this issue's national importance. That importance is centered in certain social institutional realities regarding contemporary American marriage. The following explanation of those social realities in this Petition demonstrates the high national importance of the fundamental marriage issue, and the powerful societal interests in perpetuating the man-woman marriage institution.

As a vital and fundamental social institution, marriage consists of a web of interrelated public meanings, including the core meaning of the union of a man and a woman.[4] Institutionalized meanings, including the man-woman meaning at the core of marriage, teach, form, and transform individuals, providing them with statuses, identities, perceptions, aspirations, and projects and guiding their conduct. By forming and transforming individuals in these ways, institutionalized meanings provide the social benefits ("goods") that society needs and justify society's expenditure of resources to perpetuate the institution.

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[4] Most do not think about marriage as the social institution that it is, although virtually everyone has substantial knowledge about some aspects of marriage from personal life experiences. This is understandable because, although important social institutions like marriage affect individuals and societies greatly, we are largely unconscious of them.

> We live in a sea of human institutional facts. Much of this is invisible to us. Just as it is hard for the fish to see the water in which they swim, so it is hard for us to see the institutionality in which we swim. Institutional facts are without exception constituted by language, but the functioning of language is especially hard to see. . . . [W]e are not conscious of the role of language in constituting social reality.

John R. Searle, *Making the Social World: The Structure of Human Civilization* 90 (2010). Nevertheless, scholars have long addressed questions like what constitutes institutions, what sustains or changes them, what their influence is on human behavior, what good they do, why societies even have them, etc. In demonstrating the rationality and importance of preserving the social institutional reality of man-woman marriage and the valuable social benefits that flow from it, this case's record draws from a rich body of academic literature on social institutions.

The institutionalized man-woman meaning provides materially and even uniquely a number of valuable social goods. The man-woman marriage institution is:

- the only source of the personally and socially valuable statuses and identities of *husband* and *wife*;
- the social predicate indispensable in advancing and making meaningful the child's bonding interest, that is, the child's interest in knowing and being raised by her own mother and father, with exceptions made only in the best interests of the child, not for the gratification of any adult desires;
- the social predicate indispensable in advancing the interests of natural parents and of society in defining and constructing parenthood on the basis of the parent-child biological bond;
- the real-world foundation of the natural family as a buffer between family members and the state and as the situs of relational rights on which the state cannot impinge because it is neither the creator nor the dispenser of those rights;
- humankind's best means for maximizing private welfare to the vast majority of children (those conceived by passionate, heterosexual coupling);
- the irreplaceable foundation of the optimal child-rearing mode;
- an essential bulwark protecting the religious liberties of large portions of the Nation's churches and people of faith;

Because of the role of language in creating and sustaining social institutions, society cannot have at the same time two institutions denominated *marriage*, one with the core meaning of the union of a man and a woman and one with the core meaning of the union of any two persons (any more than society can have monogamy as a core, institutionalized meaning if it also allows polygamy).

Although interacting with and influenced by other institutions such as law, property, and religion, marriage in our society is a distinct, unitary social institution and does not have two separate, independent existences, one "civil" and one "religious."

In material ways, genderless marriage will be an institution radically different from the man-woman marriage institution.[5] This radical difference between the two possible marriage institutions could not be otherwise: fundamentally different meanings, when magnified by institutional power and influence, produce divergent social identities, aspirations, projects, or ways of behaving, and thus different social goods. To say otherwise would be to ignore the undisputed effects that social institutions have in the formation and transformation of individuals.[6] The reality is that

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[5] This does not mean that there is no overlap in formative instruction between the two possible marriage institutions; the significance is in the divergence. This significant divergence may be seen in the nature of the two institutions' respective social goods.

[6] This case's record shows that well-informed observers of marriage—regardless of their sexual, political, or theoretical

changing the meaning of marriage to that of "any two persons" will transform the institution profoundly, if not immediately then certainly over time as the new meaning is mandated in texts, in schools, and in many other parts of the public square and voluntarily published by the media and other institutions, with society, especially its children, thereby losing the ability to discern the meanings of the old institution.

The law did not create the man-woman marriage institution. However, the law, especially constitutional law, has the power to suppress the now widely shared man-woman meaning and, by mandating a genderless marriage regime, will over time indeed suppress that meaning by displacing it with the radically different any-two-persons meaning.[7] By suppressing and displacing the man-woman meaning in that way, the law will cause the diminution over time and then the loss of the valuable social goods materially and even uniquely provided by that now-institutionalized meaning.

A genderless marriage regime is and will be socially hostile and politically adverse to:

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orientations—uniformly acknowledge the magnitude of the differences between the two possible institutions of marriage.

[7] The Plaintiff Respondents seek to use the law's power to suppress the man-woman meaning by replacing it with the any-two-persons meaning. That is the only way that they or any same-sex couple can "marry" in any intelligible sense. After redefinition, the old meaning would be deemed "unconstitutional" and the mandate imposing the new meaning would be seen as vindicating some important "right." In those circumstances, suppression would be a legal imperative of a very high order.

- the child's bonding interest;
- natural parenthood as the foundation for the construction of parenthood in our society;
- the concept that relational rights within the natural family are not created, dispensed, and withdrawn at the will of the state;
- the personally and socially valuable statuses and identities of *husband* and *wife*, each of which "is a distinct mode of association and commitment that carries centuries and volumes of social and personal meaning"[8]; and
- the religious liberties of large portions of the Nation's churches and people of faith.

Even though this summary of the relevant social institutional realities of contemporary American marriage is necessarily compressed,[9] it serves to illuminate the profound importance and the broad and deep social consequences of this Court's resolution of the fundamental marriage issue. Regarding consequences: First, if federal constitutional law were to suppress the man-woman

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[8] Ronald Dworkin, *Is Democracy Possible Here?* 86 (2006).

[9] In making the social institutional argument for man-woman marriage, this case's record addresses those realities more fully. For immediate access to a full treatment of that argument and those realities, *see*, *e.g.*, Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision,* 1 Duke J. Const. L. & Pub. Pol'y 1 (2006); Monte Neil Stewart, *Marriage Facts*, 31 Harv. J.L. & Pub. Pol'y 313 (2008); and Monte Neil Stewart, Jacob Briggs & Julie Slater, *Marriage, Fundamental Premises, and the California, Connecticut, and Iowa Supreme Courts*, 2012 B.Y.U.L. Rev. 193.

meaning at the core of the marriage institution (as the law has the power to do), society would see first the diminution over time and then the loss of the valuable social goods that meaning uniquely provides. Those valuable social goods have no source in our society other than the man-woman marriage institution, and a genderless marriage regime will not produce them; indeed, it will be inimical to them. Second, at the same time, a constitutionally mandated genderless marriage regime will effectively advance a particular conception of the moral equality of forms of sexuality, a conception grounded in the influential "comprehensive doctrines"[10] of many Americans, particularly among the Nation's elites, but one contested by the comprehensive doctrines of many other Americans.

In this case, the Petitioner examined and developed in depth all the social institutional realities that demonstrate plainly society's vital and powerful interests in preserving and perpetuating the man-woman meaning at the core of the marriage institution.

Because of that deep examination and development, the record in this case provides a strong and comprehensive basis for this Court's

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[10] *See* John Rawls, *Political Liberalism* 13 (1995); *see also* John Rawls, *The Idea of Public Reason Revisited*, 64 Chi. L. Rev. 765 (1997); Matthew B. O'Brien, *Why Liberal Neutrality Prohibits Same-Sex Marriage: Rawls, Political Liberalism, and the Family*, 1 Brit. J. Amer. L. Studies, issue 2 (summer/fall 2012), available at http://villanova.academia.edu/MatthewOBrien/Papers/1536325/Why_Liberal_Neutrality_Prohibits_Same-Sex_Marriage_Rawls_Political_Liberalism_and_the_Family.

resolution of the fundamental marriage issue. Nor is that record one-sided. The legal team representing the plaintiffs is as strong as any legal team advocating for genderless marriage in any of the marriage cases; the plaintiffs' legal team in this case met the highest standards of zeal and competence in putting into the record materials and arguments supportive of their side in this vastly important legal contest (including their argument on the level of judicial scrutiny).

III. The Ninth Circuit's Decision Misapplied this Court's Ruling in *Windsor*, Necessitating this Court's Action to Now Clarify *Windsor*.

The Ninth Circuit's decision relied in part on this Court's ruling in *United States v. Windsor*, 133 S. Ct. 2675 (2013), but misapprehended that case.

To correctly understand *Windsor*, and the reason that this Court found the line-drawing under the federal Defense of Marriage Act ("DOMA") examined therein to be constitutionally offensive, it is of paramount importance to correctly identify the classes and lines created by DOMA. The line that DOMA drew was between man-woman couples validly married under the laws of a State and same-sex couples also validly married under those same laws. Although when DOMA was passed in 1996 no State authorized same-sex couples to marry, it was clearly understood that, if and when that happened, DOMA would operate to create those two classes and to treat the married same-sex couples as not married for any federal purpose. As to the resulting harms to those couples, *Windsor* is fairly read as identifying two categories: economic and dignitary.

The relevant and extraordinary feature of DOMA's line-drawing was that the federal government, with only very minor and specific exceptions, had never before made a definition of marriage but rather had always deferred to the States; if a State said a couple was married, the federal government treated the couple as married. *Windsor* deemed this highly "unusual" feature offensive in two closely related ways. First, it impinged on the authority of the States to regulate and define domestic relations, principally marriage, a power that under our federalism has always been pre-eminently, indeed, virtually exclusively, the prerogative of the States. Second, the line-drawing coupled with the "unusual" departure from deference to the States' traditional authority over marriage suggested that DOMA was targeting same-sex couples for adverse treatment more than it was advancing the various fiscal and uniformity interests proffered in the statute's defense.

The States' reserved power to regulate marriage, as an aspect of our federalism, without question played a central role in *Windsor's* holding that DOMA is unconstitutional. *Windsor* explained that "'[t]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce.'" *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013) (quoting *Haddock v. Haddock*, 201 U.S. 562, 575 (1906)) (emphasis added). *Windsor* reaffirmed that "'when the Constitution was adopted the common understanding was that the domestic

relations of husband and wife and parent and child were matters reserved to the States.'" *Id.* at 2691 (quoting *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383–84 (1930)) (emphasis added). *Windsor* emphasized the States' "historic and essential authority to define the marital relation," *id.* at 2692, on the understanding that "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities[,]'" *id.* at 2691 (quoting *Williams v. North Carolina*, 317 U.S. 287, 298 (1942)). And the Court noted that "[c]onsistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations." *Id.* Specifically, this Court held that New York's recognition of same-sex marriage was "without doubt a proper exercise of its sovereign authority within our federal system, all in the way that the Framers of the Constitution intended." *Id.* at 2692. Congress went astray, the Court held, by "interfer[ing] with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power." *Id.* at 2693. Given this reasoning, it is "undeniable" that the Supreme Court's judgment in *Windsor* "is based on federalism." *Id.* at 2697 (Roberts, C.J., dissenting).

Windsor's thorough discussion of both DOMA's infringement on the States' sovereignty over marriage and the economic and dignitary harms resulting from that infringement illuminate the decision's holdings. To the extent that the Court's

decision to strike down DOMA is based on Fifth Amendment substantive due process jurisprudence, its holding is that a couple (probably any couple, whether man-woman or same-sex) bears a right (with the federal government bearing the corresponding duty) to federal recognition of the privileged marriage status conferred on the couple by a State in the exercise of its sovereign power in the area of domestic relations. To the extent that the Court's decision to strike down DOMA is based on the equal protection component of the Fifth Amendment's due process clause, the holding is that the governmental fiscal and uniformity interests supposedly advanced by the creation of the disfavored class are not sufficiently good reasons for that creation in light of two realities: one, that creation amounted to an extraordinary, unprecedented, and affirmative federal infringement on the States' sovereign power over marriage; two, that infringement suggested a targeting of the disfavored class more than the advancement of legitimate interests.

The Ninth Circuit ignored these central aspects of *Windsor*, and made the same error Congress committed in enacting DOMA—by creating a "federal intrusion on state power" with its resulting "disrupt[ion] [to] the federal balance." *Id.* at 2692. *Windsor* affirms that Nevada's laws defining marriage deserve this Court's respect and deference, no less than New York's. Like New York, Nevada adopted its definition of marriage "[a]fter a statewide deliberative process that enabled its citizens to discuss and weigh arguments for and against same sex marriage," and its laws reflect "the

community's considered perspective on the historical roots of the institution of marriage." *Id.* at 2689, 2692–93. That Nevada chose to keep and preserve the man-woman definition of marriage, while New York decided to adopt a genderless marriage regime, does not detract from the validity of Nevada's choice. *Windsor* reaffirms "the long-established precept that the incidents, benefits, and obligations of marriage ... may vary, subject to constitutional guarantees, from one State to the next." *Id.* at 2692. Singling out Nevada's marriage laws for less respect or deference than the Supreme Court gave New York's laws would contradict that Court's endorsement of nationwide diversity on the States' consideration of genderless marriage and violate the "'fundamental principle of equal sovereignty' among the States." *Shelby Cnty., Alabama v. Holder*, 133 S. Ct. 2612, 2623 (2013) (quoting *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

In brief, fundamental principles of federalism reserve for Nevada the sovereign authority to define and regulate marriage. A judicial declaration nullifying Nevada's definition of marriage would disrupt the federal balance, just as DOMA did, by interjecting federal power into an area of law recognized as uniquely belonging to State authority.

Windsor also examined and ruled in favor of the claimants with respect to a disparate treatment claim, under the Constitution, as to marriages which were recognized in certain states, but not by the federal government, under DOMA. However, this Court expressly noted that its opinion in that regard "and its holding are confined to those lawful marriages." 133 S. Ct. at 2696. Thus, that portion of

the *Windsor* decision, while requiring the federal government to recognize as marriages relationships which were so recognized by any state, did not reach the ultimate issue in dispute in this matter, of whether a state is *required* to define marriage as the union of any two persons otherwise qualified.

This Court should therefore take the opportunity to do so now, and to rule on that subject at this time.

IV. This Court Should Issue a Writ of Certiorari in Order to Address the Third Question Presented Herein.

On October 13, 2014, the Petitioner submitted its petition for an *en banc* rehearing of the Ninth Circuit's decision overruling the district court. Dkt. 274-1 That petition was based on both substantive and procedural grounds.

Substantive Issues. The substantive grounds for the rehearing petition noted the importance of the question at issue and the need for full consideration by the entire court, sitting *en banc*. (Oxford's prominent liberal legal philosopher Joseph Raz accurately observed that "there can be no doubt that the recognition of gay marriage will effect as great a transformation in the nature of marriage as that from polygamous to monogamous or from arranged to unarranged marriage.")

Of paramount concern was the diminution of what the literature calls the child's bonding right, which flows from the social message, expectation, ideal, and promise that, to the greatest extent possible, a child will know and be raised by her own

mother and father, whose union brought her into this world and whose family and biological heritage are central and vital to the child's identity. The man-woman meaning at the core of the marriage institution, reinforced by the law, has always sustained, valorized, and made normative the child's bonding right. With its regime of "Parent A" and "Parent B," the genderless marriage institution, reinforced by the law, does just the opposite. Genderless marriage's core institutionalized meaning of "the union of two otherwise qualified persons without regard to gender" teaches everyone—married and unmarried, gay and straight, men and women, and all the children—that a child knowing and being reared by her mother and father is neither socially preferred nor officially encouraged.

Nevada has a compelling and wholly legitimate interest in minimizing the social ills clearly attendant upon a failure of the child's bonding right, that is, attendant upon an increase in the level of fatherlessness and motherlessness in the lives of the vast majority of children. Those adverse consequences and related compelling societal interests are exactly why this federal constitutional contest between man-woman marriage and genderless marriage is of unmatched importance.

Moreover, the Decision reached by the panel distorted, evaded, and elided the Coalition's defense of man-woman marriage, in a characterization of that defense which did not amount to even a bad caricature. The Decision "disguised the difficulties" presented by that defense, and attempted to "win the game by sweeping all the chessmen off the table."

Learned Hand, Mr. Justice Cardozo, 52 Harv. L. Rev. 361, 362 (1939). What an eminent scholar said of Judge Posner's opinion in the Seventh Circuit's marriage case applies fully to the Ninth Circuit Decision: "[T]he argument that Posner is said to have refuted remains compelling. His judgment is one long attempt to hide from that argument and to conceal it from his readers. In its refusal to engage the opposing argument, Posner's opinion disgraces the federal judiciary." John Finnis, *The Profound Injustice of Judge Posner on Marriage,* Public Discourse (October 9, 2014), http://www.thepublicdiscourse.com/2014/10/ 13896/. Other procedural grounds set forth in the rehearing petition discussed the disparity now existing between the circuits with respect to the level of scrutiny applicable to claims allegedly arising out of disparate treatment based on sexual orientation, created by the Ninth Circuit's abandonment of rational basis review, still upheld in most circuits.

Procedural grounds. The procedural grounds in favor of the Petition for Rehearing forms the basis for the third question presented in this petition: "Does substantial evidence of panel-packing, that is, of assigning a case to a three-judge panel of particular judges with the intent of influencing the outcome, require a federal circuit court to vacate the panel's decision and allow for a rehearing" The appearance is strong and inescapable that the assignment of this case to the three-judge panel which heard the same was not done through a neutral process but rather was done in order to influence the outcome in favor of the plaintiffs.

All circuits, including the Ninth, are committed to a neutral process to match judges and cases, that is, a process that precludes the assignment of particular judges to particular cases with an intent to thereby influence the outcome—what is sometimes called "panel packing." *See, e.g.,* J. Robert Brown, Jr. & Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals,* 78 Tex. L. Rev. 1037 (2000) ("Neutral Assignment").

The virtue of a neutral process is self-evident, as is the injury to the justice system when there are deviations from it.

The random assignment of cases, and the random reassignment in the event of disqualification, has the obvious, commonsensical and beneficial purpose of maintaining the public's confidence in the integrity of the judiciary. This purpose is defeated when cases or motions are assigned, or reassigned, to judges who are handpicked to decide the particular case or motion in question. A system of random assignment is purely objective and is not open to the criticism that business is being assigned to particular judges in accordance with any particular agenda.

See, *Grutter v. Bollinger*, 16 F.Supp.2d 797, 802 (E.D. Mich. 1998); see also Neutral Assignment, 78 Tex. L. Rev. at 1066.

Serious deviations from a neutral process do occur. Perhaps the best known instance occurred in the "old" Fifth Circuit when key actors in that court engaged in panel packing of both circuit panels and three-judge district courts to assure a particular outcome in civil rights cases. See Neutral

Assignment, 78 Tex. L. Rev. at 1044–65; Todd C. Peppers et. al., *Random Chance or Loaded Dice: The Politics of Judicial Designation,* 10 U. N.H. L. Rev. 69, 69–71 (2012). The use of statistics helped uncover that deviation. See Neutral Assignment, 78 Tex. L. Rev. at 1050–64.

From January 1, 2010, to October 13, 2014, the Ninth Circuit had assigned to merits panels eleven cases involving the intersection of federal constitutional rights and sexual orientation law (the "Relevant Cases"), as were listed and described in a table included among the exhibits to the Petition (Dkt. No. 274-2 at 6-10). Judge Berzon was on five of those panels. Dkt. No. 274-2 at p. 6. Judge Reinhardt had the next highest number, with four panel assignments. Id. With two, Judges Schroeder, Thomas, and Alarcón are the only other judges with more than one assignment. Id. Seventeen judges, including District Judge Bennett, received one assignment. Id. Eighteen of the judges with active status during any part of the relevant time period received none.

Careful statistical analysis indicates a high likelihood that the number of Relevant cases assigned to Judges Reinhardt and Berzon, including this and the Hawaii and Idaho marriage cases (which the petition treated as one for these purposes), did not result from a neutral judge-assignment process. That careful analysis was set forth in the report of Dr. Matis ("Report") attached to the rehearing petition as Exhibit 3 thereto (Dkt. 274-2; Appendix H hereto at pp. 191a–202a). The Report's careful statistical analysis shows a

substantial and significant bias in the selection process, centering on Judges Reinhardt and Berzon.

Judges Reinhardt and Berzon are publicly perceived to be favorably disposed to arguments for expanding the rights of gay men and lesbians, more so than all or nearly all other judges in the Ninth Circuit. That perception gives rise to an appearance of an uneven playing field. That perception is reinforced by, one, the unremarkable observation that experienced and informed lawyers would readily assess the panel which was chosen to hear this case as one quite congenial to the plaintiffs in the marriage cases and just the opposite to the parties defending man-woman marriage; and, two, the consistent public commentary, after the announcement of the three-judge panel on September 1, 2014, to the effect that, for the plaintiffs, this panel was the most favorable panel possible.

The problem to be remedied is the appearance of unfairness. *See generally*, *Liljeberg v. Health Sers. Acquisition Corp.*, 486 U.S. 847, 860 (1988); *Liteky v. United States*, 510 U.S. 540, 548 (1994). When that appearance is present, it does not matter that "the judge actually has no interest in the case or . . . the judge is pure in heart and incorruptible." *Liljeberg*, 486 U.S. at 860 (quotation marks omitted). Thus, it does not matter whether Judge Reinhardt or Judge Berzon played any conscious role in the particular acts causing their many assignments; what matters is the vivid appearance of a deviation from the Circuit's neutral selection process.

The appearance of unfairness is not a close question here. Even without the aid of professional statisticians, a reasonable person will immediately sense that something is amiss when one judge out of more than thirty is assigned over a four and one-half year period to five of a circuit's eleven Relevant Cases involving a particular issue, and when both that Judge and another Judge with respect to whom assignment disparities also exist, are assigned to the most momentous of those cases, here involving same-sex marriage. That sense will deepen on realizing that eighteen of the judges with active status during any part of the relevant time period were assigned to none of the eleven Relevant Cases. That sense will deepen even further because of the appearance, arising from widely shared public perceptions, that Judges Reinhardt and Berzon's presence on the panel favored one side over the other.

Sophisticated statistical analysis validates the reasonable person's sense that something is amiss. Compared to a selection process that is genuinely neutral, the odds, as reflected in the Report's Table 4, are 441-to-1 against a neutral selection process having produced the resultant panels for the Relevant Cases. Dkt. No. 274-2 at p. 27; Appendix H hereto at 201a. Significantly, the two most assigned judges received five and four assignments respectively. *Id.* The appearance to a reasonable person is of something serious being wrong and requiring a remedy.

It must be remembered that a "system of neutral assignment means little absent an effective enforcement mechanism." Neutral Assignment, 78

Tex. L. Rev. at 1108. When "[e]nforcement . . . [is] left to the judges on the circuit . . . [the] judges must become aware that the procedures governing random assignment have been violated. In general, this requires empirical observation." Id.

The requisite empirical observation was presented to the Circuit and called out for an effective remedy. The Circuit however rejected both the substantive and this procedural argument. Thus, this question is now sought to be resolved by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 9, 2015.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 12-17668

SUSAN LATTA, et al. Plaintiffs-Appellees,

v.

C.L. OTTER, et al., Defendants-Appellants (and consolidated cases)

Filed: October 7, 2014[1]

OPINION

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*464 Opinion by Judge REINHARDT; Concurrence by Judge REINHARDT; Concurrence by Judge BERZON.

Opinion by Judge REINHARDT:

Both Idaho and Nevada have passed statutes and enacted constitutional amendments preventing

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

same-sex couples from marrying and refusing to recognize same-sex marriages validly performed elsewhere.[2] Plaintiffs, same-sex couples who live in Idaho and Nevada and wish either to marry there or to have marriages entered into elsewhere recognized in their home states, have sued for declaratory relief and to enjoin the enforcement of these laws. They argue that the laws are subject to heightened scrutiny because they deprive plaintiffs of the fundamental due process right to marriage, and because they deny them equal protection of the law by discriminating against them on the bases of their sexual orientation and their sex. In response, Governor Otter, Recorder Rich, and the State of

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[2] Idaho Const. Art. III, § 28 ("A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state."); Idaho Code §§ 32–201 ("Marriage is a personal relation arising out of a civil contract between a man and a woman...."), 32–202 (identifying as qualified to marry "[a]ny unmarried male ... and unmarried female" of a certain age and "not otherwise disqualified."); 32–209 ("All marriages contracted without this state, which would be valid by the laws of the state or country in which the same were contracted, are valid in this state, unless they violate the public policy of this state. Marriages that violate the public policy of this state include, but are not limited to, same-sex marriage, and marriages entered into under the laws of another state or country with the intent to evade the prohibitions of the marriage laws of this state."); Nev. Const. Art. 1, § 21 ("Only a marriage between a male and female person shall be recognized and given effect in this state."); Nev.Rev.Stat. § 122.020(1) ("[A] male and female person ... may be joined in marriage.").

Idaho, along with the Nevada intervenors, the Coalition for the Protection of Marriage ("the Coalition"), argue that their laws survive heightened scrutiny, primarily because the states have a compelling interest in sending a message of support for the institution of opposite-sex marriage. They argue that permitting same-sex marriage will seriously undermine this message, and contend that the institution of opposite-sex marriage is important because it encourages people who procreate to be responsible parents, and because opposite-sex parents are better for children than same-sex parents.

Without the benefit of our decision in *SmithKline Beecham Corp. v. Abbott Labs.,* 740 F.3d 471 (9th Cir.2014), *reh'g en banc denied,* 759 F.3d 990 (9th Cir.2014), the *Sevcik* district court applied rational basis review and upheld Nevada's laws. *Sevcik v. Sandoval,* 911 F.Supp.2d 996 (D.Nev.2012). After we decided *SmithKline,* the *Latta* district court concluded that heightened scrutiny applied to Idaho's laws because they discriminated based on sexual orientation, and invalidated them.[3] *Latta v. Otter,* No. 1:13–CV–00482–CWD, 19 F.Supp.3d 1054, 1072–77, 2014

[3] The *Latta* court also found a due process violation because, it concluded, the laws curtailed plaintiffs' fundamental right to marry. *Latta v. Otter,* No. 1:13–CV–00482–CWD, 19 F.Supp.3d 1054, 1067–72, 2014 WL 1909999, at *9–13 (D.Idaho May 13, 2014).

WL 1909999, at *14–18 (D.Idaho May 13, 2014). We hold that the Idaho and Nevada laws at issue violate the Equal Protection Clause of the Fourteenth Amendment because they deny lesbians and gays[4] who *465 wish to marry persons of the same sex a right they afford to individuals who wish to marry persons of the opposite sex, and do not satisfy the heightened scrutiny standard we adopted in *SmithKline.*

I.

Before we reach the merits, we must address two preliminary matters: first, whether an Article III case or controversy still exists in *Sevcik,* since Nevada's government officials have ceased to defend their laws' constitutionality; and second, whether the Supreme Court's summary dismissal in *Baker v. Nelson,* 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972), is controlling precedent that precludes us from considering plaintiffs' claims.

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[4] We have recognized that "[s]exual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them." *Hernandez–Montiel v. I.N.S.,* 225 F.3d 1084, 1093 (9th Cir.2000), *overruled on other grounds by Thomas v. Gonzales,* 409 F.3d 1177, 1187 (9th Cir.2005), *vacated,* 547 U.S. 183, 126 S.Ct. 1613, 164 L.Ed.2d 358 (2006).

A.

Governor Sandoval and Clerk–Recorder Glover initially defended Nevada's laws in the district court. However, they have since withdrawn their answering briefs from consideration by this Court, in light of our decision in *SmithKline,* 740 F.3d at 480–81 (holding heightened scrutiny applicable). Governor Sandoval now asserts that *United States v. Windsor,* —— U.S. ——, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013), "signifies that discrimination against same-sex couples is unconstitutional," and that "[a]ny uncertainty regarding the interpretation of *Windsor* was ... dispelled" by *SmithKline.* As a result, we have not considered those briefs, and the Governor and Clerk–Recorder were not heard at oral argument, pursuant to Fed. R.App. P. 31(c).

The Nevada Governor and Clerk Recorder remain parties, however, and continue to enforce the laws at issue on the basis of a judgment in their favor below. As a result, we are still presented with a live case or controversy in need of resolution. Despite the fact that Nevada "largely agree[s] with the opposing party on the merits of the controversy, there is sufficient adverseness and an adequate basis for jurisdiction in the fact the [state] intend[s] to enforce the challenged law against that party." *Windsor,* 133 S.Ct. at 2686–87 (citation and quotation marks omitted). Although the state defendants withdrew their briefs, we are required to ascertain and rule on the merits arguments in

the case, rather than ruling automatically in favor of plaintiffs-appellants. *See Carvalho v. Equifax Info. Servs., LLC,* 629 F.3d 876, 887 n. 7 (9th Cir.2010) ("[Defendant's] failure to file a brief does not compel a ruling in [plaintiff's] favor, given that the only sanction for failure to file an answering brief is forfeiture of oral argument.").

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

Because the state defendants have withdrawn their merits briefs, we face a situation akin to that in *Windsor.* There, a case or controversy remained between Windsor and the United States, which *466 agreed with her that the Defense of Marriage Act was unconstitutional but nonetheless refused to refund the estate tax she had paid. Here as there, the state defendants' "agreement with [plaintiffs'] legal argument raises the risk that instead of a real, earnest and vital controversy, the Court faces a friendly, non-adversary proceeding...." 133 S.Ct. at 2687

(citations and quotation marks omitted). Hearing from the Coalition helps us "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). As a result, we consider the briefs and oral argument offered by the Coalition, which, Governor Sandoval believes, "canvass the arguments against the Appellants' position and the related policy considerations."[5]

B.

Defendants argue that we are precluded from hearing this case by *Baker,* 409 U.S. 810, 93 S.Ct. 37. In that case, the Minnesota Supreme Court had rejected due process and equal protection challenges to a state law limiting marriage to a man and a woman. 291 Minn. 310, 191 N.W.2d 185, 186–87 (1971). The United States Supreme Court summarily dismissed an appeal from that decision "for want of a substantial federal question." *Baker,* 409 U.S. at 810, 93 S.Ct. 37. Such summary dismissals "prevent lower courts from coming to opposite conclusions on the precise issues

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

presented and necessarily decided by those actions," *Mandel v. Bradley,* 432 U.S. 173, 176, 97 S.Ct. 2238, 53 L.Ed.2d 199 (1977) (per curiam), until "doctrinal developments indicate otherwise," *Hicks v. Miranda,* 422 U.S. 332, 343–44, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975) (citation and quotation marks omitted). Defendants contend that this decades-old case is still good law, and therefore bars us from concluding that same-sex couples have a due process or equal protection right to marriage.

However, "subsequent decisions of the Supreme Court" not only "suggest" but make clear that the claims before us present substantial federal questions.[6] *Wright v. Lane Cnty. Dist. Ct.,* 647 F.2d 940, 941 (9th Cir.1981); *see Windsor,* 133 S.Ct. at 2694–96 (holding unconstitutional under the Fifth Amendment a federal law recognizing opposite-sex-sex but not same-sex marriages

[6] To be sure, the Court made explicit in *Windsor* and *Lawrence* that it was not deciding whether states were required to allow same-sex couples to marry. *Windsor,* 133 S.Ct. at 2696 ("This opinion and its holding are confined to those lawful marriages [recognized by states]."); *Lawrence v. Texas,* 539 U.S. 558, 578, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) ("The present case ... does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."). The Court did not reach the question we decide here because it was not presented to it. Although these cases did not tell us the *answers* to the federal questions before us, *Windsor* and *Lawrence* make clear that these are substantial federal *questions* we, as federal judges, must hear and decide.

because its "principal purpose [was] to impose inequality, not for other reasons like governmental efficiency"); *Lawrence v. Texas,* 539 U.S. 558, 578–79, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) (recognizing a due process right to engage in intimate conduct, including with *467 a partner of the same sex); *Romer v. Evans,* 517 U.S. 620, 631–34, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) (invalidating as an irrational denial of equal protection a state law barring protection of lesbians and gays under state or local anti-discrimination legislation or administrative policies). Three other circuits have issued opinions striking down laws like those at issue here since *Windsor,* and all agree that *Baker* no longer precludes review. *Accord Baskin v. Bogan,* No. 14–2386, 766 F.3d 648, 659–60, 2014 WL 4359059, at *7 (7th Cir. Sept. 4, 2014); *Bostic v. Schaefer,* 760 F.3d 352, 373–75 (4th Cir.2014); *Kitchen v. Herbert,* 755 F.3d 1193, 1204–08 (10th Cir.2014). As any observer of the Supreme Court cannot help but realize, this case and others like it present not only substantial but pressing federal questions.

II.

Plaintiffs are ordinary Idahoans and Nevadans. One teaches deaf children. Another is a warehouse manager. A third is an historian. Most are parents. Like all human beings, their lives are given greater meaning by their intimate, loving, committed relationships with their partners and children. "The common vocabulary of family life

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

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

> The fact that Nevada has seen fit to give same-sex couples the opportunity to enjoy the benefits afforded married couples by state law makes its case for the constitutionality of its regime even weaker than Idaho's. With the concrete differences in treatment gone, all that is left is a message of disfavor. The Supreme Court has "repeatedly emphasized [that] discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants," can cause serious "injuries to those who are denied equal treatment solely because of their membership in a disfavored group." *Heckler v. Mathews,* 465 U.S. 728, 739–40, 104 S.Ct. 1387, 79 L.Ed.2d 646 (1984) (citation omitted).

If Nevada were concerned, as the Coalition purports it to be, that state recognition of same-sex unions would make the institution of marriage "genderless" and thereby undermine

Defendants argue that their same-sex marriage bans do not discriminate on the basis of sexual orientation, but rather on the basis of procreative capacity. Effectively if not explicitly, they assert that while these laws may disadvantage same-sex couples and their children, heightened scrutiny is not appropriate because differential treatment by sexual orientation is an incidental effect of, but not the reason for, those laws. However, the laws at issue distinguish on their face between opposite-sex couples, who are permitted to marry and whose out-of-state marriages are recognized, and same-sex couples, who are not permitted to marry and whose marriages are not recognized. Whether facial discrimination exists "does not depend on why" a policy discriminates, "but rather on *468 the explicit terms of the discrimination." *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.,* 499 U.S. 187, 199, 111 S.Ct. 1196, 113 L.Ed.2d 158 (1991). Hence, while the procreative capacity distinction that defendants seek to draw could in theory represent a *justification* for the discrimination worked by the laws, it cannot overcome the inescapable conclusion that Idaho and Nevada do discriminate on the basis of sexual orientation.

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opposite-sex spouses' commitments to each other and their children, it would be ill-advised to permit opposite-sex couples to participate in the alternative domestic partnership regime it has established. However, Nevada does just that.

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

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

Id. at 481.

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

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

We concluded:

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

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

III.

Defendants argue that their marriage laws survive heightened scrutiny because they promote child welfare by encouraging optimal parenting. Governor Otter argues that same-sex marriage "teaches *everyone*—married and unmarried, gay and straight, men and women, and all the children—that a child knowing and being reared by her mother and father is neither socially preferred nor officially encouraged." Governor Otter seeks to have the state send the opposite message to all Idahoans: that a child reared by its biological parents *is* socially preferred and officially encouraged.

This argument takes two related forms: First, defendants make a "procreative channeling" argument: that the norms of opposite-sex marriage ensure that as many children as possible are raised by their married biological mothers and fathers. They claim that same-sex marriage will undermine those existing norms, which encourage people in opposite-sex relationships to place their children's interests above their own and preserve intact family *469 units, instead of pursuing their own emotional and sexual needs elsewhere. In short, they argue that allowing same-sex marriages will adversely affect opposite-sex marriage by reducing its appeal to heterosexuals, and will reduce the chance that accidental pregnancy will lead to marriage. Second, Governor Otter and the Coalition (but not the state of Idaho) argue that limiting marriage to opposite-sex couples promotes child welfare because children are most likely to thrive if raised by two parents of opposite sexes, since, they assert, mothers and fathers have "complementary" approaches to parenting.[9] Thus, they contend, children raised by opposite-sex couples receive a better upbringing.

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

A.

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

Unsupported legislative conclusions as to whether particular policies will have societal effects of the sort at issue in this case—determinations which often, as here, implicate constitutional rights—have not been afforded deference by the Court. To the contrary, we "retain[ ] an independent constitutional duty to review factual findings where constitutional rights are at stake.... Uncritical deference to [legislatures'] factual findings in these cases is inappropriate." *Gonzales v. Carhart,* 550 U.S. 124, 165–66, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007); *see also Hodgson v. Minnesota,* 497 U.S. 417, 450–55, 110 S.Ct. 2926, 111 L.Ed.2d 344 (1990).

B.

Marriage, the Coalition argues, is an "institution directed to certain great social tasks, with many of those involving a man and a woman united in the begetting, rearing, and education of

children"; it is being "torn away," they claim, "from its ancient social purposes and transformed into a government-endorsed celebration of the private desires of two adults (regardless of gender) to unite their lives sexually, emotionally, and socially for as long as those personal desires last." Defendants struggle, however, to identify any means by which same-sex marriages will undermine these social purposes. They argue vehemently that same-sex marriage will harm existing and especially future opposite-sex couples and their children because the message communicated by the social institution of marriage will be lost.

As one of the Nevada plaintiffs' experts testified, there is no empirical support for the idea that legalizing same-sex marriage would harm—or indeed, affect—opposite-sex marriages or relationships. That expert presented data from Massachusetts, a state which has permitted same-sex marriage since 2004, showing no decrease in marriage rates or increase in divorce rates in the past decade.[10] *See* Amicus Brief of *470

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

Massachusetts et al. 23–27; *see also* Amicus Brief of American Psychological Association et al. 8–13. It would seem that allowing couples who want to marry so badly that they have endured years of litigation to win the right to do so would reaffirm the state's endorsement, without reservation, of spousal and parental commitment. From which aspect of same-sex marriages, then, will opposite-sex couples intuit the destructive message defendants fear? Defendants offer only unpersuasive suggestions.

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

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

> The notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved, a prediction hardly different from other "self-fulfilling prophec[ies]," *see Mississippi Univ. for Women* [*v. Hogan*], 458 U.S. [718,] 730 [102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982)], once routinely used to deny rights or opportunities.
>
> ...
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> A like fear, according to a 1925 report, accounted for Columbia Law School's resistance to women's admission, although "[t]he faculty ... never maintained that women could not master legal learning.[11] ... No, its argument has been ...

[11] Likewise, Governor Otter assures us that Idaho's laws were not motivated by judgments about the relative emotional commitments of same-sex and opposite-sex couples; his

> more practical. If women were admitted to the Columbia Law School, [the faculty] said, then the choicer, more manly and red-blooded graduates of our great universities would go to the Harvard Law School!" The Nation, Feb. 18, 1925, p. 173.

518 U.S. 515, 542–44, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996); *see also Palmore v.* *471 *Sidoti,* 466 U.S. 429, 433, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984) ("The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."). The *Sevcik* district court thus erred in crediting the argument that "a meaningful percentage of heterosexual persons would cease to value the civil institution as highly as they previously had and hence enter it less frequently ... because they no longer wish to be associated with the civil institution as redefined," both because defendants failed to produce any support for that prediction, and because private disapproval is a categorically inadequate justification for public injustice. *Sevcik,* 911 F.Supp.2d at 1016.

Same-sex marriage, Governor Otter asserts, is part of a shift towards a consent-based, personal

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argument is about an "ethos," he claims, and so is not weakened by the fact that same-sex couples may, as he admits, be just as child-oriented.

relationship model of marriage, which is more adult-centric and less child-centric.[12] The *Latta* district court was correct in concluding, however, that "marriage in Idaho is and has long been a designedly consent-based institution.... Idaho law is wholly indifferent to whether a heterosexual couple wants to marry because they share this vision" of conjugal marriage. *Latta,* 19 F.Supp.3d at 1081, 2014 WL 1909999, at *23.

Idaho focuses on another aspect of the procreative channeling claim. Because opposite-sex couples can accidentally conceive (and women may choose not to terminate unplanned pregnancies), so the argument goes, marriage is important because it serves to bind such couples together and to their children. This makes some sense. Defendants' argument runs off the rails, however, when they suggest that marriage's stabilizing and unifying force is unnecessary for same-sex couples, because they always choose to conceive or adopt a child.[13]

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

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

> [These states] think[ ] that straight couples tend to be sexually irresponsible, producing unwanted children by the carload, and so must be pressured ... to marry, but

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

Moreover, marriage is not simply about procreation, but as much about

> expressions of emotional support and public commitment.... [M]any religions recognize marriage as having spiritual significance; ... therefore, the commitment of marriage may be an exercise of *472 religious faith as well as an expression of personal dedication.... [M]arital

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> that gay couples, unable as they are to produce children wanted or unwanted, are model parents—model citizens really—so have no need for marriage. Heterosexuals get drunk and pregnant, producing unwanted children; their reward is to be allowed to marry. Homosexual couples do not produce unwanted children; their reward is to be denied the right to marry. Go figure.

Baskin, 766 F.3d at 662, 2014 WL 4359059, at *10 (7th Cir. Sept. 4, 2014).

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

> status often is a precondition to the receipt of government benefits (e.g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimation of children born out of wedlock).

Turner v. Safley, 482 U.S. 78, 95–96, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987) (recognizing that prisoners, too, enjoyed the right to marry, even though they were not allowed to have sex, and even if they did not already have children).

Although many married couples have children, marriage is at its essence an "association that promotes ... a bilateral loyalty, not commercial or social projects." *Griswold v. Connecticut,* 381 U.S. 479, 486, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (recognizing that married couples have a privacy right to use contraception in order to prevent procreation). Just as "it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse," *Lawrence,* 539 U.S. at 567, 123 S.Ct. 2472, it demeans married couples—especially those who are childless—to say that marriage is simply about the capacity to procreate.

Additionally, as plaintiffs argue persuasively, Idaho and Nevada's laws are grossly over- and under-inclusive with respect to procreative capacity. Both states give marriage licenses to many opposite-sex couples who cannot

or will not reproduce—as Justice Scalia put it, in dissent, "the sterile and the elderly are allowed to marry," *Lawrence,* 539 U.S. at 604–05, 123 S.Ct. 2472—but not to same-sex couples who already have children or are in the process of having or adopting them.[14]

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

If defendants really wished to ensure that as many children as possible had *married* parents, they would do well to rescind the right to no-fault divorce, or to divorce altogether. Neither has done so. Such reforms might face constitutional difficulties of their own, but they would at least further the states' asserted interest in solidifying marriage. Likewise, if Idaho and Nevada want to

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

increase the percentage of children being raised by their two *biological* parents, they might do better to ban assisted reproduction using donor sperm or eggs, gestational surrogacy, and adoption, by both opposite-sex and same-sex couples, as well as by single people. Neither state does. *See* Idaho Code §§ 39–5401 *et seq.;* Nev.Rev.Stat. §§ 122A.200(1)(d), 126.051(1)(a), 126.510 *et seq.,* 127.040; *see also* Carla Spivack, *The Law of Surrogate Motherhood in the United States,* 58 Am. J. Comp. L. 97, 102 & n.15 (2010); *Idaho is a destination for surrogacy,* KTVB.com (Dec. 5, 2013).

In extending the benefits of marriage only to people who have the capacity to procreate, while denying those same benefits to people who already have children, Idaho and Nevada materially harm and *473 demean same-sex couples and their children.[15] *Windsor,* 133 S.Ct. at 2694. Denying

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

children resources and stigmatizing their families on this basis is "illogical and unjust." *Plyler v. Doe,* 457 U.S. 202, 220, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) (citation omitted). It is counterproductive, and it is unconstitutional.

C.

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

[7] However, as we explained in *SmithKline, Windsor* "forbid[s] state action from 'denoting the inferiority' " of same-sex couples. 740 F.3d at 482 (citing *Brown v. Bd. of Educ.,* 347 U.S. 483, 494, 74 S.Ct. 686, 98 L.Ed. 873 (1954)).

> It is the identification of such a class by the law for a separate and lesser public status that "make[s] them unequal." *Windsor,* 133 S.Ct. at 2694. DONIA was "practically a brand upon them, affixed by the law, an assertion of their inferiority." *Strauder v. West Virginia,* 100 U.S. 303, 308, 25 L.Ed. 664 (1879). *Windsor* requires

> that classifications based on sexual orientation that impose inequality on gays and lesbians and send a message of second-class status be justified by some legitimate purpose.

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

Defendants' argument is, fundamentally, non-responsive to plaintiffs' claims to *marriage* rights; instead, it is about the suitability of same-sex couples, married or not, as parents, adoptive or otherwise. That it is simply an ill-reasoned excuse for unconstitutional discrimination is evident from the fact that Idaho and Nevada already allow adoption by lesbians and gays. The Idaho Supreme Court has determined that "sexual orientation [is] wholly irrelevant" to a person's fitness or ability to adopt children. *In re Adoption of Doe,* 156 Idaho 345, 326 P.3d 347, 353 (2014). "In a state where the privilege of becoming a child's adoptive parent does not hinge on a person's sexual orientation, it is impossible to fathom how hypothetical concerns about the same person's parental fitness could possibly relate to civil marriage." *Latta,* 19 F.Supp.3d at 1081, 2014 WL 1909999, at *23. By enacting a domestic partnership law, Nevada, too, has already acknowledged that no harm will come of treating same-sex couples the same as opposite-

sex *474 couples with regard to parenting. Nev.Rev.Stat. § 122A.200(1)(d) affords same-sex domestic partners parenting rights identical to those of married couples, including those related to adoption, custody and visitation, and child support. *See also St. Mary v. Damon,* 309 P.3d 1027, 1033 (Nev.2013) (en banc) ("Both the Legislature and this court have acknowledged that, generally, a child's best interest is served by maintaining two actively involved parents. To that end, the Legislature has recognized that the children of same-sex domestic partners bear no lesser rights to the enjoyment and support of two parents than children born to married heterosexual parents.").

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

Thus, we need not address the constitutional restraints the Supreme Court has long imposed on sex-role stereotyping, which may provide another potentially persuasive answer to defendants' theory. *See Virginia,* 518 U.S. at 533, 116 S.Ct. 2264 (explaining that justifications which "rely on

overbroad generalizations about the different talents, capacities, or preferences of males and females" are inadequate to survive heightened scrutiny); *see also Caban v. Mohammed,* 441 U.S. 380, 389, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979) (rejecting the claim that "any universal difference between maternal and paternal relations at every phase of a child's development" justified sex-based distinctions in adoption laws). We note, in addition, that defendants have offered no probative evidence in support of their "complementarity" argument.

IV.

Both the Idaho defendants and the Coalition advance a few additional justifications, though all are unpersuasive.[16] First, they argue that the population of each state is entitled to exercise its democratic will in regulating marriage as it sees fit. Each state "has an undeniable interest in ensuring that its rules of domestic relations reflect the widely held values of its people." *Zablocki v. Redhail,* 434 U.S. 374, 399, 98 S.Ct. 673, 54

[16] None of the arguments advanced by other states in defense of their bans is any more persuasive. In particular, we agree with the Seventh Circuit that states may not "go slow" in extending to same-sex couples the right to marry; "it is sufficiently implausible that allowing same-sex marriage would cause palpable harm to family, society, or civilization to require the state to tender evidence justifying [if not proving] its fears; it has provided none." *Baskin,* 766 F.3d at 668–69, 2014 WL 4359059, at *16–17.

L.Ed.2d 618 (1978) (Powell, J., concurring). True enough. But a primary purpose of the Constitution is to protect minorities from oppression by majorities. As *Windsor* itself made clear, "state laws defining and regulating marriage, of course, must respect the constitutional rights of persons." 133 S.Ct. at 2691 (citing *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967)). Thus, considerations of federalism cannot carry the day for defendants. They must instead rely on the substantive arguments that we find lacking herein.

*475 Second, defendants argue that allowing same-sex couples to marry would threaten the religious liberty of institutions and people in Idaho and Nevada. Whether a Catholic hospital must provide the same health care benefits to its employees' same-sex spouses as it does their opposite-sex spouses, and whether a baker is civilly liable for refusing to make a cake for a same-sex wedding, turn on state public accommodations law, federal anti-discrimination law, and the protections of the First Amendment.[17] These questions are not

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[17] *See, e.g., Elane Photography, LLC v. Willock,* 284 P.3d 428 (N.M.App.2012) (holding that a wedding photographer was liable for discrimination against a same-sex couple under state public accommodations law, and that this law did not violate the First Amendment), *cert. denied,* —— U.S. ——, 134 S.Ct. 1787, 188 L.Ed.2d 757 (2014). Nevada law currently prohibits discrimination based on sexual orientation in public accommodations, while Idaho law does not. Nev.Rev.Stat. §§ 651.050(3), 651.070; Dan Popkey, *Idaho doesn't protect gays from discrimination, but Otter says that does not make the*

before us. We merely note that avoiding the enforcement of anti-discrimination laws that "serv[e] compelling state interests of the highest order" cannot justify perpetuation of an otherwise unconstitutionally discriminatory marriage regime. *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 549, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987) (citation omitted).

Third, the Coalition argues that Nevada's ban is justified by the state's interest in protecting "the traditional institution of marriage."[18] Modern marriage regimes, however, have evolved considerably; within the past century, married women had no right to own property, enter into contracts, retain wages, make decisions about children, or pursue rape allegations against their husbands. *See generally* Claudia Zaher, *When A Woman's Marital Status Determined Her Legal Status: A Research Guide on the Common Law*

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state anti-gay, Idaho Statesman (Feb. 23, 2014).

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

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

Doctrine of Coverture, 94 Law Libr. J. 459, 460–61 (2002) ("Under coverture, a wife simply had no legal existence. She became ... 'civilly dead.' "). Women lost their citizenship when they married foreign men. *See* Kristin Collins, *When Father's Rights Are Mothers' Duties,* 109 Yale L.J. 1669, 1686–89 (2000). (In fact, women, married or not, were not allowed to serve on juries or even to vote. *See J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 131–35, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994).). Before no-fault divorce laws were enacted, separated spouses had to fabricate adulterous affairs in order to end their marriages. Lawrence M. Friedman, *A History of American Law* 577–78 (2005). As plaintiffs note, Nevada has been a veritable pioneer in changing these practices, enacting (and benefitting economically from) laws that made it among the easiest places in the country to get married and un-married. Both Idaho and Nevada's marriage regimes, as they exist today, bear little resemblance to those in place a century ago. As a result, defendants cannot credibly argue that their laws protect a "traditional institution"; at most, they preserve the status quo with respect to one aspect of marriage—exclusion of same-sex couples.

Certainly, the exclusion of same-sex couples from marriage is longstanding. However, "it is circular reasoning, not analysis, *476 to maintain that marriage must remain a heterosexual institution because that is what it historically has

been." *Goodridge v. Dep't of Pub. Health,* 440 Mass. 309, 798 N.E.2d 941, 961 n. 23 (2003). The anti-miscegenation laws struck down in *Loving* were longstanding. Here as there, however, "neither history nor tradition [can] save [the laws] from constitutional attack." *Lawrence,* 539 U.S. at 577–78, 123 S.Ct. 2472 (quoting *Bowers v. Hardwick,* 478 U.S. 186, 216, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986) (Stevens, J., dissenting)).

V.

Idaho and Nevada's marriage laws, by preventing same-sex couples from marrying and refusing to recognize same-sex marriages celebrated elsewhere,[19] impose profound legal, financial, social and psychic harms on numerous citizens of those states. These harms are not inflicted on opposite-sex couples, who may, if they wish, enjoy the rights and assume the responsibilities of marriage. Laws that treat people differently based on sexual orientation are unconstitutional unless a "legitimate purpose ... overcome[s]" the injury inflicted by the law on

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

lesbians and gays and their families. *SmithKline,* 740 F.3d at 481–82.

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

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

The lessons of our constitutional history are clear: inclusion strengthens, rather than weakens, our most important institutions. When we integrated our schools, education improved. *See Brown v. Bd. of Educ. of Topeka,* 347 U.S. 483,

492–95, 74 S.Ct. 686, 98 L.Ed. 873 (1954). When we opened our juries to women, our democracy became more vital. *See Taylor v. Louisiana,* 419 U.S. 522, 535–37, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). When we allowed lesbian and gay soldiers to serve openly in uniform, it enhanced unit cohesion. *See Witt v. Dep't of Air Force,* 527 F.3d 806, 821 n. 11 (9th Cir.2008). When same-sex couples are married, just as when opposite-sex couples are married, they serve as models of loving commitment to all.

The judgment of the district court in *Latta v. Otter* is AFFIRMED. The judgment of the district court in *Sevcik v. Sandoval* is REVERSED, and the case is REMANDED to the district court for the prompt issuance of an injunction permanently *477 enjoining the state, its political subdivisions, and its officers, employees, and agents, from enforcing any constitutional provision, statute, regulation or policy preventing otherwise qualified same-sex couples from marrying, or denying recognition to marriages celebrated in other jurisdictions which, if the spouses were not of the same sex, would be valid under the laws of the state.

AFFIRMED REVERSED and REMANDED.

REINHARDT, Circuit Judge, concurring:

I, of course, concur without reservation in the opinion of the Court. I write separately only to add that I would also hold that the fundamental right to marriage, repeatedly recognized by the Supreme Court, in cases such as *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), *Zablocki v. Redhail,* 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978), and *Turner v. Safley,* 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), is properly understood as including the right to marry an individual of one's choice. That right applies to same-sex marriage just as it does to opposite-sex marriage. As a result, I would hold that heightened scrutiny is appropriate for an additional reason: laws abridging fundamental rights are subject to strict scrutiny, and are invalid unless there is a "compelling state interest" which they are "narrowly tailored" to serve. *United States v. Juvenile Male,* 670 F.3d 999, 1012 (9th Cir.2012) (citing *Reno v. Flores,* 507 U.S. 292, 302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993)), *cert. denied,* —— U.S. ——, 133 S.Ct. 234, 184 L.Ed.2d 122 (2012). Because the inadequacy of the states' justifications has been thoroughly addressed, I write only to explain my view that the same-sex marriage bans invalidated here also implicate plaintiffs' substantive due process rights.

Like all fundamental rights claims, this one turns on how we describe the right. Plaintiffs and

defendants agree that there is a fundamental right to marry, but defendants insist that this right consists only of the right to marry an individual of the opposite sex. In *Washington v. Glucksberg,* 521 U.S. 702, 720–21, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997), the Supreme Court explained "that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." Our articulation of such fundamental rights must, we are told, be "carefully formulat[ed]." *Id.* at 722, 117 S.Ct. 2258 (citations and quotation marks omitted).

However, "careful" does not mean "cramped." Our task is to determine the scope of the fundamental right to marry as inferred from the principles set forth by the Supreme Court in its prior cases. *Turner* held that prisoners who had no children and no conjugal visits during which to conceive them—people who could not be biological parents—had a due process right to marry. 482 U.S. at 94–97, 107 S.Ct. 2254. *Zablocki* held that fathers with outstanding child support obligations—people who were, at least according to adjudications in family court, unable to adequately provide for existing children—had a due process right to marry. 434 U.S. at 383–87, 98 S.Ct. 673.

In each case, the Supreme Court referred to—and considered the historical roots of—the general right of people to marry, rather than a narrower right defined in terms of those who

sought the ability to exercise it. These cases rejected status-based restrictions on marriage not by considering whether to recognize a new, narrow fundamental right (i.e., the right of *478 prisoners to marry or the right of fathers with unpaid child support obligations to marry) or determining whether the class of people at issue enjoyed the right as it had previously been defined, but rather by deciding whether there existed a sufficiently compelling justification for depriving plaintiffs of the right they, as people, possessed.[1] *See id.* at 384, 98 S.Ct. 673 ("[D]ecisions of this Court confirm that the right to marry is of fundamental importance for all individuals.").

The third and oldest case in the fundamental right to marry trilogy, *Loving,* is also the most directly on point. That case held that Virginia's anti-miscegenation laws, which prohibited and penalized interracial marriages, violated the Fourteenth Amendment's Equal Protection and Due Process Clauses. 388 U.S. at 2–6, 87 S.Ct. 1817. In a rhetorical stroke as uncomprehending as

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[1] *Turner* and *Zablocki* illustrate another important point, pertinent to the adequacy of defendants' justifications for curtailing the right. The first of these cases involved plaintiffs whom the state was entitled to prevent from procreating, and the second involved those who were unable to support existing offspring financially. If the fundamental right to marry extends to them, it certainly cannot be limited only to those who can procreate or to those who, in the eyes of the state, would form part of an ideal parenting unit.

it is unavailing, defendants contend that lesbians and gays are not denied the freedom to marry by virtue of the denial of their right to marry individuals of the same sex, as they are still free to marry individuals of the opposite sex. Defendants assert that their same-sex marriage bans are unlike the laws in *Turner* and *Zablocki* because they do not categorically bar people with a particular characteristic from marrying, but rather limit whom lesbians and gays, and all other persons, may marry. However, *Loving* itself squarely rebuts this argument. Mildred Jeter and Richard Loving were not barred from marriage altogether. Jeter was perfectly free to marry a black person, and Loving was perfectly free to marry a white person. They were each denied the freedom, however, to marry the person whom they chose—the other. The case of lesbians and gays is indistinguishable. A limitation on the right to marry another person, whether on account of race or for any other reason, is a limitation on the right to marry.[2]

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[2] Defendants are apparently concerned that if we recognize a fundamental right to marry the person of one's choice, this conclusion will necessarily lead to the invalidation of bans on incest, polygamy, and child marriage. However, fundamental rights may sometimes permissibly be abridged: when the laws at issue further compelling state interests, to which they are narrowly tailored. Although such claims are not before us, it is not difficult to envision that states could proffer substantially more compelling justifications for such laws than have been put forward in support of the same-sex marriage bans at issue here.

Defendants urge that "man-woman" and "genderless" marriage are mutually exclusive, and that permitting the latter will "likely destroy[ ]" the former. Quite the opposite is true. *Loving* teaches that Virginia's anti-miscegenation laws did not simply "deprive the Lovings of liberty without due process of law." 388 U.S. at 12, 87 S.Ct. 1817. They did far worse; as the Court declared, the laws also "surely ... deprive[d] *all the State's citizens* of liberty without due process of law." *Id.* (emphasis added). When Virginia told Virginians that they were not free to marry the one they loved if that person was of a different race, it so grievously constrained their "freedom of choice to marry" that it violated the constitutional rights even of those citizens who did not themselves wish to enter interracial marriages *479 or who were already married to a person of the same race. *Id.* When Idaho tells Idahoans or Nevada tells Nevadans that they are not free to marry the one they love if that person is of the same sex, it interferes with the universal right of *all the State's citizens*—whatever their sexual orientation—to "control their destiny." *Lawrence v. Texas,* 539 U.S. 558, 578, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003).

To define the right to marry narrowly, as the right to marry someone of the opposite sex, would be to make the same error committed by the majority in *Bowers v. Hardwick,* 478 U.S. 186, 190, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), which considered whether there was a "fundamental right to engage in homosexual sodomy." This description

of the right at issue "fail[ed] to appreciate the extent of the liberty at stake," the Court stated in *Lawrence,* 539 U.S. at 567, 123 S.Ct. 2472. *Lawrence* rejected as wrongheaded the question whether "homosexuals" have certain fundamental rights; "persons"—of whatever orientation—are rights-holders. *See id.* Fundamental rights defined with respect to the subset of people who hold them are fundamental rights misdefined. The question before us is not whether lesbians and gays have a fundamental right to marry a person of the same sex; it is whether a person has a fundamental right to marry, to enter into "the most important relation in life," *Maynard v. Hill,* 125 U.S. 190, 205, 8 S.Ct. 723, 31 L.Ed. 654 (1888), with the one he or she loves. Once the question is properly defined, the answer follows ineluctably: yes.

Historically, societies have strictly regulated intimacy and thereby oppressed those whose personal associations, such as committed same-sex relationships, were, though harmful to no one, disfavored. Human intimacy, like "liberty [,] [has] manifold possibilities." *Lawrence,* 539 U.S. at 578, 123 S.Ct. 2472. Although "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress [,] [a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." *Id.* at 578–79, 123 S.Ct. 2472.

We, as judges, deal so often with laws that confine and constrain. Yet our core legal instrument comprehends the rights of all people, regardless of sexual orientation, to love and to marry the individuals they choose. It demands not merely toleration; when a state is in the business of marriage, it must affirm the love and commitment of same-sex couples in equal measure. Recognizing that right dignifies them; in so doing, we dignify our Constitution.

BERZON, Circuit Judge, concurring:

I agree that Idaho and Nevada's same-sex marriage prohibitions fail because they discriminate on the basis of sexual orientation and I join in the Opinion of the Court. I write separately because I am persuaded that Idaho and Nevada's same-sex marriage bans are also unconstitutional for another reason: They are classifications on the basis of gender that do not survive the level of scrutiny applicable to such classifications.

I. The Same–Sex Marriage Prohibitions Facially Classify on the Basis of Gender

"[S]tatutory classifications that distinguish between males and females are 'subject to scrutiny under the Equal Protection Clause.' " *Craig v. Boren,* 429 U.S. 190, 197, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) (quoting *Reed v. Reed,* 404 U.S. 71, 75, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971)). "To withstand

constitutional challenge, ... classifications by gender must serve important *480 governmental objectives and must be substantially related to achievement of those objectives." *Id.* "The burden of justification" the state shoulders under this intermediate level of scrutiny is "demanding": the state must convince the reviewing court that the law's "proffered justification" for the gender classification "is 'exceedingly persuasive.' " *United States v. Virginia,* 518 U.S. 515, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) ("*VMI* "). Idaho and Nevada's same-sex marriage bans discriminate on the basis of sex and so are invalid unless they meet this "demanding" standard.

A. Idaho and Nevada's same-sex marriage prohibitions facially classify on the basis of sex.[1] Only women may marry men, and only men may marry women.[2] Susan Latta may not marry her

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[1] "Sex" and "gender" are not necessarily coextensive concepts; the meanings of these terms and the difference between them are highly contested. *See, e.g.,* Katherine Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender,* 144 U. Pa. L. Rev 1 (1995). For present purposes, I will use the terms "sex" and "gender" interchangeably, to denote the social and legal categorization of people into the generally recognized classes of "men" and "women."

[2] Idaho Const. art. III § 38 ("A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state."); Idaho Code § 32–201(1) ("Marriage is a personal relation arising out of a civil contract between a man and a woman...."); Nev. Const. art. I, § 21 ("Only a

partner Traci Ehlers for the sole reason that Latta is a woman; Latta could marry Ehlers if Latta were a man. Theodore Small may not marry his partner Antioco Carillo for the sole reason that Small is a man; Small could marry Carillo if Small were a woman. But for their gender, plaintiffs would be able to marry the partners of their choice. Their rights under the states' bans on same-sex marriage are wholly determined by their sex.

A law that facially dictates that a man may do X while a woman may not, or vice versa, constitutes, without more, a gender classification. "[T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether [a policy] involves disparate treatment through explicit facial discrimination does not depend on why the [defendant] discriminates but rather on the explicit terms of the discrimination." *UAW v. Johnson Controls, Inc.,* 499 U.S. 187, 199, 111 S.Ct. 1196, 113 L.Ed.2d 158 (1991).[3] Thus,

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marriage between a male and female person shall be recognized and given effect in this state."); Nev.Rev.Stat. § 122.020 ("[A] male and a female person ... may be joined in marriage.").

[3] *UAW v. Johnson Controls* was a case brought under Title VII of the Civil Rights act of 1964, which, inter alia, bans employment policies that discriminate on the basis of sex. Title VII provides it is

> an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or

*481 plaintiffs challenging policies that facially discriminate on the basis of sex need not separately

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> otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; (2) to limit, segregate, or classify his employees ... in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e–2(a). The Supreme Court has "analog[ized]" to its decisions interpreting what constitutes discrimination "because of" a protected status under Title VII in analyzing Fourteenth Amendment equal protection claims and vice versa. *See, e.g., Gen. Elec. Co. v. Gilbert,* 429 U.S. 125, 133, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976), *superseded by statute on other grounds as recognized in Johnson Controls,* 499 U.S. at 219, 111 S.Ct. 1196 ("While there is no necessary inference that Congress ... intended to incorporate into Title VII the concepts of discrimination which have evolved from court decisions construing the Equal Protection Clause of the Fourteenth Amendment, the similarities between the congressional language and some of those decisions surely indicate that the latter are a useful starting point in interpreting the former."). As the Court has explained, "[p]articularly in the case of defining the term 'discrimination,' " Title VII must be interpreted consistently with Fourteenth Amendment equal protection principles, because Congress does not define "discrimination" in Title VII. *See Gilbert,* 429 U.S. at 133, 97 S.Ct. 401; *see also* 42 U.S.C. § 2000e. I therefore rely on Title VII cases throughout this Opinion for the limited purpose of determining whether a particular classification is or is not sex-based.

show either "intent" or "purpose" to discriminate. *Personnel Adm'r of Massachusetts v. Feeney,* 442 U.S. 256, 277–78, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979).

Some examples help to illuminate these fundamental precepts. Surely, a law providing that women may enter into business contracts only with other women would classify on the basis of gender. And that would be so whether or not men were similarly restricted to entering into business relationships only with other men.

Likewise, a prison regulation that requires correctional officers be the same sex as the inmates in a prison "explicitly discriminates ... on the basis of ... sex." *Dothard v. Rawlinson,* 433 U.S. 321, 332, 332 n. 16, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977). Again, that is so whether women alone are affected or whether men are similarly limited to serving only male prisoners.[4]

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[4] *Dothard* in fact dealt with a regulation that applied equally to men and women. *See* 433 U.S. at 332 n. 16, 97 S.Ct. 2720 ("By its terms [the regulation at issue] applies to contact positions in both male and female institutions."); *see also id.* at 325 n. 6, 97 S.Ct. 2720. *Dothard* ultimately upheld the sex-based discrimination at issue under Title VII's "bona fide occupational qualification" exception, 42 U.S.C. § 2000e–2(e), because of the especially violent, sexually charged nature of the particular prisons involved in that case, and because the regulation applied only to correctional officers in "contact positions" (i.e. working in close physical proximity to inmates) in maximum security institutions. *See Dothard,* 433 U.S. at

Further, it can make no difference to the existence of a sex-based classification whether the challenged law imposes gender homogeneity, as in the business partner example or *Dothard,* or gender heterogeneity. Either way, the *classification* is one that limits the affected individuals' opportunities based on their sex, as compared to the sex of the other people involved in the arrangement or transaction.

As Justice Johnson of the Vermont Supreme Court noted, the same-sex marriage prohibitions, if anything, classify *more* obviously on the basis of sex than they do on the basis of sexual orientation: "A woman is denied the right to marry another woman because her would-be partner is a woman, not because one or both are lesbians.... [S]exual orientation does not appear as a qualification for marriage" under these laws; sex does. *Baker v. State,* 170 Vt. 194, 744 A.2d 864, 905 (1999) (Johnson, J., concurring in part and dissenting in part).

The statutes' gender focus is also borne out by the experience of one of the Nevada plaintiff couples:

336–37, 97 S.Ct. 2720 (internal quotation marks omitted). For present purposes, the salient holding is that the same-sex restriction *was* overtly a sex-based classification, even if it could be justified by a sufficiently strong BFOQ showing. *Id.* at 332–33, 97 S.Ct. 2720.

> When Karen Goody and Karen Vibe went to the Washoe County Marriage Bureau to obtain a marriage license, the *482 security officer asked, "Do you have a man with you?" When Karen Vibe said they did not, and explained that she wished to marry Karen Goody, she was told she could not even obtain or complete a marriage license application ... [because] "[t]wo women can't apply" ... [and] marriage is "between a man and a woman."

Notably, Goody and Vibe were not asked about their sexual orientation; Vibe was told she was being excluded because of her gender and the gender of her partner.

Of course, the reason Vibe wants to marry Goody, one presumes, is due in part to their sexual orientations.[5] But that does not mean the classification at issue is not sex-based. *Dothard* also involved a facial sex classification intertwined with presumptions about sexual orientation, in that instance heterosexuality. The Supreme Court in

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[5] The need for such a presumption, as to a factor that does not appear on the face of the same-sex marriage bans, suggests that the gender discrimination analysis is, if anything, a closer fit to the problem before us than the sexual orientation rubric. While the same-sex marriage prohibitions obviously operate to the disadvantage of the people likely to wish to marry someone of the same gender—i.e. lesbians, gay men, bisexuals, and otherwise-identified persons with same-sex attraction—the individuals' *actual* orientation is irrelevant to the application of the laws.

Dothard agreed that the state was justified in permitting only male officers to guard male inmates, because there was "a real risk that other inmates, deprived of a normal heterosexual environment, would assault women guards because they were women." 433 U.S. at 335, 97 S.Ct. 2720. Thus, *Dothard*'s reasoning confirms the obvious: a statute that imposes a sex qualification, whether for a marriage license or a job application, is sex discrimination, pure and simple, even where assumptions about sexual orientation are also at play.

Lawrence v. Texas, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) also underscores why the continuation of the same-sex marriage prohibitions today is quite obviously about gender. *Lawrence* held that it violates due process for states to criminalize consensual, noncommercial same-sex sexual activity that occurs in private between two unrelated adults. *See id.* at 578, 123 S.Ct. 2472. After *Lawrence,* then, the continuation of the same-sex marriage bans necessarily turns on the gender identity of the spouses, not the sexual activity they may engage in. To attempt to bar that activity would be unconstitutional. *See id.* The Nevada intervenors recognize as much, noting that *Lawrence* "differentiates between the fundamental right of gay men and lesbians to enter an intimate relationship, on one hand, and, on the other hand, the right to marry a member of one's own sex." The "right to marry a member of one's own sex" expressly turns on sex.

B. In concluding that these laws facially classify on the basis of gender, it is of no moment that the prohibitions "treat men as a class and women as a class equally" and in that sense give preference to neither gender, as the defendants[6] fervently maintain. That argument revives the long-discredited reasoning of *Pace v. Alabama*, which upheld an anti-miscegenation statute on the ground that "[t]he punishment of each offending person, whether white or black, is the same." 106 U.S. 583, 585, 1 S.Ct. 637, 27 L.Ed. 207 (1883), *overruled* *483 *by McLaughlin v. Florida,* 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964). *Plessy v. Ferguson,* 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), *overruled by Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), similarly upheld racial segregation on the reasoning that segregation laws applied equally to black and white citizens.

This narrow view of the reach of the impermissible classification concept is, of course, no longer the law after *Brown. Loving v. Virginia* reinforced the post-*Brown* understanding of impermissible classification under the Fourteenth Amendment in a context directly analogous to the present one. Addressing the constitutionality of

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[6] Following the style of the Opinion of the Court, *see* Op. Ct. at 466 n. 5, I will refer throughout this Opinion to arguments advanced generally by "defendants," meaning the parties that continue actively to argue in defense of the laws, i.e. the Idaho defendants and the Nevada intervenors.

anti-miscegenation laws banning interracial marriage, *Loving* firmly "reject[ed] the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discrimination." 388 U.S. 1, 8, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). As *Loving* explained, "an even-handed state purpose" can still be "repugnant to the Fourteenth Amendment," *id.* at 11 n. 11, 87 S.Ct. 1817, because restricting individuals' rights, choices, or opportunities "solely because of racial classifications violates the central meaning of the Equal Protection Clause" even if members of all racial groups are identically restricted with regard to interracial marriage. *Id.* at 12, 87 S.Ct. 1817. "Judicial inquiry under the Equal Protection Clause ... does not end with a showing of equal application among the members of the class defined by the legislation." *McLaughlin,* 379 U.S. 184 at 191, 85 S.Ct. 283.

If more is needed to confirm that the defendants' "equal application" theory has no force, there is more—cases decided both before and after *Loving*. *Shelley v. Kraemer,* for example, rejected the argument that racially restrictive covenants were constitutional because they would be enforced equally against both black and white buyers. *Shelley v. Kraemer* 334 U.S. 1, 21–22, 68 S.Ct. 836, 92 L.Ed. 1161 (1948). In so holding, *Shelley* explained: "The rights created by the first section of the Fourteenth Amendment are, by its terms,

guaranteed to the individual. The rights established are personal rights." *Id.* at 22, 68 S.Ct. 836. *Shelley* also observed that "a city ordinance which denied to colored persons the right to occupy houses in blocks in which the greater number of houses were occupied by white persons, and imposed similar restrictions on white persons with respect to blocks in which the greater number of houses were occupied by colored persons" violated the Fourteenth Amendment despite its equal application to both black and white occupants. *See id.* at 11, 68 S.Ct. 836 (describing *Buchanan v. Warley,* 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149 (1917)).

The same individual rights analysis applies in the context of gender classifications. Holding unconstitutional peremptory strikes on the basis of gender, J.E.B. explained that "individual jurors themselves have a right to nondiscriminatory jury selection procedures.... [T]his right extends to both men and women." *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 140–41, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). "The neutral phrasing of the Equal Protection Clause, extending its guarantee to 'any person,' reveals its concern with rights of individuals, not groups (though group disabilities are sometimes the mechanism by which the State violates the individual right in question)." *Id.* at 152, 114 S.Ct. 1419 (Kennedy, J., concurring).

City of Los Angeles, Dep't of Water & Power v. Manhart further explains why, even in "the

absence of a discriminatory *484 effect on women as a class" or on men as a class, the same-sex marriage bars constitute gender classifications, because they "discriminate against *individual[s]* ... because of their sex." 435 U.S. 702, 716, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978) (emphasis added). In that case, the parties recognized that women, as a class, lived longer than men. *Id.* at 707–09, 98 S.Ct. 1370. The defendant Department argued that this fact justified a policy that facially required all women to contribute larger monthly sums to their retirement plans than men, out of fairness to men as a class, who otherwise would subsidize women as a class. *Id.* at 708–09, 98 S.Ct. 1370. *Manhart* rejected this justification for the sex distinction, explaining that the relevant focus must be "on fairness to individuals rather than fairness to classes," and held, accordingly, that the policy was unquestionably sex discriminatory. *Id.* at 709, 711, 98 S.Ct. 1370.

Under all these precedents, it is simply irrelevant that the same-sex marriage prohibitions privilege neither gender as a whole or on average. Laws that strip *individuals* of their rights or restrict personal choices or opportunities solely on the basis of the individuals' gender are sex discriminatory and must be subjected to intermediate scrutiny. *See J.E.B.,* 511 U.S. at 140–42, 114 S.Ct. 1419. Accordingly, I would hold that Idaho and Nevada's same-sex marriage prohibitions facially classify on the basis of gender, and that the "equal application" of these laws to

men and women as a class does not remove them from intermediate scrutiny.[7]

C. The same-sex marriage prohibitions also constitute sex discrimination for the alternative

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[7] Several courts have so held. *See Golinski v. U.S. Office of Pers. Mgmt.,* 824 F.Supp.2d 968, 982 n. 4 (N.D.Cal.2012) ("Ms. Golinski is prohibited from marrying Ms. Cunninghis, a woman, because Ms. Golinski is a woman. If Ms. Golinski were a man, DOMA would not serve to withhold benefits from her. Thus, DOMA operates to restrict Ms. Golinski's access to federal benefits because of her sex."), *initial hearing en banc denied,* 680 F.3d 1104 (9th Cir.2012) *and appeal dismissed,* 724 F.3d 1048 (9th Cir.2013); *In re Levenson,* 560 F.3d 1145, 1147 (9th Cir.2009) (Reinhardt, J., presiding) ("If [Levenson's husband] were female, or if Levenson himself were female, Levenson would be able to add [his husband] as a beneficiary. Thus, the denial of benefits at issue here was sex-based and can be understood as a violation of the ... prohibition of sex discrimination."); *Perry v. Schwarzenegger,* 704 F.Supp.2d 921, 996 (N.D.Cal.2010) ("Perry is prohibited from marrying Stier, a woman, because Perry is a woman. If Perry were a man, Proposition 8 would not prohibit the marriage. Thus, Proposition 8 operates to restrict Perry's choice of marital partner because of her sex."), *aff'd sub nom., Perry v. Brown,* 671 F.3d 1052 (9th Cir.2012), *vacated and remanded sub nom., Hollingsworth v. Perry,* —— U.S. ——, 133 S.Ct. 2652, 186 L.Ed.2d 768 (2013); *Baehr v. Lewin,* 74 Haw. 530, 852 P.2d 44, 59 (1993) (plurality op.) (a same-sex marriage bar, "on its face, discriminates based on sex"); *Baker,* 744 A.2d at 905 (Johnson, J., concurring in part and dissenting in part) (a same-sex marriage bar presents "a straightforward case of sex discrimination" because it "establish[es] a classification based on sex").

reason that they impermissibly prescribe different treatment for similarly situated subgroups of men and women. That is, the same-sex marriage laws treat the subgroup of men who wish to marry men less favorably than the otherwise similarly situated subgroup of women who want to marry men. And the laws treat the subgroup of women who want to marry women less favorably than the subgroup of otherwise identically situated men who want to marry women.

The Supreme Court has confirmed that such differential treatment of similarly-situated sex-defined subgroups also constitutes impermissible sex discrimination. *Phillips v. Martin Marietta Corp.*, for example, held that an employer's refusal to *485 hire women with preschool-age children, while employing men with children the same age, was facial sex discrimination, even though all men, and all women without preschool-age children, were treated identically. *See* 400 U.S. 542, 543–44, 91 S.Ct. 496, 27 L.Ed.2d 613 (1971) (per curiam). And the Seventh Circuit held an airline's policy requiring female flight attendants, but not male flight attendants, to be unmarried was discrimination based on sex, relying on *Phillips* and explaining that a classification that affects only some members of one gender is still sex discrimination if similarly situated members of the other gender are not treated the same way. "The effect of the statute is not to be diluted because discrimination adversely affects only a portion of

the protected class." *Sprogis v. United Air Lines, Inc.,* 444 F.2d 1194, 1198 (7th Cir.1971).

Of those individuals who seek to obtain the state-created benefits and obligations of legal marriage to a woman, men may do so but women may not. Thus, at the subclass level—the level that takes into account the similar situations of affected individuals—women as a group and men as a group *are* treated differently. For this reason as well I would hold that Idaho and Nevada's same-sex marriage prohibitions facially classify on the basis of gender. They must be reviewed under intermediate scrutiny.

D. One further point bears mention. The defendants note that the Supreme Court summarily rejected an equal protection challenge to a same-sex marriage bar in *Baker v. Nelson,* 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972), holding there was no substantial federal question presented in that case. But the Court did not clarify that sex-based classifications receive intermediate scrutiny until 1976. *See Craig,* 429 U.S. at 221, 218, 97 S.Ct. 451 (Rehnquist, J., dissenting) (describing the level of review prescribed by the majority as "new," and as "an elevated or 'intermediate' level scrutiny"). As this fundamental doctrinal change postdates *Baker, Baker* is no longer binding as to the sex discrimination analysis, just as it is no longer binding as to the sexual orientation discrimination analysis. *See* Op. Ct. at 465–67.

II. Same–Sex Marriage Bars Are Based in Gender Stereotypes

Idaho and Nevada's same sex marriage laws not only classify on the basis of sex but also, implicitly and explicitly, draw on "archaic and stereotypic notions" about the purportedly distinctive roles and abilities of men and women. Eradicating the legal impact of such stereotypes has been a central concern of constitutional sex-discrimination jurisprudence for the last several decades. *See, e.g., Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 725, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982). The same-sex marriage bans thus share a key characteristic with many other sex-based classifications, one that underlay the Court's adoption of intermediate scrutiny for such classifications.

The Supreme Court has consistently emphasized that "gender-based classifications ... may be reflective of 'archaic and overbroad' generalizations about gender, or based on 'outdated misconceptions concerning the role of females in the home rather than in the marketplace and world of ideas.' " *J.E.B.,* 511 U.S. at 135, 114 S.Ct. 1419 (quoting *Schlesinger v. Ballard,* 419 U.S. 498, 506–07, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975); *Craig,* 429 U.S. at 198–99, 97 S.Ct. 451) (some internal quotation marks omitted). Laws that rest on nothing more than "the 'baggage of sexual stereotypes,' that presume[ ] the father has the 'primary responsibility to provide a home and its

essentials,' while the mother is the 'center of home and family life' " *486 have been declared constitutionally invalid time after time. *Califano v. Westcott,* 443 U.S. 76, 89, 99 S.Ct. 2655, 61 L.Ed.2d 382 (1979) (quoting *Orr v. Orr,* 440 U.S. 268, 283, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979); *Stanton v. Stanton,* 421 U.S. 7, 10, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975); *Taylor v. Louisiana,* 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975)). Moreover, "gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization." *J.E.B.,* 511 U.S. at 139 n. 11, 114 S.Ct. 1419. And hostility toward nonconformance with gender stereotypes also constitutes impermissible gender discrimination. *See generally Price Waterhouse v. Hopkins,* 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989); *accord Nichols v. Azteca Rest. Enters., Inc.,* 256 F.3d 864, 874 (9th Cir.2001) (harassment against a person for "failure to conform to [sex] stereotypes" is gender-based discrimination) (internal quotation marks omitted).

The notion underlying the Supreme Court's anti-stereotyping doctrine in both Fourteenth Amendment and Title VII cases is simple, but compelling: "[n]obody should be forced into a predetermined role on account of sex," or punished for failing to conform to prescriptive expectations of what behavior is appropriate for one's gender. *See* Ruth Bader Ginsburg, *Gender and the Constitution,* 44 U. Cin.L.Rev. 1, 1 (1975). In other

words, laws that give effect to "pervasive sex-role stereotype[s]" about the behavior appropriate for men and women are damaging because they restrict individual choices by punishing those men and women who do not fit the stereotyped mold. *Nev. Dep't of Human Resources v. Hibbs,* 538 U.S. 721, 731, 738, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003).

Idaho and Nevada's same-sex marriage prohibitions, as the justifications advanced for those prohibitions in this Court demonstrate, patently draw on "archaic and stereotypic notions" about gender. *Hogan,* 458 U.S. at 725, 102 S.Ct. 3331. These prohibitions, the defendants have emphatically argued, communicate the state's view of what is both "normal" and preferable with regard to the romantic preferences, relationship roles, and parenting capacities of men and women. By doing so, the laws enforce the state's view that men and women "naturally" behave differently from one another in marriage and as parents.

The defendants, for example, assert that "gender diversity or complementarity among parents ... provides important benefits" to children, because "mothers and fathers tend on average to parent differently and thus make unique contributions to the child's overall development." The defendants similarly assert that "[t]he man-woman meaning at the core of the marriage institution, reinforced by the law, has always recognized, valorized, and made normative the

roles of 'mother' and 'father' and their uniting, complementary roles in raising their offspring."

Viewed through the prism of the Supreme Court's contemporary anti-stereotyping sex discrimination doctrine, these proferred justifications simply underscore that the same-sex marriage prohibitions discriminate on the basis of sex, not only in their form—which, as I have said, is sufficient in itself—but also in reviving the very infirmities that led the Supreme Court to adopt an intermediate scrutiny standard for sex classifications in the first place. I so conclude for two, somewhat independent, reasons.

A. First, and more obviously, the gender stereotyping at the core of the same-sex marriage prohibitions clarifies that those laws affect men and women in basically the same way as, not in a fundamentally different manner from, a wide range *487 of laws and policies that have been viewed consistently as discrimination based on sex. As has been repeated again and again, legislating on the basis of such stereotypes limits, and is meant to limit, the choices men and women make about the trajectory of their own lives, choices about work, parenting, dress, driving-and yes, marriage. This focus in modern sex discrimination law on the preservation of the ability freely to make individual life choices regardless of one's sex confirms that sex discrimination operates at, and must be justified at, the level of individuals, not at the broad class level of all men and women. Because the same-sex

marriage prohibitions restrict individuals' choices on the basis of sex, they discriminate based on sex for purposes of constitutional analysis precisely to the same degree as other statutes that infringe on such choices—whether by distributing benefits or by restricting behavior—on that same ground.

B. Second, the long line of cases since 1971 invalidating various laws and policies that categorized by sex have been part of a transformation that has altered the very institution at the heart of this case, marriage. Reviewing that transformation, including the role played by constitutional sex discrimination challenges in bringing it about, reveals that the same sex marriage prohibitions seek to preserve an outmoded, sex-role-based vision of the marriage institution, and in that sense as well raise the very concerns that gave rise to the contemporary constitutional approach to sex discrimination.

(i) Historically, marriage was a profoundly unequal institution, one that imposed distinctly different rights and obligations on men and women. The law of coverture, for example, deemed the "the husband and wife ... one person," such that "the very being or legal existence of the woman [was] suspended ... or at least [was] incorporated and consolidated into that of the husband" during the marriage. 1 William Blackstone, Commentaries on the Laws of England 441 (3d rev. ed.1884). Under the principles of coverture, "a married woman [was] incapable, without her husband's consent, of

making contracts ... binding on her or him." *Bradwell v. Illinois,* 83 U.S. 130, 141, 16 Wall. 130, 21 L.Ed. 442 (1872) (Bradley, J., concurring). She could not sue or be sued without her husband's consent. *See, e.g.,* Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* 11–12 (2000). Married women also could not serve as the legal guardians of their children. *Frontiero v. Richardson,* 411 U.S. 677, 685, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973) (plurality op.).

Marriage laws further dictated economically disparate roles for husband and wife. In many respects, the marital contract was primarily understood as an economic arrangement between spouses, whether or not the couple had or would have children. "Coverture expressed the legal essence of marriage as reciprocal: a husband was bound to support his wife, and in exchange she gave over her property and labor." Cott, *Public Vows,* at 54. That is why "married women traditionally were denied the legal capacity to hold or convey property...." *Frontiero,* 411 U.S. at 685, 93 S.Ct. 1764. Notably, husbands owed their wives support even if there were no children of the marriage. *See, e.g.,* Hendrik Hartog, *Man and Wife in America: A History* 156 (2000).

There was also a significant disparity between the rights of husbands and wives with regard to physical intimacy. At common law, "a woman was the sexual property of her husband; that is, she had a duty to have intercourse with

him." John D'Emilio & Estelle B. Freedman, *Intimate Matters: A History of Sexuality in* *488 *America* 79 (3d ed.2012). Quite literally, a wife was legally "the possession of her husband, ... [her] husband's property." Hartog, Man and Wife in America, at 137. Accordingly, a husband could sue his wife's lover in tort for "entic[ing]" her or "alienat[ing]" her affections and thereby interfering with his property rights in her body and her labor. *Id.* A husband's possessory interest in his wife was undoubtedly also driven by the fact that, historically, marriage was the only legal site for licit sex; sex outside of marriage was almost universally criminalized. *See, e.g.,* Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex,* 115 Yale L.J. 756, 763–64 (2006).

Notably, although sex was strongly presumed to be an essential part of marriage, the ability to procreate was generally not. *See, e.g.,* Chester Vernier, American Family Laws: A Comparative Study of the Family Law of the Forty–Eight American States, Alaska, the District of Columbia, and Hawaii (to Jan. 1, 1931) (1931) I § 50, 239–46 (at time of survey, grounds for annulment typically included impotency, as well as incapacity due to minority or "non-age"; lack of understanding and insanity; force or duress; fraud; disease; and incest; but not inability to conceive); II § 68, at 38–39 (1932) (at time of survey, grounds for divorce included "impotence"; vast majority of states "generally held that impotence ... does not

mean sterility but must be of such a nature as to render complete sexual intercourse practically impossible"; and only Pennsylvania "ma[d]e sterility a cause" for divorce).

The common law also dictated that it was legally impossible for a man to rape his wife. Men could not be prosecuted for spousal rape. A husband's "incapacity" to rape his wife was justified by the theory that " 'the marriage constitute[d] a blanket consent to sexual intimacy which the woman [could] revoke only by dissolving the marital relationship.' " *See, e.g.,* Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape,* 88 Calif. L. Rev 1373, 1376 n.9 (2000) (quoting Model Penal Code and Commentaries, § 213.1 cmt. 8(c), at 342 (Official Draft and Revised Comments 1980)).

Concomitantly, dissolving the marital partnership via divorce was exceedingly difficult. Through the mid-twentieth century, divorce could be obtained only on a limited set of grounds, if at all. At the beginning of our nation's history, several states did not permit full divorce except under the narrowest of circumstances; separation alone was the remedy, even if a woman could show "cruelty endangering life or limb." Peter W. Bardaglio, *Reconstructing the Household: Families, Sex, and the Law in the Nineteenth–Century South* 33 (1995); *see also id.* 32–33. In part, this policy dovetailed with the grim fact that, at English common law, and in several states through the

beginning of the nineteenth century, "a husband's prerogative to chastise his wife"—that is, to beat her short of permanent injury—was recognized as his marital right. Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy,* 105 Yale L.J. 2117, 2125 (1996).

Perhaps unsurprisingly, the profoundly unequal status of men and women in marriage was frequently cited as justification for denying women equal rights in other arenas, including the workplace. "[S]tate courts made clear that the basis, and validity, of such laws lay in stereotypical beliefs about the appropriate roles of men and women." *Hibbs v. Dep't of Human Res.,* 273 F.3d 844, 864 (9th Cir.2001), *aff'd sub nom., Nevada Dep't of Human Res. v. Hibbs,* 538 U.S. 721, 123 S.Ct. 1972, 155 L.Ed.2d 953. Justice Bradley infamously opined in 1887 that "the civil law, as well as nature herself, has always recognized a *489 wide difference in the respective spheres and destinies of man and woman." *Bradwell,* 83 U.S. at 141, 83 U.S. 130 (Bradley, J., concurring). On this view, women could be excluded from various professions because "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." *Id.* Instead, the law gave effect to the belief that "[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother." *Id.*

As a result of this separate-spheres regime, " '[h]istorically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second.' ... Stereotypes about women's domestic roles [we]re reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men." *Hibbs,* 538 U.S. at 736, 123 S.Ct. 1972 (quoting the Joint Hearing before the Subcommittee on Labor—Management Relations and the Subcommittee on Labor Standards of the House Committee on Education and Labor, 99th Cong., 2d Sess., at 100 (1986)). Likewise, social benefits programs historically distinguished between men and women on the assumption, grounded in the unequal marital status of men and women, that women were more likely to be homemakers, supported by their working husbands. *See, e.g., Califano v. Goldfarb,* 430 U.S. 199, 205–07, 97 S.Ct. 1021, 51 L.Ed.2d 270 (1977); *Weinberger v. Wiesenfeld,* 420 U.S. 636, 644–45, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975).

(ii) This asymmetrical regime began to unravel slowly in the nineteenth century, starting with the advent of Married Women's Property Acts, which allowed women to possess property in their own right for the first time. *See, e.g.,* Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930,* 82 Geo. L.Rev. 2127(1994). Eventually, state legislatures revised their laws. Today, of course, a

married woman may enter contracts, sue and be sued without her husband's participation, and own and convey property. The advent of "no fault" divorce regimes in the late 1960s and early 1970s made marital dissolutions more common, and legislatures also directed family courts to impose child and spousal support obligations on divorcing couples without regard to gender. *See* Cott, *Public Vows,* at 205–06. As these legislative reforms were taking hold, "in 1971 ... the Court f[ou]nd for the first time that a state law violated the Equal Protection Clause because it arbitrarily discriminated on the basis of sex." *Hibbs,* 273 F.3d at 865 (citing *Reed,* 404 U.S. 71, 92 S.Ct. 251).

This same legal transformation extended into the marital (and nonmarital) bedroom. Spousal rape has been criminalized in all states since 1993. *See, e.g.,* Sarah M. Harless, *From the Bedroom to the Courtroom: The Impact of Domestic Violence Law on Marital Rape Victims,* 35 Rutgers L.J. 305, 318 (2003). *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), held that married couples have a fundamental privacy right to use contraceptives, and *Eisenstadt v. Baird,* 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972), later applied equal protection principles to extend this right to single persons. More recently, *Lawrence* clarified that licit, consensual sexual behavior is no longer confined to marriage, but is protected when it occurs, in private, between two consenting adults, regardless of their gender. *See* 539 U.S. at 578, 123 S.Ct. 2472.

In the child custody context, mothers and fathers today are generally presumed to be equally fit parents. *See, e.g.,* Cott, *Public Vows,* at 206. *490 *Stanley v. Illinois,* 405 U.S. 645, 658, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), for example, held invalid as an equal protection violation a state law that presumed unmarried fathers, but not unwed mothers, unfit as parents. Later, the Supreme Court expressly "reject[ed] ... the claim that ... [there is] any universal difference between maternal and paternal relations at every phase of a child's development." *Caban v. Mohammed,* 441 U.S. 380, 389, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979). Likewise, both spouses in a marriage are now entitled to economic support without regard to gender. *See* Cott, at 206–07. Once again, equal protection adjudication contributed to this change: *Orr,* 440 U.S. at 278–79, 99 S.Ct. 1102, struck down a state statutory scheme imposing alimony obligations on husbands but not wives.

In short, a combination of constitutional sex-discrimination adjudication, legislative changes, and social and cultural transformation has, in a sense, already rendered contemporary marriage "genderless," to use the phrase favored by the defendants. *See* Op. Ct. at 12 n.6. For, as a result of these transformative social, legislative, and doctrinal developments, "[g]ender no longer forms an essential part of marriage; marriage under law is a union of equals." *Perry,* 704 F.Supp.2d at 993. As a result, in the states that currently ban same-sex marriage, the legal norms that currently govern

the institution of marriage are "genderless" in every respect *except* the requirement that would-be spouses be of different genders. With that exception, Idaho and Nevada's marriage regimes have jettisoned the rigid roles marriage as an institution once prescribed for men and women. In sum, "the sex-based classification contained in the[se] marriage laws," as the *only* gender classification that persists in some states' marriage statutes, is, at best, "a vestige of sex-role stereotyping" that long plagued marital regimes before the modern era, *see Baker,* 744 A.2d at 906 (Johnson, J., concurring in part and dissenting in part), and, at worst, an attempt to reintroduce gender roles.

The same-sex marriage bars constitute gender discrimination both facially and when recognized, in their historical context, both as resting on sex stereotyping and as a vestige of the sex-based legal rules once imbedded in the institution of marriage. They must be subject to intermediate scrutiny.

III. Idaho and Nevada's Same–Sex Marriage Prohibitions Fail Under Intermediate Scrutiny

For Idaho and Nevada's same-sex marriage prohibitions to survive the intermediate scrutiny applicable to sex discriminatory laws, it must be shown that these laws "serve important governmental objectives and [are] substantially related to achievement of those objectives." *Craig,*

429 U.S. at 197, 97 S.Ct. 451. "The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women." *Hogan,* 458 U.S. at 725–26, 102 S.Ct. 3331.

In part, the interests advanced by the defendants fail because they are interests in promoting and enforcing gender stereotyping and so simply are not legitimate governmental interests. And even if we assume that the other governmental objectives cited by the defendants are legitimate and important, the defendants have not shown that the same-sex marriage prohibitions are substantially related to achieving any of them.

The asserted interests fall into roughly three categories: (1) ensuring children are *491 raised by parents who provide them with the purported benefits of "gender complementarity," also referred to as "gender diversity"; (2) "furthering the stability of family structures through benefits targeted at couples possessing biological procreative capacity," and/or discouraging "motherlessness" or "fatherlessness in the home"; and (3) promoting a "child-centric" rather than "adult-centric" model of marriage.[8] The defendants insist that "genderless

[8] The defendants also assert that the state has an interest in "accommodating religious freedom and reducing the potential

marriage run[s] counter to ... [these] norms and ideals," which is why "man-woman marriage" must be preserved.

The Opinion of the Court thoroughly demonstrates why all of these interests are without merit as justifications for sexual orientation discrimination. I add this brief analysis only to show that the justifications are likewise wholly insufficient under intermediate scrutiny to support the sex-based classifications at the core of these laws.

A. The Idaho defendants assert that the state has an interest in ensuring children have the benefit of parental "gender complementarity." There must be "space in the law for the distinct role of 'mother' [and] the distinct role of 'father' and therefore of their united, complementary role in raising offspring," the Idaho defendants insist. On a slightly different tack, the Nevada intervenors similarly opine that "[s]ociety has long recognized

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for civic strife." But, as the Opinion of the Court notes, even if allowing same-sex marriage were likely to lead to religious strife, which is highly doubtful, to say the least, that fact would not justify the denial of equal protection inherent in the gender-based classification of the same-sex marriage bars. *See Watson v. City of Memphis,* 373 U.S. 526, 535, 83 S.Ct. 1314, 10 L.Ed.2d 529 (1963) (rejecting the city's proffered justification that delay in desegregating park facilities was necessary to avoid interracial "turmoil," and explaining "constitutional rights may not be denied simply because of hostility to their assertion or exercise").

that diversity in education brings a host of benefits to students," and ask, "[i]f that is true in education, why not in parenting?"

Under the constitutional sex-discrimination jurisprudence of the last forty years, neither of these purported justifications can possibly pass muster as a justification for sex discrimination. Indeed, these justifications are laden with the very " 'baggage of sexual stereotypes' " the Supreme Court has repeatedly disavowed. *Califano v. Westcott,* 443 U.S. at 89, 99 S.Ct. 2655 (quoting *Orr,* 440 U.S. at 283, 99 S.Ct. 1102).

(i) It should be obvious that the stereotypic notion "that the two sexes bring different talents to the parenting enterprise," runs directly afoul of the Supreme Court's repeated disapproval of "generalizations about 'the way women are,' " *VMI,* 518 U.S. at 550, 116 S.Ct. 2264, or "the way men are," as a basis for legislation. Just as *Orr,* 440 U.S. at 279–80, 99 S.Ct. 1102, rejected gender-disparate alimony statutes "as effectively announcing the State's preference for an allocation of family responsibilities under which the wife plays a dependent role," so a state preference for supposed gender-specific parenting styles cannot serve as a legitimate reason for a sex-based classification.

This conclusion would follow "[e]ven [if] some statistical support can be conjured up for the generalization" that men and women behave differently as marital partners and/or parents,

because laws that rely on gendered stereotypes about how men and women behave (or should behave) must be reviewed under intermediate scrutiny. *See J.E.B.,* 511 U.S. at 140, 114 S.Ct. 1419. It has even greater force where, as *492 here, the supposed difference in parenting styles lacks reliable empirical support, even "on average."[9] Communicating such archaic gender-role stereotypes to children, or to parents and potential parents, is not a legitimate governmental interest, much less a substantial one.

(ii) The assertion that preserving "man-woman marriage" is permissible because the state has a substantial interest in promoting "diversity" has no more merit than the "gender complementarity" justification. Diversity is assuredly a weighty interest in the context of public educational institutions, with hundreds or thousands of individuals. But "[t]he goal of community diversity has no place ... as a requirement of marriage," which, by law, is a private institution consisting only of two persons. *Baker v. State,* 744 A.2d at 910 (Johnson, J., concurring in part and dissenting in part). "To begin with, carried to its logical conclusion, the [Nevada intervenors'] rationale could require all

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[9] As one of the plaintiffs' expert psychologists, Dr. Michael Lamb, explained, "[t]here ... is no empirical support for the notion that the presence of both male and female role models in the home enhances the adjustment of children and adolescents."

marriages to be between [two partners], not just of the opposite sex, but of different races, religions, national origins, and so forth, to promote diversity." *Id.* Such an absurd requirement would obviously be unconstitutional. *See Loving,* 388 U.S. 1, 87 S.Ct. 1817.

Moreover, even if it were true that, on average, women and men have different perspectives on some issues because of different life experiences, individual couples are at least as likely to exhibit conformity as diversity of personal characteristics. Sociological research suggests that individual married couples are more likely to be *similar* to each other in terms of political ideology, educational background, and economic background than they are to be dissimilar; despite the common saying that "opposites attract," in actuality it appears that "like attracts like." *See, e.g.,* John R. Alford et al., *The Politics of Mate Choice,* 73:2 J. Politics 362, 376 (2011) ("[S]pousal concordance in the realm of social and political attitudes is extremely high."); Jeremy Greenwood et al., *Marry Your Like: Assortative Mating and Income Inequality* (Population Studies Ctr., Univ. Of Penn., Working Paper No. 14–1, at 1, 2014) (Since the 1960s, "the degree of assortative mating [with regard to educational level] has increased."). Further, there is no evidence of which I am aware that gender is a better predictor of diversity of viewpoints or of parenting styles than other characteristics. Such "gross generalizations that would be deemed impermissible if made on the

basis of race [do not become] somehow permissible when made on the basis of gender." *J.E.B.,* 511 U.S. at 139–40, 114 S.Ct. 1419.

In short, the defendants' asserted state interests in "gender complementarity" and "gender diversity" are not legitimate "important governmental objectives." *See Craig,* 429 U.S. at 197, 97 S.Ct. 451. Accordingly, I do not address whether excluding same-sex couples from marriage is substantially related to this goal.

B. The defendants also argue that their states have an important interest in "encouraging marriage between opposite-sex partners" who have biological children, so that those children are raised in an intact marriage rather than in a cohabiting or single-parent household. Assuming that this purpose is in fact a "important governmental objective," the defendants have entirely failed to explain how excluding same-sex couples from marriage is substantially related to achieving the objective of furthering family stability.

*493 (i) I will interpret the asserted state goal in preventing "fatherlessness" and "motherlessness" broadly. That is, I shall assume that the states want to discourage parents from abandoning their children by encouraging dual parenting over single parenting. If the asserted purpose were instead read narrowly, as an interest in ensuring that a child has both a mother and a father in the home (rather than two mothers or two

fathers), the justification would amount to the same justification as the asserted interest in "gender complementarity," and would fail for the same reason. That is, the narrower version of the family stability justification rests on impermissible gender stereotypes about the relative capacities of men and women.

Discouraging single parenting by excluding same-sex couples from marriage is oxymoronic, in the sense that it will likely achieve exactly the opposite of what the states say they seek to accomplish. The defendants' own evidence suggests that excluding same-sex couples from marriage renders their unions less stable, increasing the risk that the children of those couples will be raised by one parent rather than two.

True, an increasing number of children are now born and raised outside of marriage, a development that may well be undesirable.[10] But that trend began apace well before the advent of same-sex marriage and has been driven by entirely different social and legal developments. The trend can be traced to declines in marriage rates, as well

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[10] According to the defendants, "[b]etween 1970 and 2005, the proportion of children living with two married parents dropped from 85 percent to 68 percent," and as of 2008, "[m]ore than a third of all U.S. children [were] ... born outside of wedlock." *See* Benjamin Scafidi, Institute for American Values, *The Taxpayer Costs of Divorce and Unwed Childbearing: First–Ever Estimates for the Nation and All Fifty States* 7 (2008).

as to the rise in divorce rates after the enactment of "no fault" divorce regimes in the late 1960s and early 1970s. "The proportion of adults who declined to marry at all rose substantially between 1972 and 1998.... [In the same period,] [t]he divorce rate rose more furiously, to equal more than half the marriage rate, portending that at least one in two marriages would end in divorce." Cott, *Public Vows,* at 203. The defendants' assertion that excluding same-sex couples from marriage will do anything to reverse these trends is utterly unsubstantiated.

(ii) The defendants' appeal to biology is similarly without merit. Their core assertion is that the states have a substantial interest in channeling opposite-sex couples into marriage, so that any accidentally produced children are more likely to be raised in a two-parent household. But the exclusion of same-sex couples from the benefits and obligations of state-sanctioned marriage is assuredly not "substantially related," *Craig,* 429 U.S. at 197, 97 S.Ct. 451, to achieving that goal.

The reason only opposite-sex couples should be allowed to marry, we are told by the defendants, is that they "possess the unique ability to create new life." But both same-sex and opposite-sex couples can and do produce children biologically related only to one member of the couple, via assisted reproductive technology or otherwise. And both same-sex and opposite-sex couples adopt children, belying the notion that the two groups

necessarily differ as to their biological connection to the children they rear.

More importantly, the defendants "cannot explain how the failure of *opposite-sex* couples to accept responsibility for the children they create relates at all to the exclusion of same-sex couples from the benefits of marriage." *494 *Baker,* 744 A.2d at 911 (Johnson, J., concurring in part and dissenting in part). For one thing, marriage has never been restricted to opposite-sex couples able to procreate; as noted earlier, the spousal relationship, economic and otherwise, has always been understood as a sufficient basis for state approval and regulation. *See supra* pp. 487–88. For another, to justify sex discrimination, the state must explain why the *discriminatory feature* is closely related to the state interest. *See Hogan,* 458 U.S. at 725–26, 102 S.Ct. 3331. The states thus would have to explain, without reliance on sex-stereotypical notions, why the bans on same-sex marriage advance their interests in inducing more biological parents to marry each other. No such showing has been or can be made.

Biological parents' inducements to marry will remain exactly what they have always been if same-sex couples can marry. The legal benefits of marriage—taxation, spousal support, inheritance rights, familial rights to make decisions concerning the illness and death of a spouse, and so on—will not change. *See, e.g. Turner v. Safley,* 482 U.S. 78, 95–96, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). The

only change will be that now-excluded couples will enjoy the same rights. As the sex-based exclusion of same-sex couples from marrying does not in any way enhance the marriage benefits available to opposite-sex couples, that exclusion does not substantially advance—or advance at all—the state interest in inducing opposite-sex couples to raise their biological children within a stable marriage.

(iii) Finally, the defendants argue that "the traditional marriage institution" or "man-woman marriage ... is relatively but decidedly more child-centric" than "genderless marriage," which they insist is "relatively but decidedly more adult-centric."

These assertions are belied by history. As I have noted, *see supra* pp. 487–89, "traditional marriage" was in fact quite "adult-centric." Marriage was, above all, an economic arrangement between spouses. *See, e.g.,* Cott, *Public Vows,* at 54. Whether or not there were children, the law imposed support obligations, inheritance rules, and other rights and burdens upon married men and women. Moreover, couples unwilling or unable to procreate have never been prevented from marrying. Nor was infertility generally recognized as a ground for divorce or annulment under the old fault-based regime, even though sexual impotence was. *See, e.g.,* Vernier, I § 50, II § 68.

Further, the social concept of "companionate marriage"—that is, legal marriage for

companionship purposes without the possibility of children—has existed since at least the 1920s. *See* Christina Simmons, *Making Marriage Modern: Women's Sexuality from the Progressive Era to World War II* 121 (2009). The Supreme Court called on this concept when it recognized the right of married couples to use contraception in 1965. *Griswold,* 381 U.S. at 486, 85 S.Ct. 1678. *Griswold* reasoned that, with or without procreation, marriage was "an association for as noble a purpose as any." *Id.*

Same-sex marriage is thus not inherently less "child-centric" than "traditional marriage."[11] In both versions, the couple may bear or adopt and raise children, or not.

*495 Finally, a related notion the defendants advance, that allowing same-sex marriage will render the marriage institution "genderless," in the sense that gender roles within opposite-sex marriages will be altered, is also a historical. As I have explained, those roles have already been profoundly altered by social, legislative, and adjudicative changes. All these changes were

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[11] Moreover, if the assertion that same-sex marriages are more "adult-centric" is meant to imply state disapproval of the sexual activity presumed to occur in same-sex marriages, that disapproval could not be a legitimate state purpose. After *Lawrence,* the right to engage in same-sex sexual activity is recognized as a protected liberty interest. *See* 539 U.S. at 578, 123 S.Ct. 2472.

adopted toward the end of eliminating the gender-role impositions that previously inhered in the legal regulation of marriage.

In short, the "child-centric"/"adult-centric" distinction is an entirely ephemeral one, at odds with the current realities of marriage as an institution. There is simply no substantial relationship between discouraging an "adult-centric" model of marriage and excluding same-sex couples.

IV. Conclusion

"Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women." *J.E.B.,* 511 U.S. at 130–31, 114 S.Ct. 1419. Idaho and Nevada's same-sex marriage proscriptions *are* sex based, and these bans *do* serve to preserve "invidious, archaic, and overbroad stereotypes" concerning gender roles. The bans therefore must fail as impermissible gender discrimination.

I do not mean, by presenting this alternative analysis, to minimize the fact that the same-sex marriage bans necessarily have their greatest effect on lesbian, gay, bisexual, and transgender individuals. Still, it bears noting that the social exclusion and state discrimination against lesbian,

gay, bisexual, and transgender people reflects, in large part, disapproval of their nonconformity with gender-based expectations.[12] That is, such individuals are often discriminated against because they are not acting or speaking or dressing as "real men" or "real women" supposedly do. "[S]tereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women." *Centola v. Potter,* 183 F.Supp.2d 403, 410 (D.Mass.2002); *see also* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination,* 69 N.Y.U. L.Rev. 197 (1994). The same-sex marriage prohibitions, in other words, impose harms on sexual orientation and gender identity minorities precisely because they impose and enforce *gender*-normative behavior.

I do recognize, however, that the gender classification rubric does not adequately capture the essence of many of the restrictions targeted at lesbian, gay, and bisexual people. Employment discrimination, housing discrimination, and peremptory strikes on the basis of sexual orientation, to name a few of the exclusions gays, lesbians, and other sexual orientation minorities have faced, are primarily motivated by stereotypes about sexual orientation; by animus against people

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[12] Although not evidently represented among the plaintiff class, transgender people suffer from similar gender stereotyping expectations. *See, e.g., Schwenk v. Hartford,* 204 F.3d 1187, 1201–02 (9th Cir.2000) (discrimination on the basis of transgender status is also gender discrimination).

based on their nonconforming sexual orientation; and by distaste for same-sex sexual activity or the perceived personal characteristics of individuals who engage in such behavior. *See, e.g., Romer v. Evans,* 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996); *SmithKline Beecham Corp. v. Abbott Labs.,* 740 F.3d 471 (2014). And those sorts of restrictions do not turn directly on gender; they do not withhold a benefit, choice, or opportunity from an individual because that individual is a man or *496 a woman. Although the gender stereotyping so typical of sex discrimination may be present, *see generally* Koppelman, 69 N.Y.U. L.Rev. 197, those restrictions are better analyzed as sexual orientation discrimination, as we did in *SmithKline*. 740 F.3d at 480–84.

As to the same-sex marriage bans in particular, however, the gender discrimination rubric does squarely apply, for the reasons I have discussed. And as I hope I have shown, the concepts and standards developed in more than forty years of constitutional sex discrimination jurisprudence rest on the understanding that "[s]anctioning sex-based classifications on the grounds that men and women, simply by virtue of their gender, necessarily play different roles in the lives of their children and in their relationships with each other causes concrete harm to women and to men throughout our society." Deborah A. Widiss et al., *Exposing Sex Stereotypes in Recent Same–Sex Marriage Jurisprudence,* 30 Harv. J.L. & Gender 461, 505 (2007). In my view, the same-sex marriage

bans belie that understanding, and, for that reason as well, cannot stand.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 12-17668

SUSAN LATTA; et al., Plaintiffs-Appellees,

v.

C.L. OTTER, "BUTCH"; et al., Defendant-Appellant,

Filed: October 7, 2014

ORDER

REINHARDT, GOULD, and BERZON,

Circuit Judges

The mandate shall issue forthwith.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 12-17668

BEVERLY SEVCIK; et al., Plaintiffs-Appellants,

v.

BRIAN SANDOVAL, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NEVADA; et al., Defendant-Appellees,

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Filed: October 7, 2014

MANDATE

MOLLY C. DWYER, CLERK OF COURT

The judgment of this Court, entered October 07, 2014, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

Molly C. Dwyer
Clerk of Court
Eliza Lau
Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

No. 2: 12-CV-00578-RCJ (PAL)

BEVERLY SEVCIK, et al., Plaintiffs

v.

BRIAN SANDOVAL, et al., Defendants

Filed: November 26, 2012

ORDER

ROBERT C. JONES
UNITED STATES DISTRICT JUDGE

This case arises out of the refusal of the State of Nevada to permit same-sex couples to enter into civil marriages, as well as its refusal to recognize same- sex marriages performed in other states as "marriages" under Nevada law. The question before the Court is not the wisdom of providing for or recognizing same-sex marriages as a matter of policy but whether the Equal Protection Clause of the Fourteenth

Amendment to the U.S. Constitution prohibits the People of the State of Nevada from maintaining statutes that reserve the institution of civil marriage to one-man-one-woman relationships or from amending their state constitution to prohibit the State from recognizing marriages formed in other states as "marriages" under Nevada law if those marriages do not conform to Nevada's one-man-one-woman civil marriage institution. For the reasons given herein, the Court rules that it does not. To the extent the present challenge is not precluded by U.S. Supreme Court precedent, Defendants are entitled to summary judgment. ***2**

I. FACTS AND PROCEDURAL HISTORY

The sixteen Plaintiffs in this case comprise eight same-sex couples who desire to marry one another in Nevada or who have validly married one another in other jurisdictions and desire to have their marriages recognized as "marriages" by the State of Nevada. (*See* Compl. ¶¶ 5–12, Apr. 10, 2012, ECF No. 1). Defendants are Governor Brian Sandoval, Clark County Clerk and Commissioner of Civil Marriages Diana Alba, Washoe County Clerk and Commissioner of Civil Marriages Amy Harvey, and Carson City Clerk-Recorder Alan Glover. (See *id.* ¶¶ 13-16). Except for the fact that they are of the same sex, the unmarried

Plaintiff couples are otherwise legally qualified to marry one another in Nevada. *(See id.* ¶ 24). Between April 1 and 6, 2012, four of the unmarried Plaintiff couples were denied marriage licenses in Clark County, Washoe County, and Carson City, variously, for this reason. *(See id.* ¶¶ 25-28). The other four Plaintiff couples were validly married in other jurisdictions and challenge the State's refusal to recognize their foreign marriages as "marriages," as opposed to "domestic partnerships," under Nevada law. *(See id.* ¶¶ 29-32).

Plaintiffs sued Defendants m this Court on a single claim under the Equal Protection Clause of the Fourteenth Amendment pursuant to 42 U.S.C. § 1983, requesting declaratory and injunctive relief. The Court granted the Coalition for the Protection of Marriage's (the "Coalition") motion to intervene after Plaintiffs withdrew their opposition to the motion. The Court has heard oral argument on Governor Sandoval's and Clerk-Recorder Glover's separate motions to dismiss. The Coalition, Clerk-Recorder Glover, Governor Sandoval, and Plaintiffs have since filed cross motions for summary judgment. The Court decides all of these motions via the present Order.

II. LEGAL STANDARDS

A. Dismissal

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the ***3** claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Conley v. Gibson,* 355 U.S. 41, 47 (1957). Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action that fails to state a claim upon which relief can be granted. A motion to dismiss under Rule 12(b)(6) tests the complaint's sufficiency. *See N. Star Int'l v. Ariz. Corp. Comm'n,* 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the factual grounds upon which it rests. *See Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007). In considering whether the complaint is sufficient to state a claim, the court will take all material allegations as true and construe them in the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan,* 792 F.2d 896, 898 (9th Cir. 1986). The court, however, is not required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden State Warriors,* 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action

with conclusory allegations is not sufficient; a plaintiff must plead facts pertaining to his own case making a violation plausible, not just possible. *Ashcroft v. Iqbal*, 556 U.S. 662, 677-79 (2009) (citing *Twombly,* 550 U.S. at 556) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."). In' other words, under the modern interpretation of Rule 8(a), a plaintiff must not only specify a cognizable legal theory *(Conley* review), but also must plead the facts of his own case so that the court can determine whether he has any plausible basis for relief under the legal theory he has specified, assuming the facts are as he alleges *(Twombly-Iqbal* review).

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion. However, material which is properly submitted as part of the *4 complaint may be considered on a motion to dismiss." *Hal Roach Studios, Inc. v. Richard Feiner* & *Co.,* 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citation omitted).

Similarly, "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss" without converting the motion to dismiss into a

motion for summaryjudgment. *Branch v. Tunnell,* 14 F.3d 449, 454 (9th Cir. 1994). Moreover, under Federal Rule of Evidence 201, a court may take judicial notice of "matters of public record." *Mack v. S. Bay Beer Distribs., Inc.,* 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court considers materials outside of the pleadings, the motion to dismiss is converted into a motion for summary judgment. *See Arpin v. Santa Clara Valley Transp. Agency,* 261 F.3d 912, 925 (9th Cir. 2001).

B. Summary Judgment

A court must grant summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those which may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *See id.* A principal purpose of summary judgment is "to isolate and dispose of factually unsupported claims." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24 (1986). In determining summary judgment, a court uses a burden-shifting scheme:

> When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a

> directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case.

C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc., 213 F.3d 474, 480 (9th Cir. 2000) (citations and internal quotation marks omitted). In contrast, when the nonmoving party bears the burden ***5** of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *See Celotex Corp.,* 477 U.S. at 323-24. If the moving party fails to meet its initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. *See Adickes v. S.H. Kress* & Co., 398 U.S. 144, 159-60 (1970).

If the moving party meets its initial burden, the burden then shifts to the opposing party to establish a genuine issue of material fact. *See Matsushita Elec. Ind us. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is

sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n,* 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations unsupported by facts. *See Taylor v. List,* 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the pleadings and set forth specific facts by producing competent evidence that shows a genuine issue for trial. *See* Fed. R. Civ. P. 56(e); *Celotex Corp.,* 477 U.S. at 324.

At the summary judgment stage, a court's function is not to weigh the evidence and determine the truth, but to determine whether there is a genuine issue for trial. *See Anderson,* 477 U.S. at 249. The evidence of the nonmovant is "to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is not significantly probative, summary judgment may be granted. *See id.* at 249-50. ***6**

III. ANALYSIS

A. Nevada's Marriage and Domestic Partnership Laws

The Nevada Constitution prohibits official recognition of same-sex marriages by the State. *See* Nev. Const. art. I, § 21 ("Only a marriage between a male and female person shall be recognized and given effect in [Nevada]."). The Nevada Legislature, however, has recently provided for "domestic partnerships" between two persons of any gender.

See generally Nev. Rev. Stat. ch. 122A. Nevada recognizes both foreign marriages and foreign quasi- marriage relationships that do not qualify as "marriages" under the Nevada Constitution as "domestic partnerships" under Chapter 122A, regardless of the label used in the jurisdiction where the relationship was formed. *See* Nev. Rev. Stat. § 122A.500.

A couple desiring to enter into a domestic partnership in Nevada must satisfy eligibility requirements similar to, but not identical to, those requirements a couple desiring to enter into a marriage must satisfy. *See* Nev. Rev. Stat. §§ 122A.100, 122A.110. Prospective domestic partners must prove to the Secretary of State that they sharea residence on at least a part-time basis, that they are neither married nor in a domestic partnership in any state, that they are not related by blood in a

way that would prevent them from being married in Nevada, and that they are both eighteen years old and competent to consent. *See id.* at § 122A.100(2), (4). If these requirements are satisfied, the couple must then file with the Secretary of State a signed, notarized form declaring their decision "to share one another's lives in an intimate and committed relationship of mutual caring" and that they desire of their own free will to enter into a domestic partnership, and they must pay a reasonable fee to the Office of the Secretary of State. *See id.* at § 122A.100(1). Domestic partners may solemnize their relationship, but they need not do so to perfect it, and religious ministers and organizations may choose not to solemnize or otherwise recognize such relationships. *See id .* at § 122A.110. Nevada's laws do not purport to prevent the celebration of domestic partnerships in religious or secular ceremonies, nor do they ***7** purport to prevent domestic partners or others from using the word "marriage" to describe the relationship.

A couple desiring to enter into a civil marriage must satisfy slightly different requirements, some of which are more stringent, and some of which are less stringent. Prospective spouses must be one male and one female, and both must be eighteen years old, although a person who is at least sixteen years old may marry with the

permission of at least one parent or legal guardian, and a person under sixteen may marry with the permission of at least one parent or legal guardian plus approval by the district court-exceptions that are not available to prospective domestic partners. *See id.* at §§ 122.020, 122.025. Although prospective domestic partners must be neither married nor in another domestic partnership, *see* Nev. Rev. Stat. § 122A.100(2)(b), a person who is already in a domestic partnership could apparently marry a third person in Nevada, because the anti-bigamy clause under the marriage chapter prevents only married persons from marrying again and says nothing of persons who are already in domestic partnerships, *see id .* at § 122.020(1). Also, Chapter 122A is silent on whether opposite-sex couples may enter into domestic partnerships; presumably, therefore, they can, though such a union would not constitute a "marriage" under the Nevada Constitution. *See id.* at § 122A.510. Unlike prospective domestic partners, prospective spouses may obtain the required marriage license from the county clerk in any county in Nevada but must provide the clerk with certain documentary evidence and must answer questions on the application form under oath. *See id.* at § 122.040. They must also pay a fee to the county clerk. *See id.* at § 122.060. However, unlike the "reasonable fee" to be charged by the Secretary of State to prospective domestic

partners, the fees to be paid by prospective spouses to county clerks are fixed by statute. *See id.* at § 122.060. Unlike domestic partnerships, a judge, justice, or minister must solemnize a marriage. *See id.* at § 122.010.

Except as otherwise provided in the statutes, domestic partners in Nevada have the same *8 rights and responsibilities as spouses have, Nev. Rev. Stat. § 122A.200(1)(a), former domestic partners have the same rights and responsibilities as former spouses have, *id .* at § 122A.200(l)(b), surviving domestic partners have the same rights and responsibilities as widows and widowers have, id. at § 122A.200(l)(c), domestic partners and former and surviving domestic partners have the same rights and responsibilities with respect to their children as spouses and former and surviving spouses have, *id.* at § 122A.200(1)(d), where state actors are concerned, Nevada law immunizes domestic partners from any discriminatory effects of federal law, *id.* at § 122A.200(1)(e) ("[t]o the extent that provisions of Nevada law adopt, refer to or rely upon provisions of federal law in a way that otherwise would cause domestic partners to be treated differently from spouses, domestic partners must be treated by Nevada law as if federal law recognized a domestic partnership in the same manner as Nevada law"), and domestic partners have the same right to nondiscriminatory treatment as spouses as a

general matter, *id.* at § 122A.200(1)(f). There is at least one notable exception to these equality prov1s10ns: "The provisions of this chapter do not require a public or private employer in this State to provide health care benefits to or for the domestic partner of an officer or employee," *id.* at § 122A.210(1), though employers may offer such coverage voluntarily, *id.* at § 122A.210(2). Although the Nevada Constitution independently provides that a domestic partnership between persons of the same sex cannot be a "marriage" in Nevada, Chapter 122A itself provides that no domestic partnership is a "marriage" under the Nevada Constitution. *See id.* at § 122A.510. The statutory provision is likely only important for opposite-sex domestic partners, because it adds nothing to the Nevada Constitution's prohibition against same-sex marriages.

B. Baker v. Nelson

Defendants argue that the present equal protection challenge is precluded by *Baker v. Nelson,* 409 U.S. 810 (1972). In that case, the Supreme Court summarily dismissed an equal protection challenge to Minnesota's marriage laws for lack of a substantial federal question. *See* ***9** *id.* at 810.

The summary dismissal of an appeal for want of a substantial federal question operates as a decision on the merits. *Hick s v. Miranda,*

422 U.S. 332, 344-45 (1975) ("[U]nless and until the Supreme Court should instruct otherwise, inferior federal courts had best adhere to the view that if the Court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise. . . . [L]ower courts are bound by summary decisions by this Court until such time as the Court informs [them] that [they] are not." (citations and internal quotation marks omitted; alterations in original)). " 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). "A summary disposition affirms only the judgment of the court below, and no more may be read into [the] action than was essential to sustain that judgment." *Ill. State Bd. of Elections v. Socialist Workers Party ,* 440 U.S. 173, 182-83 (1979) (citation omitted). "Questions which 'merely lurk in the record' are not resolved, and no resolution of them may be inferred." *Id.* at 183 (citation omitted). Accordingly, *Baker* controls the present case, unless the specific challenge presented in this case was not decided by the Minnesota Supreme Court.

In *Baker,* the Minnesota Supreme Court ruled, *inter alia,* that "[t]he equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry. . . . We hold, therefore, that [the statute permitting only opposite-sex marriage] does not offend the . . . Fourteenth Amendment[] to the United States Constitution." *Baker v. Nelson,* 191 N.W.2d 185, 187 (Minn. 1971). The Supreme Court summarily dismissed the appeal from this decision "for want of a substantial federal question." *See Baker,* 409 U.S. at 810. The challenged statute in *Baker* was Chapter 517 of the Minnesota *10 Statutes, which prohibited same-sex marriages. *See Baker,* 191 N.W.2d at 186. The plaintiffs in *Baker* challenged that statute under the Ninth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See id.* The Minnesota Supreme Court ruled that the statute offended none of these constitutional provisions. *See id.* at 186-87. The U.S. Supreme Court summarily dismissed the appeal, *see Baker,* 409 U.S. at 810, so this Court "had best adhere to the view that" the question of whether a state's refusal to recognize same-sex marriage offends the Equal Protection Clause is constitutionally insubstantial, *see Hick s,* 422 U.S. at 344-45, and the Court is prevented from coming to an opposite conclusion, *see Mandel,* 432 U.S. at 176.

Governor Sandoval and Clerk-Recorder Glover therefore ask the Court to dismiss. Plaintiffs respond that *Baker* does not control because *Baker* concerned the broader question of whether the Equal Protection Clause requires a state to permit same- sex marriages, whereas the present case concerns the narrower question of whether the Equal Protection Clause permits a state to set up nearly identical civil institutions, i.e., marriage and domestic partnership, and then exclude same-sex couples from one and not the other. As discussed in more detail, *infra,* the State of Nevada has not done this in the way Plaintiffs argue it has. The Court finds that the present challenge is in the main a garden-variety equal protection challenge precluded by *Baker.* Plaintiffs also argue that the outcome in *Perry v. Brown,* 671 F.3d 1052 (9th Cir. 2012) cannot be squared with Defendants' interpretation of the *Hick's* doctrine. But the Court finds *Perry* to be consistent with the view that *Baker* precludes a large part of the present challenge. The equal protection claim is the same in this case as it was in *Baker,* i.e., whether the Equal Protection Clause prevents a state from refusing to permit same-sex marriages. There is an additional line of argument potentially applicable in this case based upon *Romer v. Evans,* 517 U.S. 620 (1996) concerning the withdrawal of existing rights or a broad, sweeping change to a minority group's legal status. A *Romer-* type analysis is not precluded by *Baker,* because the

Romer doctrine was ***11** not created until after *Baker* was decided. But the traditional equal protection claim is precluded, and this is consistent with *Perry.* The *Perry* court was clear and emphatic that its decision was based solely upon the Supreme Court's withdrawal-of-existing-rights theory adopted in *Romer* in 1996, twenty-four years after *Baker* was decided, not upon a general equal protection challenge, which the Court finds *Baker* precludes.

In summary, the present equal protection claim is precluded by *Baker* insofar as the claim does not rely on the *Romer* line of cases, and Defendants are entitled to dismissal in part, accordingly. Although the Court finds that *Baker* precludes a large part of the present challenge, the Court will conduct a full equal protection analysis so that the Court of Appeals need not remand for further proceedings should it rule that *Baker* does not control or does not control as broadly as the Court finds.

C. Plaintiffs' Equal Protection Challenge

"[B]ecause of the[] differences [in the rights and responsibilities of spouses and domestic partners], coupled with the stigma of exclusion and of being branded by the government as inferior, same-sex couples and their children suffer both tangible and dignitary harms, all of which are of constitutional

dimension." (*See* Compl. ¶ 39). For this reason, Plaintiffs challenge Section 21 of Article I of the Nevada Constitution ("Section 21") and Nevada Revised Statutes ("NRS") section 122.020 under the Equal Protection Clause of the Fourteenth Amendment, both facially and as applied. (*See* Compl. ¶¶ 88-89). Section 21 provides that only a marriage between one man and one woman may be recognized as a marriage in Nevada, *see* Nev. Const. art I, § 21, and NRS section 122.020 provides that prospective spouses must be, *inter alia,* of opposite sexes to qualify for marriage, *see* Nev. Rev. Stat. § 122.020. Plaintiffs do not appear to challenge any other provisions of Nevada law in the present lawsuit, and they have brought no due process challenge.

In analyzing an equal protection challenge, a court first identifies the categorical ***12** distinction the state has drawn and determines what level of constitutional scrutiny applies to such distinctions. *E.g., United States v. Lopez-Flores,* 63 U.S. 1468, 1472 (9th Cir. 1995) (citing *Jones v. Helms,* 452 U.S. 412, 423-24 (1981); *Hernandez v. Texas,* 347 U.S. 475, 479 (1954)). The court then scrutinizes the challenged law, accordingly. *Id.* (citing *Plyler v. Doe,* 457 U.S. 202, 217-18 (1982)).

1. Identification of the Distinction Drawn by the State

The parties appear to agree that the

distinction drawn by the state of Nevada is heterosexual versus homosexual persons, except that at least one Defendant argues that the State has drawn no distinction at all because the laws at issue are facially neutral with respect to both gender and sexual orientation. Under the conception of the distinction drawn by the State as being between homosexual and heterosexual persons, the Court would apply rational-basis scrutiny. *See High Tech Gays v. Def. Indus. Sec. Clearance Office,* 895 F.2d 563, 574 (9th Cir. 1990).

Before determining the level of review, however, the Court will more closely analyze the distinction the State has drawn. Although the distinction the State has drawn (between one-man-one-woman marriages on the one hand, and any other gender- or number-configuration of spouses on the other hand) largely burdens homosexuals, the distinction is not by its own terms drawn according to sexual orientation. Homosexual persons may marry in Nevada, but like heterosexual persons, they may not marry members of the same sex. That is, a homosexual man may marry anyone a heterosexual man may marry, and a homosexual woman may marry anyone a heterosexual woman may marry. In this sense, the State of Nevada has drawn no distinction at all. Under this conception of the (lack of) distinction drawn by the State, the laws at

issue would receive no scrutiny at all under the Equal Protection Clause.

In another sense, the State of Nevada may be said to have drawn a gender-based distinction, because although the prohibition against same-sex marriage applies equally to men ***13** and women, "the statutes proscribe generally accepted conduct if engaged in by members of" the same gender. *Loving v. Virginia,* 388 U.S. 1, 11 (1967). In pre-1967 Virginia, both Caucasians and non-Caucasians were prohibited from interracial marriage (though a non-Caucasian could marry another non-Caucasian of a difference race), and in Nevada, both men and women are prohibited from same-sex marriage. The *Loving* Court, however, specifically rejected the argument that a reciprocal disability necessarily prevents heightened scrutiny under the Equal Protection Clause. *See id.* at 8 ("Because we reject the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations, we do not accept the State's contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose."). In other words, *Loving* could fairly be said to stand, *inter alia,* for the proposition that if a person could engage in generally acceptable activity (marriage) but for characteristic X1 (non-Caucasian), then the level

of scrutiny applicable to X-based (race-based) distinctions applies to the disability, regardless of whether persons with characteristic X2 (Caucasian) are subject to a reciprocal disability according to heir own X-based characteristic. Application of this principle here might counsel the use of intermediate scrutiny. That is, just as in pre-1967 Virginia a Caucasian but not a non-Caucasian could marry another Caucasian, and vice versa, in Nevada a man but not a woman may marry another woman, and vice versa. *Cf. id.* at 11 ("There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races."). Under this conception of the distinction drawn by the State, *i.e.*, a gender-based distinction, the Court would apply intermediate scrutiny. *See, e.g., Hibbs v. Dep't of Human Res.,* 273 F.3d 844, 855 (9th Cir. 2001).

Although the State appears to have drawn no distinction at all at first glance, and although the distinction drawn by the State could be characterized as gender-based under the *Loving* ***14** reciprocal-disability principle, the Court finds that for the purposes of an equal protection challenge, the distinction is definitely sexual-orientation based. The issue turns upon the alleged discriminatory intent behind the challenged laws, which is the *sine qua non* of a claim of unconstitutional discrimination. *See*

Washington v. Davis, 426 U.S. 229, 240 (1976). "To state a claim under 42 U.S.C. § 1983 for a violation of the Equal Protection Clause of the Fourteenth Amendment a plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class." *Lee v. City of L.A.,* 250 F.3d 668, 686 (9th Cir. 2001) (quoting *Barren v. Harrington,* 152 F.3d 1193, 1194 (9th Cir. 1998)). "Where the challenged governmental policy is 'facially neutral,' proof of its disproportionate impact on an identifiable group can satisfy the intent requirement only if it tends to show that some invidious or discriminatory purpose underlies the policy." *Id.* (citing *Vill. Of Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 264-66 (1977) (citing *Washington,* 426 U.S. at 242)).

The laws at issue here are not directed toward persons of any particular gender, nor do they affect people of any particular gender disproportionately such that a gender-based animus can reasonably be perceived. So although the *Loving* reciprocal- disability principle would indicate a gender-based distinction in a case where the members of a particular gender were targeted, because it is homosexuals who are the target of the distinction here, the level of scrutiny applicable to sexual- orientation-based distinctions applies. *See Loving,* 388 U.S. at 11 (noting that the anti-miscegenation laws at issue in that

case targeted racial minorities because the laws were "designed to maintain White Supremacy"). Here, there is no indication of any intent to maintain any notion of male or female superiority, but rather, at most, of heterosexual superiority or "heteronormativity" by relegating (mainly) homosexual legal unions to a lesser status. In *Loving,* the elements of the disability were different as between Caucasians and non-Caucasians, whereas here, the burden on men and women is the same. The distinction might be gender based *15 if only women could marry a person of the same sex, or if only women could marry a transgendered person, or if the restriction included some other asymmetry between the burdens placed on men and the burdens placed on women. But there is no distinction here between men and women, and the intent behind the law is to prevent homosexuals from marrying.

2. The Level of Scrutiny Applicable to Sexual-Orientation-Based Distinctions

The Supreme Court has never explicitly stated what level of scrutiny inferior court are to apply to distinctions draw according to sexual orientation, though it has implied that rational basis scrutiny applies because it has never applied any higher standard in relevant o cases. *See, e.g., Romer,* 517 U.S. at 631-32 (citing *Heller v. Doe,* 509 U.S. 312, 319-20 (1993)) (applying the rational basis standard). The Court of Appeals,

however, has ruled that "homosexuals do not constitute a suspect or quasi- suspect class entitled to greater than rational basis scrutiny under the equal protection component of the Due Process Clause of the Fifth Amendment." *High Tech Gays,* 895 F.2d at 574.[1] Although the *HighTech Gays* court cited to *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that private, homosexual activity may be criminalized), which was overruled by *Lawrence v. Texas,* 539 U.S. 558 (2003), *see Golinski v. Office of Pers. Mgmt.,* 824 F. Supp. 2d 968, 983-84 (N.D. Cal. 2012), the *Lawrence* Court did not adopt any standard of review applicable to distinctions drawn according to sexual orientation for the purposes of equal protection, and therefore *Lawrence* is not on point for the purposes of the standard of review to be applied, and only the Court of Appeals sitting en bane may overrule *High Tech Gays'* adoption of the rational basis standard for distinctions drawn according to sexual orientation, *see Miller v. Cammie,* 335 F.3d 889, 899 (9th Cir. 2003) (en bane).

***16** *High Tech Gays'* adoption of rational basis scrutiny for sexual-orientation-based distinctions is not "clearly irreconcilable" with

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[1] Although *High Tech Gays* concerned the "equal protection component" of the Fifth Amendment, *see id.,* "[e]qual protection analysis in the Fifth Amendment area is the same as that under the [Equal Protection Clause of the] Fourteenth Amendment," *Buckley v. Valeo,* 424 U.S. 1, 93 (1976).

Lawrence such that a district court may ignore it under *Miller.* Rather, the Court agrees with the *Jackson* and *Dragovic* courts, which have ruled that *High Tech Gays* survived *Lawrence* in this regard. *See Jackson v. Abercrombie,* No. 11-00734 ACK-KSC, 2012 WL 3255201, at *29, (D. Haw. 2012) (ruling that *Lawrence* did not undercut *High Tech Gays'* holding that rational basis scrutiny applies to sexual- orientation-based distinctions); *Dragovich v. U.S. Dep't of the Treasury,* No. C 10-01564 CW, 2012 WL 1909603, at *9 (N.D. Cal. 2012) (same). More importantly, as those courts also noted, the Court of Appeals directly ruled just four years ago that *High Tech Gays* survived *Lawrence* with respect to the level of scrutiny to be applied in sexual-orientation-based equal protection challenges. *See Witt v. Dep't of Air Force,* 527 F.3d 806, 821 (9th Cir. 2008) (citing *Philips v. Perry,* 106 F.3d 1420, 1424-25 (1997) (citing *High Tech Gays,* 895 F.2d at 574)) *("Philips* clearly held that [the Department of Defense's former 'don't ask, don't tell' policy] does not violate equal protection under rational basis review, and that holding was not disturbed by *Lawrence,* which declined to address equal protection." (citation omitted)).

And this would be the result even in the absence of *Witt.* The *Lawrence* Court had certified three questions: (1) whether Texas' anti-sodomy law was infirm under the Equal Protection Clause of the Fourteenth Amendment; (2) whether the law was infirm under the Due

Process Clause of the Fourteenth Amendment; and (3) whether *Bowers* should be overruled. *See* 539 U.S. at 564. The Court resolved the case under the second two questions. *See id.* ("We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution. For this inquiry we deem it necessary to reconsider the Court's holding in *Bowers."). Lawrence's* rejection of Texas' anti-sodomy law was based upon the Due Process Clause, not upon the Equal Protection Clause. *See id.* at 578 ***17** ("Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."). *Bowers* in turn had also been decided purely under the Due Process Clause. *See Bowers,* 478 U.S. at 190 ("The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy . . . ."); *id.* at 201 (Blackmun, J., dissenting) (lamenting the Court's refusal to consider an equal protection challenge).

The *High Tech Gays* court noted that other Courts of Appeals had reasoned that the fact that homosexual behavior could be criminalized outright necessarily precluded a ruling that a group defined by a desire or propensity to engage in such activity could be a suspect or quasi-suspect class for the purposes

of equal protection. *See* 895 F.2d at 571 & n.6. But it simply does not follow that because *Bowers* independently prevented heightened scrutiny, that heightened scrutiny is necessarily an open question now that *Bowers* has been overruled. That would be the case if *High Tech Gays* had relied exclusively upon *Bowers,* but it did not. The *High Tech Gays* court's analysis of whether sexual- orientation based distinctions deserve heightened scrutiny did not need to rely on *Bowers* simply because *Bowers* independently necessitated the result. The *High Tech Gays* court separately analyzed whether homosexuals constituted a suspect class under the traditional factors and determined they did not. *See* 895 F.2d at 573-74. The court noted that to obtain recognition as a suspect class for equal protection purposes, the class "must 1) have suffered a history of discrimination; 2) exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and 3) show that they are a minority or politically powerless, or alternatively show that the statutory classification at issue burdens a fundamental right." *Id.* at 573 (citing *Bowen v. Gilliard,* 483 U.S. 587, 602-03 (1987) (citing *Lyng v. Castillo,* 477 U.S. 635, 638 (1986))). The court found that homosexuals had suffered a history of discrimination, but that homosexuality was not immutable and that homosexuals were ***18** not politically powerless because they had successfully lobbied legislatures to pass anti-

discrimination legislation protecting them. *See id.* at 573-74.

Although *Witt* confirmed that *Lawrence* did not reopen *High Tech Gays* determination that homosexuals are not a suspect or quasi-suspect class, reexamination of the issue today would only tend to tilt the scales further towards rational basis review. First, homosexuals have indeed suffered a history of discrimination, but it is indisputable that public acceptance and legal protection from discrimination has increased enormously for homosexuals, such that this factor is weighted less heavily towards heightened scrutiny than it was in 1990. It is the present state of affairs and any lingering effects of past discrimination that are important to the analysis, not the mere historical facts of discrimination taken in a vacuum. Although historical discrimination taken alone may be relevant to a showing under the second factor, i.e., whether the group is in fact a discretely identifiable group, without a showing of continuing discrimination or lingering effects of past discrimination, the first factor does not tend to support an .argument that the group need be protected from majoritarian processes. Unlike members of minority races, for example, homosexuals do not in effect inherit the effects of past discrimination through their parents. That is, members of certain racial minorities are more likely to begin life at a socioeconomic

disadvantage because of historical discrimination against their ancestors, the effects of which are passed from parent to child, taking many generations to ameliorate via the later removal of discrimination. On the contrary, homosexuality by its nature, whether chosen or not, is a characteristic particularly unlikely to be passed from parent to child in such a way that the effects of past discrimination against one's ancestors will have effects upon oneself. In the context of a characteristic like homosexuality, where no lingering effects of past discrimination are inherited, it is contemporary disadvantages that matter for the purposes of assessing disabilities due to discrimination. Any such disabilities with respect to homosexuals have been largely erased since 1990.

***19** Second, the Supreme Court has not yet ruled that homosexuality is immutable for the purposes of equal protection, so although public and scientific opinion on the matter may have changed in the intervening years, *High Tech Gays'* analysis on the point cannot be countermanded by a district court on that basis. Assuming for the sake of argument that the characteristic is immutable for the purposes of an equal protection analysis, this factor would weigh in favor of heightened scrutiny.

Third, and most importantly, the Supreme Court has not ruled that homosexuals

lack political power such that *High Tech Gays'* determination that they do not lack it has been undermined, and homosexuals have in fact gained significant political power in the years since *High Tech Gays* was decided. Today, unlike in 1990, the public media are flooded with editorial, commercial, and artistic messages urging the acceptance of homosexuals. Anti-homosexual messages are rare in the national informational and entertainment media, except that anti-homosexual characters are occasionally used as foils for pro-homosexual viewpoints in entertainment media. Homosexuals serve openly in federal and state political offices. The President of the United States has announced his personal acceptance of the concept of same-sex marriage, and the announcement was widely applauded in the national media. Not only has the President expressed his moral support, he has directed the Attorney General not to defend against legal challenges to the Defense of Marriage Act ("DOMA"), a federal law denying recognition to same-sex marriages at the federal level. It is exceedingly rare that a president refuses in his official capacity to defend a democratically enacted federal law in court based upon his personal political disagreements. That the homosexual-rights lobby has achieved this indicates that the group has great political power. The State of Nevada has itself outlawed sexual-orientation- based discrimination as a general matter. *See*

generally Nev. Rev. Stat. ch. 233. Congress has not included the category under Title VII's protections, however. *See* 42 U.S.C. § 2000e-2. In 2012 America, anti-homosexual viewpoints are widely regarded as uncouth. All in all, the *20 political power of homosexuals has increased tremendously since 1990 when the *High Tech Gays* court ruled that the group did not, even then, sufficiently lack political power for the purposes of an equal protection analysis. This factor therefore weighs greatly in favor of rational basis review.

The Court respectfully disagrees with the recent conclusion of the Second Circuit to the contrary in a DOMA case. *See Windsor v. United States,* Nos. 12- 2335, 12-2435, 2012 WL4937310 (2nd Cir. 2012). That court concluded: "The question is not whether homosexuals have achieved political successes over the years; they clearly have. The question is whether they have the strength to politically protect themselves from wrongful discrimination." *Id.* at *9. That statement is strictly true, but the answer to the second question is powerfully influenced by the answer to the first question, because political success is the most direct, if not defining, indicator of the ability to protect oneself through political processes. The Court believes the test as presented, or at least as applied, by the Second Circuit is little test at all, but rather a reason behind an absolute (or

nearly absolute) rule that the Second Circuit has now impliedly adopted, i.e., that a discrete minority group challenging a discriminatory law necessarily lacks political power for the purposes of a level-of- scrutiny analysis based purely upon the fact that the group has not been able democratically to avoid or alter the law it is challenging in a particular case. That result obviates the Supreme Court's use of political powerlessness as a factor in assessing the level of scrutiny to be applied. If a plaintiff could necessarily win on the political powerlessness factor of the level-of-scrutiny analysis by the very fact that he was unable to challenge a particular law democratically, the factor would be meaningless. Political powerlessness for the purpose of an equal protection analysis does not mean that the members of a group have failed to achieve all of their goals or have failed to achieve the particular goal they aim to achieve via the lawsuit in which the political powerlessness issue is litigated. The English suffix "-less" means "without," and "powerless" means "without power," not "without total *21 power." If there were no legal space in which a minority group had sufficient political power such that it were not entitled to heightened scrutiny under an equal protection analysis, but where it had failed to succeed democratically on a particular challenged issue, then the analysis of the

group's political power for the purposes of a heightened scrutiny analysis would be no analysis at all a plaintiff would have prevailed on the issue by the mere fact that he had standing to file a lawsuit. What legal space would such reasoning leave for a state to prevail on the Supreme Court's political powerlessness factor, which inferior courts must presumably treat as a meaningful inquiry?

Any minority group can reasonably argue that its political power is less than it might be were the group either not a minority or more popular. That is simply an inherent aspect of democracy. That issue is relevant to the powerlessness analysis, but it is not dispositive of it. There are a myriad of factors in a democratic society that may permit a minority or disfavored group to succeed democratically, such as legislators' disinclination to be labeled as bigots or even as unreasonable, the desire of another faction to pass legislation on which it needs the first minority's or their allies' cooperation, or other factors. The question of "powerlessness" under an equal protection analysis requires that the group'schances of democratic success be virtually hopeless, not simply that its path to success is difficult or challenging because of democratic forces. Even assuming that homosexuals are themselves under-represented in legislatures, *see id.* (discussing

the practical difficulty in assessing this fact), this does not mean that pro-homosexual legislators are under- represented or that anti-homosexual (or indifferent) legislators cannot be made to compromise democratically. In the present case, it simply cannot be disputed that there have historically been sufficient pro-homosexual legislators (or anti-homosexual and indifferent legislators who can be democratically bargained with) in the State of Nevada to protect homosexuals from oppression as a general matter. *See, e.g.,* Nev. Rev. Stat. §§ 118.020, 233.010, 613.330. Plaintiffs' democratic loss on a particular issue does not prove that they lack political ***22** power for the purposes of an equal protection analysis. That homosexuals cannot protect themselves democratically without aid from other groups is a conclusion that is necessarily true for any minority group by definition, so treating this point as dispositive would avoid any meaningful analysis of the political powerlessness factor. *See City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 445 (1985) ("Any minority can be said to be powerless to assert direct control over the legislature, but if that were a criterion for higher level scrutiny by the courts, much economic and social legislation would now be suspect."). The relevant consideration is the group's "ability to attract the attention of the lawmakers," an ability homosexuals cannot seriously be said not to possess. *See id.* The issue of homosexual rights, and particularly the issue of same-sex marriages

or quasi-marriage relationships has been front and center in American politics for nearly a decade. Just this month, the People of several more States voted whether to approve or prohibit same-sex marriages.

The *Windsor* court wrote that "it is safe to say that the seemingly small number of acknowledged homosexuals [in positions of power or authority] is attributable either to a hostility that excludes them or to a hostility that keeps their sexual preference private-which, for our purposes, amounts to much the same thing." *Id .* But it is not necessarily safe to say this. A small number of homosexuals in certain positions of power could just as easily indicate that homosexuals constitute an equally small proportion of the population. The number of open homosexuals in such positions will only "seem[] small" to an observer who assumes that the proportion of homosexuals in society at large is greater than the proportion of open homosexuals in these kinds of positions. And there is a third option the *Windsor* court did not discuss, i.e., that the "seemingly" small number of open homosexuals in positions of power or authority may be largely attributable to neither exclusion nor sexual-orientation-based shame that discourages them from identifying themselves, but rather to the fact that people as a general matter- and

especially people in positions of power and prestige-tend not to draw attention to their sexual ***23** practices or preferences, whatever they may be, for social, career, and economic reasons. This natural disinclination of public figures to announce their sexual practices or preferences does not necessarily transform into passive oppression simply because the sexual practices or preferences of a particular subset of persons also happens to be a matter of special social controversy. Lastly, a homosexual person simply need not announce his or her own homosexuality to be active in the fight for homosexual rights. Many advocates of homosexual rights are themselves heterosexual, and there is no need to announce one's sexual orientation or preferences in order to advocate for homosexual rights. To whatever degree homosexuals have not been able to succeed politically to the extent many people wish, it is clear that, in Nevada at least, homosexuals have been able to enact laws protecting their interests through the democratic process, including laws protecting them from discrimination in areas such as employment and housing, as well as laws creating outright legal status for homosexual relationships.

In arguing for heightened scrutiny for gender-based distinctions in 1973, Justice Brennan opined that women's recent political successes should not be dispositive of the political powerlessness analysis. *See Frontiero v.*

Richardson, 411 U.S. 677, 685-86 (1973) (Brennan, J.) (plurality opinion).[2] But even assuming this reasoning were precedential, the reasons with which Justice Brennan supported his conclusion in that case are for the most part not present here. Although women had been able to attract the attention of lawmakers during the early- and mid-Twentieth Century, they had been under-represented democratically for a long time prior to those political successes because they could not vote, such that for centuries their political voice was disproportionately small compared to their numbers. *See id.* at 685. Women had also been excluded from juries and even been denied the basic right of property ownership for centuries. ***24** *See id.* Homosexuals have not historically been denied the right to vote, the right to serve on juries, or the right to own property. Although the right to vote could have been lost for conviction under a felony anti- sodomy law, the fraction of homosexuals disenfranchised due to conviction of such crimes was almost certainly minuscule, and the need or desire to keep one's sexual orientation secret because of such laws, though perhaps regrettable, would have no effect on

[2] Four justices concurred in the judgment, based upon rational basis review. *See id.* at 691 (Stewart, J., concurring in the judgment with Burger, C.J., and Blackmun, J.) (citing *Reed v. Reed ,* 401 U.S. 71 (1971)); *id.* (Powell, J., concurring in the judgment) (citing *Reed ,* 401 U.S. 71).

one's ability to vote, serve on a jury, or otherwise participate in American democracy. Also, the continued discrimination against women in 1973 was largely due to the high visibility of the sex characteristic, a visibility that the characteristic of homosexuality does not have to nearly the same extent as gender. *See id.* at 686.

The assessment of a group's disabilities and its political power to remove them is a critical factor in determining whether heightened scrutiny should apply under the Fourteenth Amendment where a particular prohibition is not textually clear, because political power is the factor that speaks directly to whether a court should take the extreme step of removing from the People the ability to legislate in a given area. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (noting that a suspect class is one that is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process").

Gross movements by the judiciary with respect to democratic processes can cause an awkward unbalancing of powers in a Madisonian constitutional democracy[3] and

[3] Justice Powell's note in concurrence in *Frontiero* that the plurality's suggestion of strict scrutiny for gender-based classifications would preempt the democratic

undermine both ***25** public confidence in the judiciary and the legitimacy of the government in general. Where a constitutional prohibition is reasonably clear, a court's removal of the relevant issue from legislative control is largely uncontroversial, and appropriately so, because the People realize that the issue has in fact already been decided democratically, either at the Constitutional Convention or later via the Article V amendment procedure. In such cases, the judiciary does not usurp the democratic process but rather respects and enforces a democratic decision made at the constitutional level as against a more recent democratic attempt to change the law at a lower legislative level.

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adoption of the Equal Rights Amendment ("ERA") then being considered for ratification by the states was prophetic. *See Frontiero,* 411U.S. at 692 (Powell, J., concurring in the judgment). Perhaps because of the usurpation of the issue by the courts, the state legislatures felt neither the need nor the political pressure to adopt that proposed amendment, which has languished for nearly half a century after approval by Congress. Because the courts have withdrawn the issue from legislative control, what rational state legislator would risk his political career by attempting to force a vote on the ERA where there is no longer any practical need to do so? The supporters of the ERA no longer exert pressure on the legislatures to act, because they have been satisfied by the courts. *A* legislator has little to gain by supporting the ERA at this stage but the enmity of the amendment's opponents.

The Constitution and Amendments thereto, which have been ratified by the States, represent a collection of democratic choices adopted in order to control future democratic choices. The Constitution is in this regard a "super statute," i.e., a statute that controls the enactment of statutes. *Cf.* H.L.A. Hart, *The Concept of Law* 81 (2d ed. 1961) (explaining what he calls "primary" and "secondary" rules). When the judiciary interferes with a legislative democratic choice in favor of a constitutional democratic choice, it ensures that a legislature cannot countermand an earlier democratic choice to which the People have assigned a higher level of priority. *See Marbury v. Madison,* 5 U.S. 137, 176-80 (1803) (Marshall, C.J.). Such an act of "judicial review" is therefore not in derogation of democratic principles, but rather is ultimately in support of them.[4]

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[4] It is often said that the Constitution is "anti-democratic" because it restricts legislative choices. But so long as judges read constitutional restrictions reasonably, the process remains democratic at its core, because the Constitution itself was and is subject to democratic forces. It was ratified by the People of the States, and it remains subject to amendment through a defined, democratic process. By contrast, in some nations, such as in the Islamic Republic of Iran, the process of judicial review is truly anti-democratic, because the standards by which a body such as the Guardian Council reviews the acts of the legislature are subject not only to a written constitution, but also to the Guardian Council's interpretation of a religious tradition that is not and has never been subject to democratic forces. Whether such a standard is grounded in religion or secular philosophy

*26 But a court must only take such action when the constitutional rule is reasonably clear. The most difficult problems arise when the text of a constitutional provision provides vague standards, such as "equal protection of the laws." Judges and laymen alike often disagree whether a particular law runs afoul of the vaguer prohibitions of the Constitution. Where a court considers invalidating a democratically adopted law because of a conflict with one of these vaguer clauses, it must tread lightly, lest its rulings appear to the People not to constitute a fair and reasonable enforcement of constitutional restrictions to which they or their ancestors have previously democratically agreed, but rather a usurpation of democratic governance via judicial whim-a judicial practice much in vogue today. Where there is no clear

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makes no difference with respect to the issue of self-governance. If the standards by which a judge reviews legislative acts are the product of his private philosophical views, and not simply a reasonable interpretation of a legal text to which the governed have agreed, he exceeds his lawful power over the governed and to that extent becomes a despot just as if an executive officer had made the decision himself. Were a court's opinions in the area of judicial review treated only as advisory, the possibility of harm would not be so great. But so long as the Executive and the States are not practically free to ignore a court's opinions in the area of judicial review, but rather will follow them as a matter of course according to the constitutional culture of the Nation, it makes no difference that the judge himself does not have the power of execution via officers directly in his employ.

prohibition of discrimination according to a particular category, and where the group complaining of discrimination has meaningful political power to protect its own interests, it is inappropriate for a court to remove the issue from legislative control.

The States are currently in the midst of an intense democratic debate about the novel concept of same-sex marriage, and homosexuals have meaningful political power to protect their interests. At the state level, homosexuals recently prevailed during the 2012 general elections on same-sex marriage ballot measures in the States of Maine, Maryland, and Washington, and they prevailed against a fourth ballot measure that would have prohibited same sex marriage under the Minnesota Constitution. It simply cannot be seriously maintained, in light of these and other ***27** recent democratic victories, that homosexuals do not have the ability to protect themselves from discrimination through democratic processes such that extraordinary protection from majoritarian processes is appropriate.[5]

[5] The fact that national attitudes are shifting in favor of acceptance of same-sex marriage and homosexual rights in general only tends to weaken the argument that homosexuals require extraordinary protection from majoritarian processes via heightened scrutiny under the Equal Protection Clause.

"[D]emocratic institutions are weakened, and confidence in the restraint of the Court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional processes." *Frontiero,* 401 U.S. at 692 (Powell, J., concurring in the judgment). Only where a discrete minority group's political power is so weak and ineffective as to make attempts to succeed democratically utterly futile is it even arguably appropriate for a court to remove relevant issues from the democratic process, except where a constitutional prohibition clearly removes the issue from legislative control, in which case a court's intervention is mandated by democratic constitutional principles. *See Marbury,* 5 U.S. at 176-80. The Equal Protection Clause of the Fourteenth Amendment does not clearly remove laws distinguishing between persons on the basis of sexual orientation from democratic control. Although the courts have ruled that a challenge to virtually any law is entitled to at least rational basis review under the Equal Protection Clause, the above analysis makes heightened scrutiny inappropriate in this case.

The *High Tech Gays* court also ruled that no fundamental rights were burdened in that case, because there was no fundamental

right to homosexual activity. That holding has been directly overruled by the *Lawrence* Court, but unlike the Department of Defense policy at issue in *High Tech Gays* that made homosexual activity an automatic trigger for heightened investigative attention when applying for a security clearance, *see* 895 F.2d at 568, the laws at issue in the present case do not burden the right to private, consensual, homosexual activity that ***28** the *Lawrence* Court recognized. The rights burdened under the challenged laws in this case are certain state-created rights, such as the right to have one's partner covered under an employer-provided health insurance plan and the right to enter into a marriage or quasi-marriage relationship with a sixteen or seventeen year-old person if that person's parent or guardian consents, *see supra,* which rights are not fundamental. Although there is a fundamental right to "marry," that right consists substantively of the ability to establish a family, raise children, and, in certain contexts, maintain privacy. *Zablocki v. Red hail,* 434 U.S. 374, 383-84 (1978) (collecting cases). It is these components that comprise the fundamental "right to marry" recognized under the Fourteenth Amendment, not the civil benefits and responsibilities accompanying the legal status of marriage, which vary from state to state. Although the title of "marriage" has been withheld, the State of Nevada has burdened none of the core substantive rights

that comprise the right to marry, sometimes referred to as the "constitutional incidents of marriage." Plaintiffs may establish legally cognizable families under Nevada's domestic partnership laws-an option that was not available to Mr. Redhail in 1978 Wisconsin.

It is also worth noting that Nevada's laws do not purport to prevent (nor could they under the First Amendment prevent) the private use of the word "marriage" in the context of same-sex relationships, and same-sex couples will of course use the word if they wish to. This has no bearing on whether the State must give the title its imprimatur.

Finally, the right to privacy is not implicated here, as Plaintiffs desire not to be left alone, but, on the contrary, desire to obtain public recognition of their relationships. In summary, no fundamental rights are burdened by Nevada's marriage-domestic partnership regime. Because homosexuals are not a suspect or quasi-suspect class, and because the laws at issue burden no fundamental rights, rational basis scrutiny applies. ***29**

3. Application of Rational Basis Scrutiny

Under rational basis review, a court does not judge the perceived wisdom or fairness of a law, nor does it examine the actual rationale for

the law when adopted, but asks only whether "there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller,* 509 U.S. at 319-20 (quoting *FCC v. Beach Commc'ns, Inc.,* 508 U.S. 307, 313 (1993)). Those challenging a law on rational basis grounds "have the burden to negat[e] every conceivable basis which might support it." *Diaz v. Brewer,* 676 F.3d 823, 826 (9th Cir. 2012) (O'Scannlain, J., dissenting from order denying rehearing en bane) (quoting *Beach Commc'ns,* 508 U.S. at 315 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364 (1973))) (alteration in *Diaz;* internal quotation marks omitted)). The question of rationality is a matter of law for which a state need not provide evidence but may rely on speculation alone. *Heller,* 509 U.S. at 320. In the summary judgment context, if the facts determining a question that is subject only to rational basis review are "at least debatable," the state is entitled to summary judgment. *See Jack son,* 2012 WL 3255201, at *33 (citing *Vance v. Bradley,* 440 U.S. 93, 110-11 (1979); *Lupert v. Cal. State Bar,* 761 F.2d 1325, 1328 (1985)).

The protection of the traditional institution of marriage, which is a conceivable basis for the distinction drawn in this case, is a legitimate state interest. Although traditional moral disapproval is not alone a valid state interest for prohibiting private, consensual activity, *see Lawrence,* 539 U.S. at 577-78

(quoting *Bowers,* 478 U.S. at 216 (Stevens, J., dissenting)), civil marriage is at least partially a public activity, and preventing "abuse of an institution the law protects" is a valid state interest, *see id.* at 567. More specifically:

> That [the Texas anti-sodomy law] as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any *legitimate state interest* here, such as national security or *preserving the traditional institution of marriage.* Unlike the moral disapproval of same-sex relations-the asserted state interest in this *30 case- *other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.*

Id. at 585 (O'Connor, J., concurring in the judgment) (emphases added). The *Lawrence* Court appears to have strongly implied that in an appropriate case, such as the present one, the preservation of the traditional institution of marriage should be considered a legitimate state interest rationally related to prohibiting same-sex marriage. *See id.* at 578 (majority opinion) ("The present case does not involve . . . whether the government must give formal recognition to any relationship that homosexual

persons seek to enter."). The State of Nevada has made available to same-sex partners the vast majority of the civil rights and responsibilities of marriage, and it has made all of the fundamental rights comprising the "right to marry" available via the domestic partnership laws, even assuming for the sake of argument that it is the "right to marry" or the "right to marry a person of one's choice," and not the "right to marry a person of the same sex" that is at issue. The State has not crossed the constitutional line by maintaining minor differences in civil rights and responsibilities that are not themselves fundamental rights comprising the constitutional component of the right to marriage, or by reserving the label of "marriage" for one-man- one-woman couples in a culturally and historically accurate way. And unlike in *Perry,* the State of Nevada has not stripped away any existing right to the title of "marriage" while leaving its constitutional incidents in place. *See Perry,* 671 F.3d at 1076-78.

As Justice O'Connor noted in concurrence in *Lawrence,* there are additional reasons to promote the traditional institution of marriage apart from mere moral disapproval of homosexual behavior, and these reasons provide a rational basis for distinguishing between opposite-sex and same-sex couples in the context of civil marriage. Human beings are created through the conjugation of one man and

one woman. The percentage of human beings conceived through non-traditional methods is minuscule, and adoption, the form of child-rearing in which same-sex couples may typically participate together, is not an alternative means of creating children, but *31 rather a social backstop for when traditional biological families fail. The perpetuation of the human race depends upon traditional procreation between men and women. The institution developed in our society, its predecessor societies, and by nearly all societies on Earth throughout history to solidify, standardize, and legalize the relationship between a man, a woman, and their offspring, is civil marriage between one man and one woman. *See Maynard v. Hill ,* 125 U.S. 190, 211 (1888) ("It 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.").[6] Should

[6] Plaintiffs' historical and sociological experts attest that marriage has changed in various ways throughout history, that homosexuality is no longer considered a "disorder" by mainstream psychiatrists and sociologists, that same-sex couples can be suitable parents, that same-sex marriage would not harm traditional marriages, that there is and has been discrimination against homosexuals, that they lack political power, and even concerning the alleged economic impact of the challenged laws, but even assuming the Court were to find all of these opinions credible-a finding the Court need not make in the rational basis context-none of Plaintiffs' experts attest that same sex marriage has ever been recognized in the history of the Anglo-American

that institution be expanded to include same-sex couples with the state's imprimatur, it is conceivable that a meaningful percentage of heterosexual persons would cease to value the civil institution as highly as they previously had and hence enter into it less frequently, opting for purely private ceremonies, if any, whether religious or secular, but in any case without civil sanction, because they no longer wish to be associated with the civil institution as redefined,[7] leading to an increased percentage

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peoples except very recently and sporadically. (*See generally* Cott. Deel., Sept. 4, 2012, ECF No. 86-2, at 3; Peplau Deel., Aug. 20, 2012, ECF No. 86-2, at 45; Badgett Deel., Spet. 7, 2012, ECF No. 86-2, at 92; Chauncey Deel., June 27, 2012, ECF No. 86-2, at 132; Segura Deel., Sept. 5, 2012, ECF No. 86-3, at 3; Lamb Deel., Aug. 27, 2012, ECF No. 86-3, at 57). The level of scrutiny is controlled by precedent in this case. Because that level of scrutiny is rational basis scrutiny, the Court need not examine the parties' evidence (which evidence is, in any case, better characterized as dueling collections of sociological opinions as opposed to scientific or other specialized evidence). The State need only have a conceivable basis for its laws.

[7] Some commentators have argued that the fact that same-sex couples may marry takes nothing from the value of an opposite- sex couple's marriage. *See, e.g.,* Michael Mello, *For Today, I'm Gay: The Unfinished Battle for Same-Sex Marriage in Vermont,* 25 Vt. L. Rev. 149, 229 (2000). Traditional spouses will have lost no rights, after all. But the legal question under rational basis review is not whether spouses or prospective spouses have good reasons (in a court's reckoning) for believing that their marriages will be harmed by the inclusion of same-sex couples in the institution of civil marriage. The question

of out- of- ***32** wedlock children, single-parent families, difficulties in property disputes after the dissolution of what amount to common law marriages in a state where such marriages are not recognized, or other unforeseen consequences. *See Jack son,* 2012 WL 3255201, at ***39-41**. Because the family is the basic societal unit, the State could have validly reasoned that the consequences of altering the traditional definition of civil marriage could be severe. *See id.* at ***44** ("[I]t is not beyond rational speculation to conclude that fundamentally altering the definition of marriage to include same-sex unions might result in undermining the societal understanding of the link between marriage, procreation, and family structure."). The Court finds Judge Kay's conclusions concerning the rational bases for Hawaii's marriage-civil union regime equally persuasive as applied to Nevada's marriage- domestic partnership regime. *See id.* at *38-45.

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is whether the State has any conceivable basis, even speculatively, to believe that spouses or prospective spouses might feel this way, for whatever reason, and that their reaction to the redefinition of civil marriage to include same- sex couples might have detrimental societal effects. *See Jackson,* 2012 WL 3255201, at *44. One might argue by analogy that the expected reaction of bigots would be an insufficient reason for a state to refuse to implement policies of racial equality, but the analogy would be flawed, because race- based distinctions command strict scrutiny under the Equal Protection Clause, whereas sexual-orientation-based restrictions command only rational basis scrutiny.

Although a nontrivial argument can be made that the nature of marriage as a philosophical matter is any exclusive romantic relationship between any two (or more) persons, or some other such definition, and that the condition that the partners in a marriage must be one man and one woman is only a special case no matter how historically consistent, the State of Nevada need not eschew tradition in the name of philosophical purity, not in the context of rational basis review, anyway, and certainly not where the philosophical issue is itself controversial. The legal question is not whether Plaintiffs have any conceivable rational *33 philosophical argument concerning the nature of marriage. They do.[8] The legal question is whether the State of Nevada has any conceivable rational basis for the distinction it has drawn. It does, and the laws at issue in this case therefore survive rational basis review under the Equal Protection Clause.[9]

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[8] If the State were to adopt a "genderless marriage" regime, it would almost certainly withstand a putative equal protection attack by opposite-sex spouses arguing that the state had no rational basis for implementing genderless marriage because of some perceived reduction in the prestige of their traditional marriages, *i.e.*, a putative "reverse stigma" argument. Where both sides of an issue have fair arguments, the State may choose between them without risking an equal protection violation under rational basis review.

[9] As to a putative due process challenge, which Plaintiffs do not bring, unlike laws against homosexual activity per se, which were not prevalent in the United States until the

Plaintiffs also argue that because the State has provided for domestic partnerships with most of the same rights and responsibilities that accompany civil marriage, the State has necessarily abandoned any possible basis for withholding the title of "marriage" apart from the sole and improper purpose of stigmatizing Plaintiffs. But the Court finds that there are rational bases for withholding the title of marriage. *See supra.* The conceivable benefits to society from maintaining a distinction between traditional marriage and same-sex domestic partnerships provide a rational basis for the State of Nevada to maintain the distinction, even if one result of the distinction is the stigmatization of same-sex relationships or if bias was one motivating factor. *See Bd. of Trs. of Univ. of Ala. v. Garrett,* 531 U.S. 356, 367 (2001) (citing *Cleburne,* 473 U.S. at 448) (noting that even where animus is a motivating factor, a law survives rational basis review where there is also a conceivable legitimate purpose behind it). Preserving the

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late Nineteenth Century and therefore have no "ancient roots," *see Lawrence,* 539 U.S. at 568-70, the prohibition against same-sex civil marriage has been nearly ubiquitous since antiquity, *see, e.g., Andersen v. King Cnty.,* 138 P.3d 963, 976-77 (Wash. 2006) (en bane) (collecting cases). Until very recently, it has been utterly unknown to the history or traditions of this Nation, and it is still unknown in the vast majority of American jurisdictions, as well as in the vast majority of international jurisdictions. Unlike private, consensual, homosexual activity, therefore, same-sex civil marriage is not a fundamental right.

traditional institution of marriage is different from the mere moral disapproval of a disfavored group, *34 *Massachusetts v. HHS*, 682 F.3d 1, 16 (1st Cir. 2012), and the positive benefits of preserving the distinction need only be conceivable for the state's laws to stand. Plaintiffs argue that preserving the traditional institution of marriage as between one man and one woman necessarily excludes same-sex couples, based at least in part upon a normative bias. But this is permitted so long as preserving the traditional institution of marriage is a legitimate state interest in-and-of-itself and any attendant bias is based upon a distinction subject only to rational basis review. *See Cleburne,* 473 U.S. at 448.

Plaintiffs' argument that Nevada's creation of a parallel but differently titled civil institution for same-sex relationships necessarily renders the State's pre-existing prohibition against same-sex marriages invalid, if accepted, would permit a plaintiff to show an equal protection violation by the very fact that a state had recently *increased* his rights in relevant respects, which is not the law. *Cf. Jack son,* 2012 WL 3255201, at *37 (noting that such a holding would both discourage the states from experimenting with social change for fear of constitutionalizing issues and would provide perverse incentives for the states to withhold rights). Perhaps if there had previously been no such institution as civil marriage, and if the

State of Nevada had simultaneously, or nearly so, created both the institutions of civil marriage and domestic partnership, excluding only same-sex couples from one but not the other, Plaintiffs' stigmatization argument would carry more weight. In such a case, although same-sex partners' rights would have been increased by the State in an absolute sense, theirrights with respect to other persons' rights would have been simultaneously decreased, indicating a potential constitutional harm. Here, the State of Nevada has only increased Plaintiffs' rights and has not simultaneously decreased them with respect to other persons' rights. The traditional form of civil marriage predates the State of Nevada by many centuries, having existed in the same form in the relevant respect (one man and one woman) for millennia in Nevada's predecessor societies. The State of Nevada's extension of the fundamental (and most of the civil) incidents of marriage to ***34** same- sex couples in recent years cannot reasonably be said to reflect anti-homosexual animosity under these circumstances, but only benevolence. Perceiving a violative malevolence in the expansion of rights alone is possible only if one presupposes that there is an additional right being withheld, which reasoning is circular. Where a minority group's rights have not been decreased by a state's acts either absolutely or in relation to other person's rights, the proffered additional right must stand on its own.

Furthermore, standing in this case cannot be based upon an allegation of harm consisting of pure stigma, because the relief Plaintiffs seek cannot redress that measure of harm. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 568 (1992). Any stigma arising out of the State's refusal to recognize same-sex relationships as "marriages" simply cannot be removed by judicial decree. In some cases, where the stigma complained of is entirely created by the state, as in the hypothetical example given above, a judicial decree might remedy it. Here, however, one-man-one-woman civil marriage is a longstanding institution not created by State of Nevada, and the decision not to recognize same-sex marriages was adopted by the People through ballot initiative. It is not plausible that the People of the State of Nevada will change their views on the matter because of any judicial decree or proclamation by the State (voluntary or not) that conflicts with their private beliefs concerning the nature of marriage. Nor can a judicial decree cure the State's own contribution to any stigma, because an act or statement made involuntarily is not, and will be known both by Plaintiffs and the rest of the populace not to be, a genuine reflection of the State's viewpoint, which is, of course, simply the collection of the viewpoints of its citizens. That is, the People will know-because they know their own opinions-that the State of Nevada does not approve of same-sex

marriages despite the fact that it has been forced by judicial decree to act as if it does. This is not to say that Plaintiffs have no recourse, but they must rely on more than pure stigma as the measure of harm. Plaintiffs must rely on a measure of ***36** harm that the Court can actually redress, i.e., the denial of equal treatment under the law itself. The Court has addressed Plaintiffs' claim in this regard under therelevant standards.

4. *Romer v. Evans*

There is an additional line of cases to consider when a state withdraws an existing right or enacts sweeping, draconian changes in a minority group's legal status, and the Court finds that analysis under this line of cases is not precluded by *Baker.* In *Romer,* the Supreme Court ruled that a law born of animosity for a discrete minority group that withdraws existing rights from the group, or which effects a sweeping change in the legal status of the group, does not survive rational basis review under the Equal Protection Clause. *See* 517 U.S. at 627 ("The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies").[10]

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[10] The *Perry* Court struck down the amendment to the California Constitution enacted via Proposition 8 because it believed *Romer* prevented the targeted

Based upon *Romer,* the Court of Appeals recently struck down an amendment to the California Constitution that had withdrawn an existing state law right to same-sex marriage while leaving the constitutional incidents of marriage in place via the domestic partnership laws. *See Perry,* 671 F.3d at 1076 (citing *Romer,* 517 U.S. at 634-35) ("Proposition 8 singles out same-sex couples for unequal treatment by taking away from them alone the right to marry, and this action amounts to a distinct constitutional violation because the Equal Protection Clause protects minority groups from being targeted for the deprivation of an existing right without a legitimate reason."). The *Perry* court, however, explicitly declined to address whether the amendment would have failed under the Fourteenth Amendment had there never been a right to same-sex *37 marriage in California. *See id.* at 1064. The dispositive issue in Perry was that the State of California had targeted a discrete group and withdrawn an existing right from its members. *See id.* at

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withdrawal of any right whatsoever from a minority group, whereas the dissent believed *Romer* prevented only sweeping changes in a minority group's legal status. In other words, the dispositive disagreement in that case concerned the meaning of *Romer,* which is somewhat cryptic as to its applicability beyond the facts of that case itself. Although the *Romer* doctrine is still nascent and controversial, the Court will for the sake of argument assume that either type of state action-withdrawal of an existing right or a sweeping change in legal status-is infirm under *Romer.*

1076. The People of California had only withdrawn from same-sex couples the right to the title of "marriage," while leaving the constitutional incidents of marriage in place via a domestic partnership regime. *See id.* at 1077-78 ("Proposition 8 did not affect [certain civil incidents of marriage under California law] or any of the other constitutionally based incidents of marriage guaranteed to same-sex couples and their families. In adopting the amendment, the People simply took the designation of marriage away from lifelong same-sex partnerships, and with it the State's authorization of that official status . . . ." (citations and internal quotation marks omitted)). The Court of Appeals ruled that the right to the title of marriage was concrete enough to establish an injury (though not itself of constitutional dimension), and that the withdrawal of the right to the title of marriage was therefore unconstitutional under *Romer* regardless of the constitutional dimension of the right itself. *See id .* at 1096 ("By using their initiative power to target a minority group and withdraw a right that it possessed, without a legitimate reason for doing so, the People of California violated the Equal Protection Clause.").

Because there has never been a right to same-sex marriage in Nevada, *Romer* and *Perry* are inapplicable here as to NRS section 122.020. That section of the NRS removed no

preexisting right and effected no change whatsoever to the legal status of homosexuals when adopted by the Nevada Territorial Legislature in 1861. *See* Nev. Comp. Laws § 196 § 2, at 65 (1861-1873).

It can be argued, however, that Section 21 removed an existing right for the purposes of a *Romer* analysis. Section 21 did not remove any preexisting right to the formation of same-sex marriage, but it did make it more difficult to change section 122.020 and other statutes through the democratic process. Before the adoption of Section 21, the People of the State of Nevada could have democratically altered section 122.020 via legislation to provide for same sex *38 marriages. Section 21 removed their ability to do so. Although homosexuals have meaningful political power, they would now have to convince their fellow citizens to amend the Nevada Constitution to achieve the particular democratic goal of legalizing same-sex marriage in Nevada, and it is more difficult to amend the Nevada Constitution than it is to amend the NRS.

The *Romer* Court does not, however, appear to have announced a general constitutional principle that any state action making it more difficult for the People to achieve a particular goal in aid of the rights of a discrete minority group through democratic processes is necessarily infirm under the

Equal Protection Clause. Such a rule would be so broad and dramatic as to be unmistakable when announced.[11] Rather, the *Romer* Court emphasized the insidious nature of laws that impose general hardships, as contrasted with laws imposing only particular disabilities. *See* 517 U.S. at 633 ("Respect for this principle explains why laws singling out a certain class of citizens for *disfavored legal status or general hard ships* are rare. A law declaring that *in general* it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." (emphases added)). That is not to say that laws imposing particular disabilities are immune from equal protection challenges, but it is to say that such challenges are governed by traditional equal protection principles, not by

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[11] Although, according to a separate line of cases not argued by the parties, an equal protection violation may result from a law making it more difficult for members of a racial minority group to protect themselves through democratic processes, such violations only occur in the context of race. *Hunter v. Erickson,* 393 U.S. 385, 391-93 (1969); *Coalition to Defend Affirmative Action v. Regents of the Univ. of Mich.,* ___ F.3d ___, 2012 WL 5519918, at *8 (6th Cir. 2012). Also, the *Hunter* principal applies only when the racial classification appears on the face of the challenged law. *Washington v. Seattle Sch. Dist. No. 1,* 458 U.S. 457, 484-85 (1982). Section 21 contains no facial distinction on the basis of sexual orientation, much less on the basis of race.

Romer, which governs only the imposition of generalized disabilities upon a disfavored group.

*39 Where a legitimate state purpose is furthered by the challenged legislation, as here, it survives an equal protection analysis at the rational basis level. There was no legitimate state purpose behind the challenged law in *Romer,* because the sole conceivable purpose there was anti-homosexual animus. *See id.* at 634-35. Colorado's constitutional provision "prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect the named class," *id.* at 624, effected a "[s]weeping and comprehensive . . . change in legal status," *id.* at 627, and was "inexplicable by anything but animus toward the class it affect[ed]," *id.* at 632. Section 21, by contrast, imposes a single, particularized disability, not a broad, sweeping change in legal status, and it was not passed without any legitimate purpose. *Romer* was an extreme case concerning a novel and ambitious type of law—a law that identified a minority group and declared that no organ of the State of Colorado should dare attempt to protect the group under the law. That kind of law is prevalent only under totalitarian regimes, and the *Romer* Court noted that it was totally outside of American constitutional traditions to enact such laws. *See id.* at 633. Section 21 is not in the character of the constitutional provision struck down in *Romer.* It does not purport to remove

any of the many protections already in place in the State of Nevada prohibiting discrimination on the basis of sexual orientation or to prevent the adoption of additional protections. It prevents only the amendment of state statutes to provide for same-sex marriage-a targeted discrimination, to be sure, but one based upon a distinction subject only to rational basis review, based at least in part upon a legitimate state interest, i.e., the protection of the traditional institution of marriage, and not based purely upon anti-homosexual animus, as the constitutional provision in *Romer* was. Section 21 therefore survives *Romer* review.

Because the maintenance of the traditional institution of civil marriage as between one man and one woman is a legitimate state interest, because the exclusion of same-sex couples from the institution of civil marriage is rationally related to furthering that interest, and because ***40** the challenged laws neither withdraw any existing rights nor effect a broad change in the legal status or protections of homosexuals based upon pure animus, the State is entitled to summary judgment. As to those Plaintiffs validly married in other jurisdictions whose marriages the State of Nevada refuses to recognize, the protection of Nevada's public policy is a valid reason for the State's refusal to credit the judgment of another state, lest other states be able to dictate the public policy of Nevada. *See Nevada v. Hall,* 440 U.S. 410, 423–24 (1979) ("Full

Faith and Credit does not . . . enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it." (quoting *Pac. Ins. Co. v. Ind us. Accident Comm'n,* 306 U.S. 493, 504-05 (1939))). *41

CONCLUSION

IT IS HEREBY ORDERED that the Motions to Dismiss (ECF Nos. 32, 33) are GRANTED IN PART and DENIED IN PART. The Complaint is dismissed as precluded by *Baker v. Nelson* with respect to the traditional equal protection challenge, but the Complaint is not dismissed with respect to the challenge under *Romer v. Evans.*

IT IS FURTHER ORDERED that the Motions for Summary Judgment (ECF Nos. 72, 74, 85) are GRANTED.

IT IS FURTHER ORDERED that the Motion for Summary Judgment (ECF No. 86) is DENIED.

IT IS FURTHER ORDERED that the Motion for Leave to File Reply (ECF No. 100) is DENIED. No party has been permitted to file a reply. The arguments have been comprehensively presented, and no reply is

necessary to preserve the relevant issues on appeal.

IT IS FURTHER ORDERED that the Clerk shall enter judgment and close the case.

IT IS SO ORDERED.

DATED: This 26th day of November, 2012.

/s/ R. Jones
ROBERT C. JONES
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

No. 2:12-CV-00578-RCJ (PAL)

BEVERLY SEVCIK, et al., Plaintiffs

v.

BRIAN SANDOVAL, et al., Defendants

Filed: December 3, 2012

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

☐ Notice of Acceptance with Offer of Judgment. A notice of acceptance with offer of judgment has been filed in this case.

IT IS ORDERED AND ADJUDGED
judgment is hereby entered per Order # 102
filed November 26, 2012.

Dated: December 3, 2012

Isl Lance S. Wilson
Clerk

Isl Molly Morrison
(By) Deputy
Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 2:12-CV-00578-RCJ (PAL)

BEVERLY SEVCIK; et al., Plaintiffs

v.

BRIAN SANDOVAL, et al., Defendant

Filed: December 3, 2012

PLAINTIFFS' NOTICE OF APPEAL

Notice is hereby given pursuant to Fed. R. App. P. 3 that all Plaintiffs, through counsel, respectfully appeal to the United States Court of Appeals for the Ninth Circuit the District Court's November 26, 2012 order, Dkt. 102, and final judgment, Dkt. 103, insofar as they (i) grant the motion to dismiss filed by Defendant Sandoval, Dkt. 32, and joined by defendant Glover, Dkt. 33; (ii) grant the motions for summary judgment filed by Defendant Sandoval, Dkt. 85, Defendant Glover, Dkt. 74, and Defendant-Intervenor Coalition for the Protection of Marriage, Dkt. 72; (iii) deny Plaintiffs' motion for summary judgment, Dkt. 86, and (iv) deny Plaintiffs' motion for leave to file a summary judgment reply brief and supporting declarations, Dkt. 100 through 100-4.

The statutory basis for this appeal is 28 U.S.C. § 1291. A copy of the order and a copy of the final judgment are attached hereto as Exhibits A and B, respectively.

Dated: December 3, 2012

Respectfully submitted,

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

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APPENDIX G

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

No. 12-17668

SUSAN LATTA, et al. Plaintiffs-Appellees,

v.

C.L. OTTER, et al., Defendants-Appellants (and consolidated cases)

Filed: January 9, 2015

ORDER
(AND DISSENTING OPINION)

****1** The panel has voted to deny the petitions for rehearing en banc.

The full court was advised of the petitions for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc reconsideration. Fed. R.App. P. 35.

The petitions for rehearing en banc are **DENIED**.

O'SCANNLAIN, Circuit Judge, joined by RAWLINSON and BEA, Circuit Judges, dissenting from the denial of rehearing en banc:

One month after the panel in these cases struck down the traditional marriage laws of Idaho and Nevada, the Sixth Circuit upheld the essentially identical laws of Michigan, Ohio, Tennessee, and Kentucky. *See DeBoer v. Snyder,* 772 F.3d 388 (6th Cir.2014). Clearly the same-sex marriage debate is not over. Indeed, not only does the debate now divide the federal circuit courts and state legislatures, but it continues to divide the American public.[1] And,

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[1] *See, e.g.,* http://www.nbcnews. com/politics/elections/2014/US/house/exitpoll (showing that in exit polling at the November 2014 election, respondents were equally divided, 48%–48%, on the question of whether same-sex marriage should be legally recognized in their state).

The debate even divides the globe—and the *DeBoer* majority is in agreement with one of the world's most prominent human rights' tribunals. Only a few months ago, the European Court of Human Rights, hardly a hotbed of hardline conservatism, made clear that the European Convention for the Protection of Human Rights and Fundamental Freedom "enshrines the traditional concept of marriage as being between a man and a woman," and "cannot be interpreted as imposing an obligation on Contracting States to grant same-sex couples access to marriage." *Hämäläinen v. Finland,* No. 37359/09, HUDOC, at *18, *24 (Eur.Ct.H.R. July 16, 2014), *available at*

***904** of course, the Supreme Court has not yet decided the issue, notwithstanding innuendo in the panel's opinion.[2]

Thoughtful, dedicated jurists who strive to reach the correct outcome—including my colleagues on the panel here—have considered this issue and arrived at contrary results. This makes clear that—regardless of one's opinion on the merits of the politically charged and controversial issues raised by these cases—we are presented with a "question of exceptional importance" that should have been reviewed by an en banc panel. *See*F.R.A.P. 35(a). Indeed, if for no other reason, we should have reheard these cases in order to consider the arguments of our colleagues on the Sixth Circuit,

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http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001–145768 # 1 ["itemid":1"001–145768"]I; *see also id.* at *19 (recognizing that "it cannot be said that there exists any European consensus on allowing same-sex marriages").

Notably, even the dissenters on the particular issue before the court—recognition of a married person's change in gender identity—agreed that "States have a legitimate interest in protecting marriage in the traditional sense by legally reserving marriage to heterosexual partners." *Id.* at *34 (Joint Dissenting Opinion of Judges Sajo, Keller, and Lemmens).

[2] What the Supreme Court *has* decided is that the federal courts should not intrude, as the panel does here, on the choices of state electorates regarding whether to define marriage as a male-female union. *Baker v. Nelson,* 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972); *see* Part I, *infra.*

who, reviewing the same question raised here, arrived at the opposite result. *See DeBoer,* 772 F.3d 388. Whether my colleagues agree or disagree with the *DeBoer* majority, at the very least, the panel should have granted rehearing to address the points raised in that opinion. Instead, we have utterly ignored another circuit's reasoned contribution to the debate. Such a clear circuit split on such an exceptionally important issue demands en banc review.[3]

Because the panel opinion neglects to address the issues raised in the conflicting Sixth Circuit opinion, and 1) overlooks binding Supreme Court precedent, 2) fails to respect bedrock principles of democratic self-governance, and 3) ignores the adverse implications of its opinion on our federal structure, I must respectfully dissent from our decision not to rehear these cases en banc.

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[3] *See*F.R.A.P. 35(b)(1)(B) (explaining that "a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals"); *see also Groves v. Ring Screw Works,* 498 U.S. 168, 172 n. 8, 111 S.Ct. 498, 112 L.Ed.2d 508 (1990) (citing "a square conflict in the Circuits," as grounds for making rehearing en banc "appropriate"); Ninth Circuit Rule 35–1 (explaining that a direct conflict with another court of appeals "is an appropriate ground for petitioning for rehearing en banc").

I

Even if the exceptional importance of the issues and the circuit split were somehow insufficient to warrant our rehearing these cases en banc, we still should have concluded rehearing was merited. The *905 panel fails to follow the Supreme Court's precedential command that federal courts must avoid substituting their own definition of marriage for that adopted by the states' citizenry. By refusing to rectify this error, we let stand an impermissible judicial intrusion into a debate reserved to the states' political processes.

A

**2 For decades, our nation has engaged in an "earnest and profound debate" on marriage policy. *See Washington v. Glucksberg,* 521 U.S. 702, 735, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (praising the American public's on-going conversation on the "morality, legality, and practicality of physician-assisted suicide" and ultimately declining to interfere); *see also Hollingsworth v. Perry,* —— U.S. ——, 133 S.Ct. 2652, 2659, 186 L.Ed.2d 768 (2013) ("The public is currently engaged in an active political debate over whether same-sex couples should be allowed to marry."). State by state, citizens have considered the issue of same-sex marriage and, through legislation, popular referendum, or

constitutional amendment, voiced their views on this question of immense public importance.[4]

Until quite recently, the judiciary has allowed this earnest democratic debate to continue unobstructed. Forty-two years ago, the Supreme Court dismissed an appeal from a Minnesota Supreme Court decision, *Baker v. Nelson,* which held that "[t]he equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the *state's* classification of persons authorized to marry." 291 Minn. 310, 191 N.W.2d 185, 187 (1971) (emphasis added). Dismissing the plaintiffs' appeal "for want of a substantial *federal* question,"409 U.S. at 810, 93 S.Ct. 37 (emphasis added), the *Baker* Court confirmed that the Constitution commits questions of marriage policy to the citizens of each state, and that absent exceptional circumstances, federal courts should resist the temptation to interfere with a state marriage regulation.

This is not to say that a state's "powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment."

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[4] To date, thirteen states and the District of Columbia have extended the traditional definition of marriage to include same-sex couples by statute or ballot initiative. *See infra* footnote 9. Many other states, including Idaho and Nevada, have used their democratic processes to retain the traditional definition of marriage.

Loving v. Virginia, 388 U.S. 1, 7, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). There are clearly exceptional circumstances in which judicial interference is needed—no more so than when a husband and wife face criminal sanctions merely for marrying when they happen to be of different races. *See id.*

But while "invidious racial discriminations" warranted judicial action in *Loving v. Virginia,* no such discrimination is implicated here.[5] Indeed, to argue that *Loving* controls here requires asserting that the Supreme Court forgot about *Loving* only five years later when it decided *Baker.* If the panel had any lingering doubts as to whether judicial interference is appropriate, *Baker* makes clear that it is not.

B

Loving holds that "restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause" and that the "Fourteenth Amendment requires that the freedom of choice to marry not be restricted *906 by invidious racial discriminations." *Loving*, 388 U.S. at 12, 87 S.Ct. 1817. Thus, Loving stands as a clear prohibition on racial discrimination in laws

[5] Indeed the panel majority—though not Judge Reinhardt *see Latta v. Otter,* 771 F.3d 456, 464 (9th Cir.2014) (Reinhardt, J., concurring)—does not rest its decision on *Loving.*

defining and regulating marriage, but it simply does not follow that Loving also somehow prevents the states from defining marriage as a union of a man and a woman.

**3 Indeed state laws that define marriage as a union of a man and a woman bear little resemblance to the Virginia statute that *criminalized* Mildred and Richard Loving's marriage merely because Mildred was black and Richard was white. *Id.* at 11, 87 S.Ct. 1817. Virginia recognized that Mildred and Richard had married in the District of Columbia, but "to maintain White Supremacy," *id.,* the state legislature chose to punish them for having the courage to do so.

Chief Justice Warren recognized that such punishment contravened the constitutional command that "the freedom of choice to marry not be restricted by invidious racial discriminations." *Id.* at 12, 87 S.Ct. 1817. But it is difficult to draw from this holding the conclusion that *Loving* is "directly on point," *Latta,* 771 F.3d at 478 (Reinhardt, J., concurring), as to whether marriage may be defined as an opposite-sex relationship.

Of course, states are not *compelled* to define marriage as such an opposite—sex union—simply look to the many states that, since *Loving,* have defined it by statute or popular vote to extend to gay

and lesbian couples.[6] But states are also not *compelled* by the federal Constitution to define marriage differently than the "generally accepted" opposite-sex relationship Mildred and Richard sought to enter in *Loving*. *See Loving,* 388 U.S. at 11, 87 S.Ct. 1817; *cf. Bishop v. Smith,* 760 F.3d 1070, 1108–09 (10th Cir.2014) (Holmes, J., concurring) (explaining that Oklahoma's codification of marriage as an opposite-sex relationship "cannot sensibly be depicted as 'unusual' where the State was simply exercising its age-old police power to define marriage in the way that it, along with every other State, always had" and noting that Oklahoma's law "formalized a definition that every State had employed for almost all of American history, and it did so in a province the states had always dominated"); *Hdmdldinen,* No. 37359/09, HUDOC, at *19, *24 (explaining that the European Convention does not impose an obligation to recognize same sex marriage, and that only ten of the 47 member states of the Council of Europe recognize such marriages).[7] *Loving* states that "[u]nder our Constitution, the

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[6] *See infra* note 9.

[7] Notwithstanding my views on the applicability of foreign law in the analysis of constitutional terms, *see* Diarmuid F. O'Scannlain, *What Role Should Foreign Practice and Precedent Play in the Interpretation of Domestic Law?,* 80 NOTRE DAME L.REV. 1893 (2005), marriage is not defined in the U.S. Constitution, and it is telling that the ECHR has left such a fundamental issue to be resolved by member-states rather than via judicial fiat.

freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State," but it says nothing about the states' power to define marriage, as every state has done for almost all of American history, as a male-female relationship. *Loving,* 388 U.S. at 12, 87 S.Ct. 1817.

C

It is utterly unsurprising then, that only five years after *Loving,* when the viability of the "generally accepted" opposite-sex definition of marriage was squarely before the Court, the Court concluded no substantial federal question was implicated. *Baker,* 409 U.S. 810, 93 S.Ct. 37. Such a conclusion was completely consistent with *Loving:* there simply is no conflict in holding *907 both that the Constitution prohibits racial restrictions on the right to enter marriage, and that the Constitution is not offended by a state's choice to define marriage as an opposite-sex relationship.

**4 Of course we cannot ignore Chief Justice Marshall's observation, as true as ever, that if "the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply." *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803).

We must ask, then: Is leaving the political process intact here not an impermissible abdication of our "authority, and indeed [ ] responsibility, to right fundamental wrongs left excused by a majority of the electorate?" *DeBoer,* 772 F.3d at 436–37 (Daughtrey, J., dissenting). Is this situation not analogous to those, where, even while recognizing "that certain matters requiring political judgments are best left to the political branches," we must ensure that courts and not the political branches, "say what the law is?" *Boumediene v. Bush,* 553 U.S. 723, 765, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008) (citing *Marbury,* 5 U.S. (1 Cranch) at 177).

Simply put, no. We are a Court of Appeals, not the Supreme Court, and our obligation is to

> adhere to the view that if the Court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise.... [T]he lower courts are bound by summary decisions by th[e Supreme] Court until such time as the Court informs [them] that [they] are not.

Hicks v. Miranda, 422 U.S. 332, 344–45, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975) (citations omitted).

Far from avoiding our responsibilities, following *Baker* here constitutes the only permissible exercise of our limited authority—the eagerness of the panel members to pronounce their

views on the merits of same-sex marriage notwithstanding.[8] When the Supreme Court "concludes [an] appeal should be dismissed because the constitutional challenge" presented "was not a substantial one," it makes a precedential decision on the merits. *Hicks,* 422 U.S. at 344, 95 S.Ct. 2281 (citing *Ohio ex rel. Eaton v. Price,* 360 U.S. 246, 247, 79 S.Ct. 978, 3 L.Ed.2d 1200 (1959); R. Stern & E. Gressman, *Supreme Court Practice* 197 (4th ed.1969); C. Wright, *Law of Federal Courts* 495 (2d ed.1970)).

Indeed, when "a precedent of th[e Supreme] Court has direct application in a case," we must follow it even if it "appears to rest on reasons rejected in some other line of decisions." *Rodriguez*

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[8] It is questionable whether judicial intrusion on the peoples' political choices is truly an effective means of advancing the same-sex marriage cause. As one legal academic and same-sex marriage supporter explains:

> Court victories are hollow victories for the LGBT community, failing to deliver the societal respect they seek, and in fact *removing the opportunity* for collective expression of such respect through voluntary legislative reform or popular referendum.

James G. Dwyer, *Same–Sex Cynicism and the Self–Defeating Pursuit of Social Acceptance Through Litigation,* 68 S.M.U. L.REV. —— (forthcoming 2015). Courts "cannot deliver the type of dignity that comprises social respect"—in fact "a judicial victory obviates legislative change, and therefore collective or majoritarian expression of respect." *Id.*

de Qui¶ as v. Shearson/AMEX, Inc., 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). "[T]he Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Id. Baker* is a precedential disposition on the merits which *Hicks* and *Rodriguez de Quijas* *908 make clear we are not at liberty to disregard.

The panel ignores *Rodriguez de Quijas* and attempts to turn the command of *Hicks* on its head. Rather than heeding the clear statement that "the lower courts are bound by summary decisions by th[e Supreme] Court until such time as the Court informs [them] that [they] are not," the panel searches for "doctrinal developments" that, when interpreted *just so,* imply that *Baker* is no longer good law. Apparently the panel believes the Supreme Court, rather than speaking clearly when it overrules dispositions on the merits, "informs" the lower courts of an overruling with so many winks and nods.

****5** Unfortunately, the panel is not without company in its approach. *See, e.g., Baskin v. Bogan,* 766 F.3d 648, 659–60 (7th Cir.2014) (doctrinal developments preclude application of *Baker*); *Bostic v. Schaefer,* 760 F.3d 352, 373–75 (4th Cir.2014) (same); *Bishop,* 760 F.3d at 1079–81 (same); *Kitchen v. Herbert,* 755 F.3d 1193, 1204–08 (10th Cir.2014) (same).

Yet neither am I. *See, e.g., DeBoer,* 772 F.3d at 399–402 (*Baker* is still binding precedent); *Massachusetts v. U.S. Dep't of Health & Human Servs.,* 682 F.3d 1, 8 (1st Cir.2012) (same), *cited in U.S. v. Windsor,* ––U.S. ––––, 133 S.Ct. 2675, 2688, 2693, 186 L.Ed.2d 808 (2013); *Conde–Vidal v. Garcia–Padilla,* No. 14–1253 PG, –– F.Supp.3d ––– –, ––––, 2014 WL 5361987, at *6 (D.P.R. Oct. 21, 2014) (same); *cf., Hdmdldinen,*No. 37359/09, HUDOC, at *24 (holding, like *Baker,* that same-sex marriage is an issue reserved to the democratic process).

D

Wishing that *Baker* has been overruled, however, does not make it so. Indeed, even if the panel's tea-leaf-reading approach to finding implicit overruling were viable, it still could not plausibly argue that *Baker* has been abrogated. In making the determination that "doctrinal developments" indicate that the Court no longer views *Baker* as good law, the panel relies on *United States v. Windsor,* –– U.S. ––––, 133 S.Ct. 2675, 186 L.Ed.2d 808, *Lawrence v. Texas,* 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), and *Romer v. Evans,* 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). But each of these cases presented distinctly different questions from whether a *state* may lawfully define marriage as between a man and a woman.

1

In *Windsor,* the Court struck down a *federal* law that intruded on a state's prerogative to define marriage, what the Court characterized as " 'virtually [an] exclusive province of the States.' " *Windsor,* 133 S.Ct. at 2691 (quoting *Sosna v. Iowa,* 419 U.S. 393, 404, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975)). If anything, *Windsor*'s emphasis on the unprecedented federal intrusion into the states' authority over domestic relations reaffirms *Baker*'s conclusion that a state's definition of marriage presents no "substantial federal question." *Baker,* 409 U.S. at 810, 93 S.Ct. 37. The *Windsor* opinion expressly "confined [itself] to ... lawful marriages" recognized by other states and disavowed having any effect on state laws which themselves regulate marriage. *Windsor,* 133 S.Ct. at 2696.

2

Likewise, in *Lawrence,* the Court did not implicate *Baker* when it struck down Texas's criminal anti-sodomy law on the ground that it interfered with personal autonomy. Like in *Windsor,* the *Lawrence* Court expressly stated that it was not deciding whether a state must recognize same-sex marriages. *See* *909 *Lawrence,*539 U.S. at 578, 123 S.Ct. 2472 ("The present case does not involve ... whether the government must give formal

recognition to any relationship that homosexual persons seek to enter.").

3

Similarly, *Romer* did not involve the definition of marriage, but rather a Colorado constitutional amendment that "nullifie[d] specific legal protections for [homosexuals] in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment" as well as laws providing protection "from discrimination by every level of Colorado government." *Romer,* 517 U.S. at 629, 116 S.Ct. 1620. Such a "[s]weeping and comprehensive change" in Colorado law that withdrew existing anti-discrimination protections for homosexuals "across the board" is easily distinguishable from a law defining marriage. *Id.* at 627, 633, 116 S.Ct. 1620; *see also* Kenji Yoshino, *The New Equal Protection,* 124 HARV. L.REV.. 747, 777–78 (2011) (noting that "the Court emphasized that *Romer* might be a ticket good only for one day" as the amendment at issue effectuated an "unprecedented" harm).

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**6 Windsor, Lawrence, and Romer simply do not limit the states' authority to define marriage and certainly do not contradict Baker's conclusion that

the Constitution does not require states to recognize same-sex marriage. See *Bishop*, 760 F.3d at 1104 (Holmes, J., concurring) (explaining that state laws defining marriage as between an opposite-sex couple are clearly distinguishable from those at issue in Romer and Windsor as they neither "target[ ] the rights of a minority in a dangerously expansive and novel fashion" as in Romer, nor do they "stray[ ] from the historical territory of the lawmaking sovereign just to eliminate privileges that a group would otherwise receive," as the federal law did in Windsor).

Our place in the federal judicial hierarchy carries with it restrictions that, inconvenient as they may be to implementing our policy choices, restrain and guide our discretion. We cannot ignore our obligation to follow *Baker*'s precedent.

II

Not only does the panel fail to abide by Supreme Court precedent, but, by injecting itself in the public's "active political debate over whether same-sex couples should be allowed to marry," *Hollingsworth,* 133 S.Ct. at 2659, it acts in a way Justice Kennedy has deemed "inconsistent with the underlying premises of a responsible, functioning democracy." *Schuette v. Coalition to Defend Affirmative Action,* —— U.S. ——, 134 S.Ct. 1623, 1637, 188 L.Ed.2d 613 (2014) (plurality opinion). Rather than allow further change "primarily [to] be

made by legislative revision and judicial interpretation of the existing system," the panel chooses to "leap ahead—revising (or even discarding) the system by creating a new constitutional right and taking over responsibility for refining it." *Dist. Attorney's Office for Third Judicial Dist. v. Osborne,* 557 U.S. 52, 74, 129 S.Ct. 2308, 174 L.Ed.2d 38 (2009). Such a leap should never be made lightly, yet here the panel takes it without regard to the fact that our country's citizens have shown themselves quite capable of "engag[ing] in serious, thoughtful examinations" of the issue of same-sex marriage. *Glucksberg,* 521 U.S. at 719, 117 S.Ct. 2258.

In some states, democratic majorities have enacted laws that expand the traditional definition of marriage to include same-sex relationships. *See Windsor,* 133 S.Ct. at 2710–11 (noting, for example, that in Maryland, voters approved a measure, by a vote of 52% to 48%, establishing that *910 "Maryland's civil marriage laws allow gay and lesbian couples to obtain a civil marriage license").[9]

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[9] *See also* Cal. Fam.Code § 300 (permitting same-sex marriage); Conn. Gen.Stat. Ann. § 46b–20a (same); Del.Code Ann. tit. 13, § 129 (same); Haw.Rev.Stat. § 572–1 (same); 750 Ill. Comp. Stat. Ann. 5/212 (same); Md.Code Ann., Fam. Law § 2–201 (same); Minn.Stat. Ann. § 517.01 (same); N.H.Rev.Stat. Ann. § 5–C:42 (same); N.Y. Dom. Rel. Law § 10 (same); R.I. Gen. Laws Ann. § 15–1–1 (same); V.T. Stat. Ann. tit. 15, § 8 (same); Wash. Rev.Code Ann. § 26.04.010 (same). If marriage is to be extended to same-sex couples, our democratic institutions provide the proper means to effect such an extension.

In other states, voters have elected to retain the centuries-old, traditional idea that marriage is limited to opposite-sex couples. *Id.* (noting a North Carolina constitutional amendment providing that "[m]arriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State"). Indeed, in Maine, citizens voted to reject same-sex marriage in 2009 (by a vote of 53% to 47%) only to change course in 2012, voting to permit same-sex marriages by that same margin. *Id.* It seems marriage-defining is a state-law issue that the states are quite capably handling through deliberation in their own state lawmaking processes.[10]

****7** The panel's opinion cuts short these "earnest and profound debate[s]," silencing the voices of millions of engaged and politically active citizens. *Glucksberg,* 521 U.S. at 735, 117 S.Ct. 2258.

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[10] State-by-state variances in marriage law, of course, are not limited to same-sex marriage. For instance, states have different age requirements. *Compare*Idaho Code Ann. § 32–202 (individuals must be 18 to marry without parental consent), *with*Miss.Code. Ann. § 93–1–5 (individuals must be 21). States also differ in their consanguinity requirements. *Compare*Idaho Code Ann. § 32–206 (prohibiting marriages between first cousins), *with*Cal. Fam.Code § 2200 (permitting such marriages). Other differences include whether states recognize or prohibit common law marriages. *Compare*Idaho Code Ann. § 32–201 (prohibiting common law marriages), *with*Mont.Code Ann. § 40–1–403 (permitting such marriages). Query if the panel's holding nullifies such prohibitions as well.

By doing so, the panel suggests that citizens of Nevada and Idaho, indeed of the nation, are not capable of having this conversation, or of reaching the "correct" conclusion. But such a view eschews the very foundational premises of democratic self-governance. As Justice Kennedy wrote in *Schuette,*"It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds.... Freedom embraces the right, indeed the duty, to engage in a rational, civic discourse in order to determine how best to form a consensus to shape the destiny of the Nation and its people." *Schuette,* 134 S.Ct. at 1637.

A

Nothing about the issue of same-sex marriage exempts it from the general principle that it is the right of the people to decide for themselves important issues of social policy. On the contrary, the Court's decision in *Windsor* recognizes the importance to democratic self-government of letting *the People* debate marriage policy. The *Windsor* Court reminded us that "[t]he dynamics of state government in the federal system are to allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other." *Windsor,* 133 S.Ct. at 2692.

Despite such express instruction from the High Court, the panel assumes it is *its* right, indeed *its* duty to reach the conclusion that it does. But recent developments suggest otherwise. As the Sixth Circuit's *DeBoer* decision reminds us, it is ***911** "[b]etter in this instance ... to allow change through the customary political processes, in which the people, gay and straight alike, become the heroes of their own stories by meeting each other not as adversaries in a court system but as fellow citizens seeking to resolve a new social issue in a fair-minded way." *DeBoer,* 772 F.3d at 421; *see also Garcia–Padilla,* No. 14–1253 PG, —— F.Supp.3d at ——, 2014 WL 5361987, at *11 ("[O]ne basic principle remains: the people, acting through their elected representatives, may legitimately regulate marriage by law."); *Robicheaux v. Caldwell,* 2 F.Supp.3d 910, 926–27 (E.D.La.2014) (noting the importance of respecting democratic voices).[11]

The healthy, spirited, and engaged debate over marriage policy represents the virtues of democratic self-governance. The panel's opinion shuts down the debate, removing the issue from the

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[11] Of course, blind deference to legislative majorities would be an abdication of our judicial duty. But, as explained in Part I, no such blind deference occurs when inferior courts follow Supreme Court precedent directly on point, the states have codified rational and long-accepted definitions of marriage, and the legislative process has shown itself to be capable of giving voice (and winning results) to both sides of the heretofore on-going conversation.

public square. In so doing, it reflects a profound distrust in—or even a downright rejection of—our constitutional structure. As the Court warned in *Osborne,* this course of action "takes[s] the development of rules and procedures in this area out of legislatures and state courts shaping policy in a focused manner and turn[s] it over to federal courts applying the broad parameters of the [Fourteenth Amendment]." 557 U.S. at 56, 129 S.Ct. 2308.

**8 Justice Powell, dissenting in the noted death penalty case *Furman v. Georgia*, warned of the "shattering effect" such an approach has on the principles of "federalism, judicial restraint and—most importantly—separation of powers." 408 U.S. 238, 417, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Powell, J., dissenting). Justice Powell acknowledged that in situations where, as here, "the language of the applicable provision provides great leeway and where the underlying social policies are felt to be of vital importance, the temptation to read personal preference into the Constitution is understandably great." *Id.* Nevertheless, he maintained that despite the temptation, "it is not the business of [courts] to pronounce policy." *Id.* Here, the panel's inability to resist such temptation reflects a "lack of faith and confidence in the democratic process." *Id.* at 464–65, 92 S.Ct. 2726.

Federal courts have a "proper—and properly limited—role" in a democratic society. *Allen v. Wright,* 468 U.S. 737, 750, 104 S.Ct. 3315, 82

L.Ed.2d 556 (1984) (quoting *Warth v. Seldin,* 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). When we artificially expand our role, not only does it flout the Constitution, it also has deleterious effects on the civic health of our country. We should not be so quick to presume we know what's best. Judicial humility in service of democratic self-rule is reason alone to rehear these cases en banc.

III

In addition to sweeping aside the virtues of democracy, the panel ignores our federal structure. The panel fails to recognize the principle that marriage law, like other areas of domestic relations, has been and should continue to be an area committed to the states. *See Windsor,* 133 S.Ct. at 2691–92 ("State laws defining and regulating marriage, of course, must respect the constitutional rights of persons, but, subject *912 to those guarantees, regulation of domestic relations is an area that has long been regarded as a *virtually exclusive province of the States*.... [T]he 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."(emphasis added)); *U.S. Dep't of Health & Human Servs.,* 682 F.3d at 12 (explaining that "DOMA intrudes extensively into a realm that has from the start of the nation been primarily confided to state regulation—domestic

relations and *the definition* and incidents of lawful marriage" (emphasis added)). The panel's opinion ignores this important aspect of Our Federalism.

A

"Long ago," the Supreme Court "observed that 'the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.' "*Elk Grove Unified Sch. Dist. v. Newdow,* 542 U.S. 1, 12, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004) (quoting *In re Burrus,* 136 U.S. 586, 593–94, 10 S.Ct. 850, 34 L.Ed. 500 (1890)). Indeed, for over a century, federal courts have recognized that actions concerning domestic relations are entrusted to state legislatures and state courts.

****9** In the latest Supreme Court opinion addressing the issue of same-sex marriage, the Court gave a ringing endorsement of the central role of the states in fashioning their own marriage policy. *Windsor,* 133 S.Ct. at 2689–93. "By history and tradition," the Court stated in *Windsor,*"the definition and regulation of marriage ... has been treated as being within the authority and realm of the separate States." *Id.* at 2689–90. Indeed, the Court continued, "[t]he recognition of civil marriages is *central* to state domestic relations law applicable to its residents and citizens." *Id.* at 2691 (emphasis added); *see also id.* ("The definition of marriage is

the foundation of the State's broader authority to regulate the subject of domestic relations...."); *Williams v. North Carolina,* 317 U.S. 287, 298, 63 S.Ct. 207, 87 L.Ed. 279 (1942) ("Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders.").

Thus, in *Windsor,* the Court struck down the *federal intrusion* into a realm committed to the states, emphasizing the exclusive role that states have in regulating marriage law. *Windsor,* 133 S.Ct. at 2691. *Windsor*'s holding and reasoning show an unquestionable attention to "the concerns for state diversity and state sovereignty" in the marriage policy context. *Id.* at 2697 (Roberts, C.J., dissenting). The panel's opinion ignores the "undeniable" conclusion that *Windsor*'s "judgment is based on federalism." *Id.*

B

Windsor was correct in resting its holding on federalism. In striking down the federal *legislature's* intrusion into this area of law committed to the states, it held Congress to the same standards to which federal *courts* have long adhered. Simply stated: the federal judiciary has affirmatively sought to *avoid* encroachments into state domestic relations policy.

Federal judges have used various doctrinal mechanisms to refrain from intruding into the uncharted waters of state domestic relations law. As the Court explained in *Ankenbrandt v. Richards,* courts have often avoided such an intrusion by invoking the "domestic relations exception" to federal jurisdiction under the diversity statute. 504 U.S. 689, 693, 112 S.Ct. 2206, 119 L.Ed.2d 468 (1992). Other courts have extended the exception to federal ***913** question jurisdiction.[12] *See, e.g., Jones v. Brennan,* 465 F.3d 304, 306–08 (7th Cir.2006). And others have invoked abstention doctrines to avoid state-law domestic relations issues. *See, e.g., Moore v. Sims,* 442 U.S. 415, 423–35, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979); *Coats v. Woods,* 819 F.2d 236, 237 (9th Cir.1987) ("This case, while raising constitutional issues, is at its core a child custody dispute."); *Peterson v. Babbitt,* 708 F.2d 465, 466 (9th Cir.1983) ("There is no subject matter jurisdiction over these types of domestic disputes.").[13]

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[12] Recent scholarship has even argued that federal courts may not have Article III jurisdiction over cases involving marital status determinations. *See* Steven G. Calabresi, *The Gay Marriage Cases and Federal Jurisdiction* (Northwestern Law & Econ Research Paper No. 14–18; Northwestern Pub. Law Research Paper No. 14–50, 2014), *available at* http://ssrn.com/abstract-2505514.

[13] Though the domestic relations exception itself is typically confined to divorce or child custody cases, the *Ankenbrandt* Court acknowledged that the exception could be broadly applied when appropriate for the federal courts to decline to

In one notable case, the Supreme Court refrained from ruling on the constitutionality of the Pledge of Allegiance—certainly a question of key constitutional import—because doing so would have required rejecting a state court order regarding parental rights of the plaintiff. *Newdow,* 542 U.S. at 17, 124 S.Ct. 2301. Because the case involved "hard questions of domestic relations [that were] sure to affect the outcome," it would have been "improper" to exercise jurisdiction and "the prudent course [was] for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law." *Id.; see also Smith v. Huckabee,* 154 Fed.Appx. 552, 555 (8th Cir.2005) (citing *Newdow* in declining to exercise jurisdiction over questions implicating state domestic relations law); *United States v. MacPhail,* 149 Fed.Appx. 449, 456 (6th Cir.2005) (same).

****10** In short, through various doctrinal mechanisms, federal courts have avoided the kind of federal intrusion into state domestic relations law

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hear a case involving "elements of the domestic relationship," *Ankenbrandt,* 504 U.S. at 705, 112 S.Ct. 2206, even when divorce or child custody is not strictly at issue. "This would be so when a case presents 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar.' " *Id.* (citation omitted). Undoubtedly, these are such cases.

exemplified by the panel's opinion.[14] Whatever the doctrinal tool, the result is the same: because family law issues—including the definition and recognition of marriage—are committed to the states, federal courts ought to refrain from intruding into this core area of state sovereignty.

Here, our court need not decide which of these many potential sources of restraint we should draw from. After all, the Supreme Court has already instructed us that a state's marriage law judgments simply do not present substantial federal *914 questions that justify intrusion. *Baker,* 409 U.S. at 810, 93 S.Ct. 37.

The panel's failure to follow *Baker*'s command

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[14] The Court has also noted, of course, that "rare instances arise in which it is necessary to answer a substantial federal question *that transcends or exists apart from* the family law issue." *Newdow,* 542 U.S. at 12–13, 124 S.Ct. 2301 (emphasis added) (citation omitted). This was the case, for instance, in *Palmore v. Sidoti* and *Loving v. Virginia. See Palmore v. Sidoti,* 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984); *Loving,* 388 U.S. 1, 87 S.Ct. 1817. In both *Palmore* and *Loving,* the Court struck down state laws that "raise[d] important federal concerns arising from the Constitution's commitment to eradicating discrimination based on race." *Palmore,* 466 U.S. at 432, 104 S.Ct. 1879. Here, however, not only is the Constitution's commitment to eradicating discrimination based on race not present, but there is no "substantial federal question that *transcends or exists apart from* the family law issue."

upsets our federal structure and warrants en banc reconsideration.

IV

The panel's opinion ignores the wisdom of a sister circuit, disregards binding Supreme Court precedent, intrudes on democratic self-governance, and undermines our Constitution's commitment to federalism. I respectfully dissent from our regrettable failure to rehear these cases en banc.

APPENDIX H

SELECTED EXCERPTS FROM EXHIBITS TO PETITION FOR REHEARING EN BANC

AFFIDAVIT OF DR. JAMES H. MATIS

State of Texas)
) ss
County of Brazos)

I, James H. Matis, being first duly sworn, testify of my own personal knowledge that:

1. My *curriculum vitae* is attached as Exhibit 2. The statements made in it are true and accurate.
2. The report attached as Exhibit 3 contains statistical analysis of the assignment of judges to the Ninth Circuit cases reflected in attached Exhibit 1. That analysis has been done in conformity with the standards governing my profession, and, in my professional and expert opinion, the report's conclusions are accurate and valid.

/s/ James H. Matis

SUBSCRIBED AND SWORN TO before me October 13th, 2014.

/s/ Countney Burgess
Notary Public
Residing at Brazos County
My Commission Expires: 5/20/18

AFFIDAVIT OF MONTE NEIL STEWART

State of Idaho)
) ss
County of Ada)

I, Monte Neil Stewart , being first duly sworn, testify of my own personal knowledge that:

1. I am a lawyer duly admitted to practice before this Court and am one of the lawyers representing in this case the Coalition for the Protection of Marriage.

2. My resume is attached as Exhibit 4, and each statement made in it is true and accurate.

3. This Court disclosed to the Coalition and the public on September 1, 2014, the composition of the panel assigned to hear this case (the Nevada genderless marriage case), *Latta v. Otter*, Case Nos. 14-35420 and 14-35421 (the Idaho genderless marriage case), and *Jackson v. Rosen*, Case Nos. 12-16995, 12-16998, and 12-17668 (the Hawaii genderless marriage case).

4. The Coalition's counsel became aware of concerns held by other practitioners

that the Circuit's judge-assignment process in socially sensitive cases like this one appeared to deviate from the ideal of a random or otherwise neutral process. Accordingly, we examined the Circuit's history of assignments in cases involving the federal constitutional rights of gay men and lesbians and learned that Judges Reinhardt and Berzon were assigned to such cases with a frequency that suggested to us deviation from a neutral-assignment process. We then engaged Dr. James H. Matis to refute or confirm that suggestion and, if he confirmed it, to quantify the deviation. Dr. Matis has now performed that task and confirmed that the presence of either of those two judges on this panel would constitute a statistically significant deviation from what one would expect from a neutral process. He further confirmed that if the two judges appeared together, the deviation would be materially greater still.

5. In the process just described, we compiled a list of the Ninth Circuit cases decided on or after January 1, 2010, and raising a federal constitutional issue regarding the rights of homosexuals *qua* homosexuals ("Relevant Cases"). Exhibit 1 is that list. Diligent search using the

resources available to us disclosed no additional Relevant Cases in the Ninth Circuit post-2009. Exhibit 1's data for each listed case is accurate.

6. Based on my many years of scholarly work on the genderless marriage issue (beginning with my intense studies of the subject at Oxford University in 2003 and 2004), on my work with a large number of appellate courts over the decades, and on my many years of direct involvement with litigation of the genderless marriage issue, I have concluded that:

    a. experienced Ninth Circuit practitioners familiar with the genderless marriage issue would uniformly prefer this panel over almost any other possible panel *if* their client were one of the plaintiffs in the Nevada and Idaho marriage cases, and, *if* their client were on the man-woman marriage side, would very likely conclude this panel to be among the least favorable possible for their client; and

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b. such preferences and conclusions are known and understood by all at the Ninth Circuit involved with the judge-assignment process.

/s/ Monte Neil Stewart

SUBSCRIBED AND SWORN TO before me October 13, 2014.

/s/ Tom C. Morris
Notary Public
Residing at Brazos
My Commission Expires¨ 4/4/17

Examination of the Appearance of Bias in Judicial Panel Selection

13 October 2014

James H. Matis, PhD

1 Summary

It is my opinion, based on the analysis described in this Report, that Ninth Circuit judge assignments in the Relevant Cases is unlikely to have happened through a neutral selection process. The Relevant Cases are those eleven cases involving the federal constitutional rights of gay men and lesbians and identified in Exhibit 1. Specifically, the probability is very small that Judge Berzon was assigned to five of those cases, that Judge Reinhardt was assigned to four of them, and that at least one of the two served in six of those eleven cases under a neutral selection process. Under the most deferential (or benefit-of-the-doubt) approach, the odds are at least 60-to-1 against a neutral assignment process assigning both judges to the eleventh and now-pending Relevant Case, along with their level of involvement in the first ten of those cases. And under another and potentially more robust analysis, the odds are 441-to-1 against such.

This Report does *not* consider the neutrality or bias of any judge, including any judge in the "group of interest" addressed below. Analysis of personal biases, if any, is beyond the scope of this Report.

2 Introduction

The purpose of this Report is to provide a statistical analysis of whether the selection of the judges on panels in the first ten of the Relevant Cases ("Earlier Cases") and the eleventh of those cases ("Current Case") appears to be biased. By "biased" I mean that there is statistical evidence that the panel of judges was not selected in a neutral fashion to hear those cases.

The data for the portion of this study summarized in Table 2 are the Relevant Cases, the identities and terms of service of the Ninth Circuit's judges serving at any time between January 1, 2010 and September 30, 2014 (as disclosed in publicly available records), and the Ninth Circuit panels assigned to cases in the same city and the same month as each of the Relevant Cases (as disclosed in the Ninth Circuit's publicly available records). The data for the portion of this study summarized in Table 3 are the same, plus the Ninth Circuit panels assigned to cases in the same city and either the preceding month or succeeding month of each of the Relevant Cases (as disclosed in the Ninth Circuit's publicly available records). The data for the portion of this study summarized in Table 4 are all Ninth Circuit panels sitting between January 1, 2009 and September 30, 2014, including the Relevant Cases.

I received Exhibit 1 from Monte Neil Stewart; it is accepted here as representing all the Ninth Circuit cases during the relevant time period (January 1,

2010 through September 8, 2014) that meet the definition of Relevant Case.

The portion of this analysis summarized in Tables 1 and 2 proceeds by first enumerating all panels available to hear each Relevant Case according to the scheduled time and city of the case. Specifically, we construct a list of panels that are scheduled in the same city and the same month as the Relevant Case. I assume that cases are assigned to panels in a neutral fashion. Thus, the probability that a particular Relevant Case is heard by a specific panel is calculated as the reciprocal of the number of available panels. This procedure explicitly adjusts for the difference in the availability of the judges according to their calendar and the scheduled time and city of the hearing. It is my opinion that the rank and file individual would use some approximation of this method as a means of determining whether a particular pattern of membership on the selected panels appeared to be biased.

3 The Model

3.1 Background Assumptions

The basic assumptions for the statistical analysis are the following:

1. The clerk's office constructs three-judge panels from available Ninth Circuit judges. One judge may be selected from outside the Circuit and is a "sitting by designation" judge.

2. Ninth Circuit judges submit a calendar, in advance, indicating their availability.[1]

3. There is a particular subset of judges that is *a priori* determined to be of interest as regards the determination of bias.[2] We refer to this subset of the judges as the "group of interest."

4. Bias in selection of judges is defined as a disproportionate representation of the judges from the group of interest on the panels which hear the Relevant Cases. "Disproportionate" is measured by calculating the probability distribution of the number of Relevant Cases assigned to panels with one or more members from the group of interest. If the probability of the observed panel assignments (and more extreme assignments) is small, we conclude that the judges in the group of interest are disproportionately represented and hence conclude that the process of selecting panels appears biased.

3.2 Available Panels

I am informed that the mechanism for forming panels is based on each judge's availability. Each

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[1] The statistical procedure given here adjusts for the differential availability of circuit judges with respect to different hearing dates and cities.

[2] For example, a subset may consist of those judges that are considered to be highly inclined for or against a sensitive social issue. As noted in the Summary above, this Report does not consider the neutrality or bias of any judge, including any judge in the "group of interest."

judge submits a calendar of available dates in advance of the panel formation process. From this schedule, a set of panels of judges is made up for each possible date of a hearing. Because of the backlog of cases, we assume here that the Ninth Circuit is at full capacity and, consequently, every possible panel for a date is selected. The members of these panels are selected in advance of any case assignments.

I am further informed that hearings of appeals to the Ninth Circuit occur monthly, and there are six different locations for those hearings, with appeals from particular district courts generally assigned to particular cities. A list of locations and the number of Ninth Circuit sittings per year in each location are given in Table 1. I understand that the clerk's office assigns cases to clusters and then a hearing time and place is scheduled. The cluster is then assigned to one of the panels available at the scheduled time and city.

Table 1: Locations of Ninth Circuit sittings and the number of courts in each location annually.

Location	Number per year
San Francisco	12
Pasadena	12
Seattle	12
Portland	6
Honolulu	3
Anchorage	1

Once the case cluster is given a date and location, the probability of being assigned to a particular panel available in that month and city is simply the reciprocal of the number of panels so available, assuming such assignment is done randomly. For example, if there were 10 panels for the scheduled time and city, the probability of the case cluster being assigned to any one particular panel would be 1 in 10.

I calculate the probability that a member of the group of interest is on the panel assigned any particular case as the number of panels with a member of the group of interest divided by the total panels available. For example, if Judge Berzon is on two panels for cases heard in July and the total number of panels available for July is 10, then the probability that Judge Berzon would be on the panel to hear a specific case in July is two in ten or 0.2.

Clearly the probability of a selection of a panel in which Judge Berzon is a member will thus depend on the number of panels with Judge Berzon and the total number of panels within the particular month and city of the scheduled hearing. To calculate the probability of being on one or more panels over time thus requires the calculation of the probability for each scheduled instance. For example, consider ten consecutive cases. The probability that Judge Berzon is selected for the first five, and not the second five, is calculated by multiplying the selection probabilities of the first five cases with the probability of non-selection for the final five cases. Note that this is the probability calculation for a specific sequence of assignments.

Now, to calculate the general probability of all possible sequences in which Judge Berzon might be assigned five of ten panels, we take all possible sequences of scheduled hearings with five panels having Judge Berzon and five panels without Judge Berzon and calculate the probability of each sequence as if that sequence had, in fact, occurred. The total probability is the sum of the probabilities for each sequence, added over all possible sequences. For example, one possible sequence is the one described above, namely, selection for the first five and non-selection for the last five. Another possible sequence would be assignment to panels 1, 2, 3, 4 and 6 and non-assignment to the rest. The product of the probabilities in this sequence will be different according to the availability of the judges. The probabilities for these two possible sequences plus

the probabilities of all other sequences with Judge Berzon appearing five times and without Judge Berzon appearing five times gives us the probability of Judge Berzon being assigned to five of ten panels.

4 Results

Here I give the probabilities (and the resulting odds against) for three different subsets of the group of interest. These probabilities are calculated assuming that at least one member of the subset is on the panel for the Current Case. The three subsets of the group of interest are:

1. Contains only Judge Berzon.

2. Contains only Judge Reinhardt.

3. Contains Judge Berzon and Judge Reinhardt. If either one or the other of these two judges or both of these judges is selected, this subset is selected.

Table 2 gives the *a priori* probability of realizing the observed count for the Earlier Cases and assignment to the Current Case for each subset. These calculations assume neutral assignments. Table 2 reports the calculated probabilities and their associated odds against and standard deviations from the mean. These three values measure the likelihood that the observed assignments in the Earlier Cases and the Current Case occurred by neutral or random chance.

Table 2: Probabilities of judge assignments in the Relevant Cases.

Subset	Probability	Odds Against	SD from Mean
Berzon	0.0203	48 to 1	2.05
Reinhardt	0.0173	56 to 1	2.11
Berzon and/or Reinhardt	0.0161	61 to 1	2.14

Because the probabilities are small and the odds against are large, it seems clear that the observed assignments in the Relevant Cases are very unlikely under the assumption of randomness or unbiasedness in the selection of panels.

Note that even though Judge Reinhardt sat on only 4 panels, compared to Judge Berzon, who sat on 5 panels, the odds are larger against Judge Reinhardt because he was not as available as Judge Berzon to sit on panels in the months and cities of the hearings for the Relevant Cases.

5 Comments

5.1 Considering other avenues to introduce bias.

A comment is in order here. The Table 2 calculations are based on a model that gives the greatest benefit of the doubt to the Ninth Circuit's panel-assignment process. That model assumes only one possible avenue to introduce bias, specifically, assigning case clusters to an established set of

panels available within the same month in which the Relevant Cases were heard. There are other plausible avenues to introduce bias. For example, the clerk might choose among panels in the immediately adjoining months. If this avenue was available, the calculations are as reflected in Table 3, which reflects a higher appearance of bias.

Table 3: Probabilities of judge assignments in the Relevant Cases (adjoining months)

Subset	Probability	Odds Against	SD from Mean
Berzon	0.0080	124 to 1	2.41
Reinhardt	0.0127	77 to 1	2.24
Berzon and/or Reinhardt	0.0074	134 to 1	2.44

Another plausible avenue to introduce bias is found in General Order 3.2.g., which allows judges in certain situations to exchange panel assignments. I assumed no effect on bias from this avenue. I did so because of the general commitment of the Ninth Circuit and its judges to the values and benefits of a neutral selection process; in other words, we assumed those judges would not engage in outcome-oriented exchanges.

5.2 Using a re-sampling method.

I also calculated probabilities using a re-sampling method. In this approach, we assume that the process that generates assignments in the Relevant

Cases also generates assignments in all other Ninth Circuit cases. This method allows us to compare the assignments in the Relevant Cases with 100,000 randomly chosen groups of eleven Ninth Circuit cases assigned post-2009 to the present. This collection of 100,000 groups acts as a control group. For each group, I looked to see how many assignments were given to each of the two most-assigned judges, without regard to the identity of those judges. (With the Relevant Cases, the numbers are five for Judge Berzon and four for Judge Reinhardt.) The results are set forth in Table 4.

Table 4: Probabilities under a re-sampling method

Most and second-most appearances	Probability	Odds Against	SD from Mean
As extreme or more extreme than observed in Relevant Cases	0.00226	441 to 1	2.84

This re-sampling approach has some important properties. The approaches used with respect to the Relevant Cases required assumptions about judge availability as affected by personal calendars, month, and city. In contrast, the re-sampling approach simply assumes that the assignment process is the same for the Relevant Cases and all

other Ninth Circuit cases, whatever that process may be. As such, the results described in Table 4 are more robust to violations of assumptions. Further, as noted earlier, the control group distribution was created without respect to the identity of the two most assigned judges in each group. Because of this feature, the results apply to generic judges rather than to Judge Reinhardt or Judge Berzon specifically and thus finesse *a priori* selection issues.

The re-sampling approach demonstrates a probability of 0.00226 for—that is, odds of 441-to-1 against—what we observe with the Relevant Cases—the two most assigned judges receiving under a neutral assignment process five and four assignments respectively—or anything more extreme.