Case No. 12-17668

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BEVERLY SEVCIK, et al.,

Plaintiffs-Appellants,

v.

GOVERNOR BRIAN SANDOVAL, et al.,

Defendants-Appellees,

and

COALITION FOR THE PROTECTION OF MARRIAGE,

Intervenor-Defendant-Appellee.

On Appeal from the United States District Court
For the District of Nevada
Case No. 2:12-CV-00578-RCJ-PAL
The Honorable Robert C. Jones, District Judge

ANSWERING BRIEF OF DEFENDANT-APPELLEE COALITION FOR THE PROTECTION OF MARRIAGE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure, Defendant-Appellee Coalition for the Protection of Marriage states that it is a Nevada non-profit corporation in good standing and that it has no shareholders.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

United States Supreme Court Cases

United States Court of Appeals Cases

United States District Court Cases

State Cases

Foreign Cases

Statutes

Constitutional Authorities

Rules

Other Authorities

INTRODUCTION

For twenty years now, this Nation has been engaged in a discussion over the public meaning and social purposes of marriage. The issue is whether marriage will continue as the union of a man and a woman and therefore as an institution directed to certain great social tasks, with many of those involving a man and a woman united in the begetting, rearing, and educating of children. Or whether marriage will be torn away 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. As is right among a self-governing people, the most important part of that discussion has happened in campaigns leading to elections determining the issue.

In elections on the marriage issue in Nevada and many other States, the common and collective wisdom came down in favor of preserving and perpetuating man-woman marriage. The majority of an informed and thoughtful electorate had powerful and worthy reasons for its vote. That majority sensed that a child's formative years are benefitted by the presence of both a mother and a father. They understood that the man-woman marriage institution vindicates the child's interest in knowing and being raised by her own natural mother and father.

They perceived that, among all child-rearing modes, the married mother-father mode had the outcomes best for children and for society. They understood that, with fatherlessness clearly leading to social ills, the man-woman marriage institution plays an important role in teaching and promoting fatherhood.

At the same time, that majority of voters sensed that a genderless marriage regime will officially repudiate the child's interest in knowing and being raised by her own natural mother and father, will work against the ideal of each child benefitting from the presence of both a mother and a father, will disparage the intact, biological, married family as the gold standard for life in the United States, will also disparage the need for fathers in the home, and, as troubling as any dark cloud on the horizon, will be inimical to the religious liberties of broad swaths of our Nation's peoples of faith and their churches, with all those who oppose genderless marriage for conscience sake being driven from the public square and to the very margins of culture.

Thwarted in the free, open, democratic process—for the time being—genderless marriage proponents ran to the courts with the claim that the majority was depriving them for no good reason of a constitutional right—the right to change marriage's meaning from the union of a man and a woman to the union of two persons without regard to gender. After all, these adults cannot have their

desires fulfilled unless and until the law makes just that change; they cannot be legally married until the law redefines marriage; and they cannot be socially and culturally married until the law's vast power effectively suppresses the competing man-woman meaning.

This great constitution-altering project, supported by many of the Nation's elites, has been built on—because it had to be, there being no alternative—a number of falsehoods. The most essential and fundamental falsehood in the proponents' narrative is that marriage is *nothing more than* a close personal relationship between two adults designed—as an act of free choice—to satisfy their personal emotional, psychological, and sexual purposes, with marriage's social goods being security for adults (and any children who may happen to be connected to the relationship), economic protection, and public affirmation of commitment. This description of marriage is true as far as it goes; the material falsehood resides in the notion of *nothing more than*. Marriage *is*, as a matter of fact, *much more than* what genderless marriage proponents can allow. It is a vital social institution with broad additional public purposes and social benefits—purposes and goods sensed, understood and perceived by the large majority of Nevada's voters and noted above. In those additional public purposes and social benefits are found the valuable and compelling societal (and hence governmental) interests that sustain

man-woman marriage against every constitutional attack regardless of the level of judicial scrutiny deployed.

Another essential falsehood in the proponents' story is that, as a group, gay men and lesbians are so politically powerless that the courts must come to their rescue against an unfeeling, or even malevolent, majority. The obvious falsity of this assertion should make it embarrassing. Hawai'i's marriage case, *Jackson v. Abercrombie*, 12-16995—which was earlier combined with this case in the Ninth Circuit for briefing and oral argument—was effectively mooted just recently by a show of massive political power when, in the face of strong opposition by man-woman marriage proponents, the Hawai'i legislature voted to redefine marriage as the union of two persons without regard to gender. In 2009 in Nevada, over two-thirds of both houses of the State legislature overrode the then-Governor's veto and enacted a complete domestic partnership act. Then, in the spring of 2013, the Nevada legislature passed for the first of two required times a joint resolution to repeal the 2002 amendment to the State constitution defining marriage as the union of a man and a woman. Moreover, genderless marriage proponents are proclaiming that, based on legislative nose-counting and public opinion polls, the legislature will pass the joint resolution again in the spring of 2015, thereby putting the matter on the November 2016 general election ballot, where a strong majority

of the voters will pass it and thereby open the way to a prompt redefinition of marriage in Nevada. Yet the Plaintiffs still assert the "politically powerless" falsehood in this Court to attempt to short-circuit the free, open, and democratic process.

Another key falsehood is that in preserving man-woman marriage, the majority was motivated by animus—ill-will and a mean-spirit towards and a bare desire to harm gay men and lesbians. The "evidence" for this falsehood is an argument built upon the first falsehood, that marriage is nothing more than a close personal relationship. The argument goes like this: Because marriage is nothing more than what the close personal relationship model allows, to let same-sex couples marry will not adversely affect marriage at all, indeed, it will strengthen it, and society will lose no valuable social goods now provided by marriage. There is no downside. (How will letting Adam and Steve marry hurt your marriage?) Because there is no downside, the majority has no good reason to keep same-sex couples from marrying. Therefore, their motive *must* be animus; there is no other possible explanation. ***But***—take away the blindfold of the first falsehood, and the fair and honest person sees right away that there is much that is good and even essential to society very likely to be lost when the law suppresses the man-woman marriage institution. Wanting to preserve that which is good and essential against

such loss is a rational, intelligent, compelling reason for the majority voting as it did. This reality puts the lie to the animus falsehood.

The genderless marriage proponents' story also relies on several misleading strategies.

One of those strategies is to argue that just as white supremacists engrafted anti-miscegenation rules onto the marriage institution and were rightly repudiated by the Supreme Court in *Loving*,[1] so homophobes, with laws like Nevada's 2002 marriage amendment, have engrafted the man-woman meaning onto marriage and should likewise be repudiated by this Court. At first blush, this strategy is only silly because, of course, the union of a man and a woman has been a core, constitutive meaning of the marriage institution found in virtually every society since pre-history. Nevada's marriage amendment did not add that institutionalized meaning but rather sought to protect and preserve it and the valuable social benefits flowing from it. On closer examination, this strategy reveals something deeply troubling. White supremacists engrafted the anti-miscegenation rules onto the marriage institution—and thereby altered marriage from how it had existed at common law and throughout the millennia—to bend that institution into the new and foreign role of inculcating white supremacist doctrines into the consciousness of the people generally. Because of the profound teaching, forming, and

[1] *Loving v. Virginia*, 388 U.S. 1 (1967).

transforming power that fundamental social institutions like marriage have over all of us, this evil strategy undoubtedly worked effectively for decades. Question: Where does one see today a similar massive political effort to profoundly change the marriage institution in order to bend it into a new and foreign role, one in important ways at odds with its ancient and essential roles? Answer: The genderless marriage movement. The big difference, of course, is the immorality of the effort to advance the white supremacist dogma compared to the morality of the effort to advance the social well-being and individual worth of gay men and lesbians. Whether that moral objective is sufficiently weighty to justify so bending and altering the marriage institution is for the free, open, democratic process to decide. Certainly, the comparison of laws that protect the man-woman meaning of marriage to anti-miscegenation laws is a false analogy that provides no basis for any court to mandate the redefinition of marriage.

Another of the genderless marriage proponents' key strategies is to cherry-pick some phrases from *Windsor*[2] and then declare that, on the basis of those phrases, the constitutional contest is over—in their favor. The proponents employ this strategy to try to get the courts to ignore both the powerful language and ideas in *Windsor* clearly supporting the opposite conclusion and large swaths of well-established Supreme Court jurisprudence contrary to the proponents' selective

[2] *United States v. Windsor*, 133 S. Ct. 2675 (2013).

reading of *Windsor* but consistent with that decision read in its entirety. That jurisprudence, exemplified by such cases as *Glucksberg*[3] and *San Antonio Independent School District*,[4] teaches that the Supreme Court generally refuses to constitutionalize and thereby take out of the democratic processes big social policy debates like the funding of public education,[5] treatment of the elderly[6] and the poor,[7] and assisted suicide[8] and will do the same with the great debate over the public meaning and social purposes of marriage.

A third misleading strategy of the genderless marriage proponents is to attempt to make this and similar cases very much *about* homosexuality and the lives of gay men and lesbians and very little *about* marriage. However, this case is very much about marriage. It is crucially important in this case to get right what marriage *is*. Equally important, however, is to see for what they are arguments over what marriage *ought to be*. The "all about gay men and lesbians" strategy, beyond its emotional and rhetorical uses, obscures that the public debate over marriage is in large part a debate over what marriage *ought to be*—a debate over two competing models for marriage. Because the public debate is very much about

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[3] *Washington v. Glucksberg*, 521 U.S. 702 (1997).
[4] *San Antonio Indep. Sch. Dist. v. Rodgriguez*, 411 U.S. 1 (1973).
[5] *Id.*
[6] *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976).
[7] *Dandridge v. Williams*, 397 U.S. 471 (1970).
[8] *Glucksberg*, 521 U.S. 702.

what marriage ought to be, this case is easily resolved here. No responsible person sees the Constitution as authorizing federal judges to decide issues like what marriage ought to be. Our whole history as a self-governing people cries out that such an issue is to be decided through our democratic processes and that judges not usurp that role.

More than a decade ago, Nevadans engaged in a large public debate about marriage—what it is and what it ought to be—and resolved that debate through their free, open, democratic process. Now they are re-engaging in that debate, and just as before, they will resolve it through that same democratic process, *if* the judges of this Court resist the siren song to resolve it first by imposing on Nevada their personal views of the good.

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Law-trained people who argue and resolve the marriage issue might not always know as much about marriage as they think they do[9] because they operate under the false understanding that marriage is a legal construct. It is not (although law, like other institutions, certainly interacts with the marriage institution). The societal interests that constitutionally justify marriage's limitation to the union of a

[9] *See* Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 U. St. Thomas L.J. 33, 34 (2004); *see also* Monte Neil Stewart, *Marriage Facts*, 31 Harv. J.L. & Pub. Pol'y 313, 317 (2008) ("*Marriage Facts*").

man and a woman exist in the very nature and fabric and operation of marriage in our society. Thus, to do right by this case, this Court must educate itself about marriage to a deep, not a superficial, level. A major burden of this brief is to facilitate that education.

STATEMENT OF JURISDICTION

The Coalition accepts the Opening Brief's Statement of Jurisdiction.

STATEMENT OF THE ISSUES

1. Whether the Fourteenth Amendment's Equal Protection Clause requires Nevada to change its definition of marriage from the union of a man and a woman to the union of two persons.

2. Whether the Fourteenth Amendment's Due Process Clause requires Nevada to change its definition of marriage from the union of a man and a woman to the union of two persons.[10]

[10] Plaintiffs' Complaint challenged Nevada's marriage laws only on the basis of the Equal Protection Clause of the Fourteenth Amendment. Excerpts of Record ("ER") 718–22. It did not raise a substantive due process claim, a fact noted and honored by the parties and the district court at various times in the proceedings below. *E.g.*, ER 665. Now, however, the Plaintiffs are raising before this Court and have fully briefed a substantive due process claim. The three Defendants defending here (the Governor, Clerk-Recorder Glover, and the Coalition), after thorough discussion among their respective counsel and very deliberate consideration, have jointly decided (1) not to object to the Plaintiffs' course regarding their substantive due process claim, (2) to brief that issue in their respective Answering Briefs, and (3) to urge this Court to address and resolve the Plaintiffs' substantive due process claim on the merits. The Coalition adopts the

ADDENDUM OF PERTINENT AUTHORITIES

Pursuant to Ninth Circuit Rule 28-2.7, the Coalition has reproduced pertinent constitutional and statutory provisions in an Addendum accompanying this Answering Brief.

STATEMENT OF THE CASE

Since attaining statehood, Nevada's legal definition of marriage has always been limited to the union of a man and woman, first by constitutional adoption of the common law,[11] then by express statutory language,[12] and most recently by express constitutional amendment.[13] The legal definition has thus always mirrored and supported the widely shared public meaning that, along with other widely shared public meanings, makes up Nevada's vital social institution of marriage.

The Coalition for the Protection of Marriage ("Coalition") is a Nevada non-profit corporation organized to protect the man-woman marriage institution

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statement of the reasons for that decision set forth in the other Defendants' Answering Briefs.

[11] *Van Sickle v. Haines*, 7 Nev. 249, 285–86 (1872), explains how Nevada's constitution adopted the common law of England. The well-established common-law definition of marriage is found in *Hyde v. Hyde*, (1866) 1 L.R.P. & D. 130, 134 (Lord Penzance): "[M]arriage . . . may . . . be defined as the voluntary union for life of one man and one woman, to the exclusion of all others."

[12] The 1861 laws of Territory of Nevada regarding marriage were expressly limited to "a male and a female." Part 2:33: 1861. The same limitation on marriage was codified in 1876 in the Statutes of Nevada, Nev. Stat. § 88 (1876), and is substantially the same today, Nev. Rev. Stat. § 122.020.

[13] Nev. Const. art. I, § 21.

through, among other ways, use of the initiative process. Nevada's citizens reserved to themselves the power to legislate by initiative. Nev. Const. art. XIX, § 2(1). By way of the State's petition process, they may place qualified initiatives to amend the constitution on a statewide general election ballot. *Id.* If a constitutional initiative obtains voter approval in two consecutive general elections, the initiative is adopted, and the Nevada constitution is amended. Nev. Const. art. XIX, § 2(4); *see also Am. Civil Liberties Union of Nevada v. Lomax*, 471 F.3d 1010, 1012 (9th Cir. 2006).

With the Coalition's leadership, Nevada's citizens followed that process through the 2000 and 2002 general elections to amend the Nevada constitution by adding to it this language: "Only a marriage between a male and female person shall be recognized and given effect in this state." Nev. Const. art. I, § 21 ("Marriage Amendment"). Both in 2000 and in 2002, the "yes" vote was slightly in excess of two-thirds of all votes cast on the ballot initiative.[14] As noted above, the Marriage Amendment did not change Nevada's definition of marriage. However, it did give the man-woman meaning of the marriage institution the highest level of protection that was in the power of Nevada voters to provide.

[14] The 2000 vote in favor of the Marriage Amendment was 69%; the 2002 vote, 67%. Dist. Ct. Dkt. 30-1 at 2 ¶5 (Affidavit of Richard Ziser).

In 2009, Nevada's legislature enacted the Nevada Domestic Partnership Act ("DPA"), Nev. Rev. Stat. §§ 122A.010 to .510. The DPA authorizes a "social contract" between two people "in an intimate and committed relationship of mutual caring," without regard to gender. Nev. Rev. Stat. §§ 122A.040, 122A.100(1)(a)(1). It further provides: "Domestic partners have the same rights, protections and benefits, and are subject to the same responsibilities, obligations and duties under law . . . as are granted to and imposed upon spouses." Nev. Rev. Stat. § 122A.200(1)(a). Consistent with the Marriage Amendment, the DPA expressly provides that a domestic partnership "is not a marriage." Nev. Rev. Stat. § 122A.510. Although the DPA is available to man-woman couples, without question it was enacted in very large measure to benefit same-sex couples.

The Plaintiffs are eight same-sex couples, all residents of Nevada. Four of the couples have married in jurisdictions other than Nevada. The other four couples want to marry in Nevada. ER 700–03.

Invoking 28 U.S.C. § 1983, the Plaintiffs initiated this civil action against Nevada's Governor and the clerks of Washoe County, Clark County, and Carson City, alleging that Nevada's Marriage Amendment and similar state laws (collectively "Marriage Laws") violate the Constitution's Fourteenth Amendment by preventing some of the Plaintiffs from marrying under color of Nevada law and

by withholding Nevada's recognition of the foreign marriages of the rest. ER 695–724. The unmarried Plaintiffs seek, as their ultimate relief, to marry in Nevada with the State's sanction; the Plaintiffs with foreign marriages, to have Nevada recognize those marriages. ER 723. Such relief requires that Nevada change (or be forced to change) its definition of marriage from the union of a man and a woman to the union of two persons without regard to gender.

When the Plaintiffs brought this action, the Coalition successfully intervened and became a party defendant. The Plaintiffs correctly acknowledge that they withdrew their opposition to the Coalition's Rule 24 intervention motion, Opening Br. at 7, but say somewhat misleadingly that they "reserved the ability to revisit the issue at a later stage if necessary" when what their counsel in fact said was that "the plaintiffs would reserve the right to come back to the Court if it turns out that there's any scheduling issues or delay that we don't anticipate." ER 666. No scheduling issues or unanticipated delays occurred. More importantly, the Plaintiffs did *not* make an issue on appeal of the Coalition's status as a party defendant by intervention. Accordingly, the Coalition is a full party to this civil action, not a second-class party, and it would be as wrong for this Court to ignore, evade, or elide any argument properly made by the Coalition as it would be to do the same in connection with any argument advanced by the Plaintiffs or the

Governor or Clerk-Recorder Glover. That is the logic and teaching of Rule 24 jurisprudence. *See, e.g.*, *United States v. California Mobile Home Park Mgmt. Co.*, 107 F.3d 1374, 1378 (9th Cir. 1997) ("[I]ntervening parties have full party status in the litigation commencing with the granting of the motion to intervene.").[15]

Three defendants actively defended in the district court (and are actively defending here): the Governor, Carson City Clerk-Recorder Alan Glover, and the Coalition. The Washoe County and Clark County clerks named as defendants elected to stay on the sidelines.

The active parties filed various dispositive motions, and in a November 26, 2012, order the district court (Chief Judge Robert Clive Jones) ruled on them all, holding that:

- Plaintiffs' claims were precluded at the district court level by *Baker v. Nelson*, 409 U.S. 810 (1972) (mem.), except to the extent that they relied on

[15] The Coalition's Article III standing is not an issue. In *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled in part on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010), the Supreme Court, having determined that there was a case or controversy based on the personal stake of the original defendant, permitted the intervenor to "piggyback" on the existing dispute without showing its own independent personal stake. *Id.* at 233. In any event, the Coalition demonstrated in the record that it had four adequate, separate, and independent bases for its own Article III standing. Dist Ct. Dkt. 30 at 13-15 & 30-1 at 2-6. (All "Dist. Ct. Dkt." references are to filings in the district court.) One of those, the Coalition's status as the Marriage Amendment's proponent, was subsequently rejected by the reasoning in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), but the other three bases remain valid.

Romer v. Evans, 517 U.S. 620 (1996), which the court saw as relying on a theory other than the equal protection and due process theories advanced in *Baker*. ER 9–12; in the interest of judicial economy, however, the district court proceeded to address all the arguments then being raised by the Plaintiffs;

- Rational basis review is the proper level of judicial scrutiny for Plaintiffs' sexual orientation equal protection claim. ER 13, 16–29;
- Because they rationally advance legitimate societal (and hence governmental) interests, Nevada's Marriage Laws do not perpetrate unconstitutional sexual orientation discrimination. ER 30–41.
- Because Nevada's Marriage Laws treat men as a class and women as a class equally, they do not perpetrate unconstitutional sex discrimination. ER 14–16.

Having disposed of all of Plaintiffs' claims, the district court entered a final judgment on December 3, 2012. ER 1. Plaintiffs filed their Notice of Appeal on the same day. ER 43–45.

SUMMARY OF THE ARGUMENT

Nevada's Marriage Laws have as their purpose and effect preserving and perpetuating the man-woman meaning at the core of the marriage institution that

has always played a vital role in Nevada society. The assessments, perceptions, and understandings of Nevada's voters and a wide and deep body of scholarly work on social institutions together support the conclusion that this core man-woman meaning materially and even uniquely provides multiple valuable benefits and that if the law were to suppress that meaning (as it must for same-sex couples to marry or have their foreign marriages recognized) then over time those benefits will diminish and then likely be lost altogether. Accordingly, Nevada has sufficiently good reasons—the preservation of those valuable social benefits—for keeping the man-woman meaning at the core of the marriage institution. The reality and validity of those reasons defeat all the Plaintiffs' constitutional challenges and certainly negate the animus slander.

ARGUMENT

I. RELEVANT AND ROBUST LEGISLATIVE FACTS SHOW THAT SOCIETY HAS GOOD REASONS TO PRESERVE "THE UNION OF A MAN AND A WOMAN" AS A CORE MEANING OF THE MARRIAGE INSTITUTION.

The ultimate issue here is whether the State of Nevada has sufficiently good reasons to preserve "the union of a man and a woman" as a core meaning of the marriage institution. That is the ultimate issue whether the theory is due process or equal protection and, if equal protection, whether the theory is sexual orientation

discrimination or sex discrimination.[16] The standard for what constitutes *sufficiently good* may vary depending on the particular theory,[17] but the ultimate issue is the same.

A. When parties present competing legislative facts, the courts defer to those chosen by the government decision-maker.

The reasons for preserving man-woman marriage reside in the realm of legislative facts, not adjudicative facts. "Adjudicative facts are facts about the parties and their activities . . . , usually answering the questions of who did what, where, when, how, why, with what motive or intent"—the types of "facts that go to a jury in a jury case," or to the factfinder in a bench trial. *Marshall v. Sawyer*, 365 F.2d 105, 111 (9th Cir.1966) (quoting Kenneth C. Davis, *The Requirement of a Trial-Type Hearing*, 70 Harv. L. Rev. 193, 199 (1956)) (internal quotation marks omitted).[18] "Legislative facts," by contrast, "do not usually concern [only] the immediate parties but are general facts which help the tribunal decide questions of law, policy, and discretion." *Id.* "Legislative facts are 'general facts which help the tribunal decide questions of law and policy,' are 'without reference to specific parties,' and 'need not be developed through evidentiary hearings.'" *Libertarian*

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[16] *Compare United States v. Juvenile Male*, 670 F.3d 999, 1011–13 (9th Cir. 2012) (substantive due process), *with High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990) (sexual orientation discrimination), *and United States v. Virginia*, 518 U.S. 515 (1996) (sex discrimination).

[17] *See* note 16 *supra*.

[18] We are not aware of any contested adjudicative facts in this case.

Nat'l Comm., Inc. v. FEC, 930 F. Supp. 2d 154, 157 (D.D.C. 2013) (quoting *Friends of the Earth v. Reilly*, 966 F.2d 690, 694 (D.C. Cir. 1992) and *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1161–62 (D.C. Cir. 1979)). A legislative fact "is a question of social factors and happenings . . . ." *Dunigan v. City of Oxford, Mississippi*, 718 F.2d 738, 748 n.8 (5th Cir. 1983).

Certain legislative facts may not be contested or contestable; many presented in this Answering Brief are in that category. But sometimes legislative facts are contested, that is, informed and thoughtful people disagree on the validity of a proffered legislative fact. In such cases, the courts do not step in to declare one view to be true and the competing view false. Rather, if the legislative fact is fairly debatable, the courts defer to the government decision-maker's choice. The courts do this for several powerful reasons. First, the courts understand and value the phenomenon of collective wisdom. Our democratic ethos privileges the reasonable understandings and conclusions reached—the legislative facts chosen—by the people through our democratic processes, not those of this or that elite no matter how confidently asserted. *See, e.g., Dandridge v. Williams*, 397 U.S. 471, 487 (1970) ("We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. Conflicting

claims of morality and intelligence are raised by opponents and proponents of almost every measure . . . . [T]he Constitution does not empower this Court to second-guess state officials . . . .").

A Washington State case asserting a right to assisted suicide provides a powerful example of this privileging of the reasonable legislative facts chosen through our democratic processes. The State prohibited assisted suicide. This Court en banc held that prohibition unconstitutional. *Compassion in Dying v. Washington*, 79 F.3d 790, 798 (9th Cir. 1996) (en banc). In doing so, it dismissed some of the State's assessments of social practices and their likely impacts. For example, the State asserted an interest in protecting the integrity and ethics of the medical profession, but this Court concluded that "the integrity of the medical profession would [not] be threatened in any way by [physician-assisted suicide]," despite the contrary assessment of the State and responsible observers of the medical profession. *Id.* at 827. As another example, the State asserted an interest in protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes, but this Court dismissed the State's concern that disadvantaged persons might be pressured into physician-assisted suicide as "ludicrous on its face." *Id.* at 825. On these two points and others like them, the Supreme Court flatly rejected this Court's substitution of its own

assessments of the relevant social practices and their likely impacts for those of the State and unanimously reversed this Court's judgment. *Washington v. Glucksberg*, 521 U.S. 702, 728–36 (1997). The Supreme Court privileged the reasonable understandings and conclusions reached—the legislative facts chosen—by the people through democratic processes.

Second, many legislative facts, often the most important, are really predictions of what will happen in society in the future assuming this or that present governmental action. Given the complexity of human society, one sensible prediction ought not be accepted as an objective "truth" in the face of a contrary but still rationally made prediction. *E.g.*, *FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775, 813–14 (1978) ("However, to the extent that factual determinations were involved . . . , they were primarily of a judgmental or predictive nature . . . . In such circumstances complete factual support in the record for the . . . judgment or prediction is not possible or required; 'a forecast of the direction in which future public interest lies necessarily involves deductions . . . .'") (quoting *FPC v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961)); *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 665–66 (1994) (Kennedy, J., plurality opinion) (noting that "[s]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on

deductions and inferences for which complete empirical support may be unavailable" and highlighting a "substantial deference" to the government decision-maker in such situations).

Third, the courts understand the limits on their own competence. "It makes no difference that the [legislative] facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety." *Vance v. Bradley*, 440 U.S. 93, 112 (1979) (quoting *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 357 (1916)) (internal quotation marks omitted).

In rational basis review, the contest between competing legislative facts can be quite lopsided against the government and the government will still prevail. The courts uphold the challenged government action if there is any reasonably conceivable state of legislative facts that could provide a rational basis for it. *See, e.g.*, *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). The action is presumed constitutional and "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it[.]" *Heller v. Doe*, 509 U.S. 312, 320 (1993) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). If any basis is even minimally debatable, plaintiffs lose. The government, by contrast, has no duty "to produce evidence to sustain the

rationality of a statutory classification." *Id.* "[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Commc'ns*, 508 U.S. at 315. Moreover, even if all defendants fail to articulate the requisite rational basis, a court will still uphold the challenged government action if it on its own can identify rational grounds. *See, e.g.*, *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 463 (1988).

This settled law has an impact on summary judgment jurisprudence. As the district court correctly observed in the Hawai'i marriage case:

> Disputes of fact that might normally preclude summary judgment in other civil cases, will generally not be substantively material in a rational basis review. That is, the question before this Court is not whether the legislative facts are true, but whether they are "at least debatable."

Jackson v. Abercrombie, 884 F. Supp. 2d 1065, 1105 (D. Haw. 2012) (citations omitted).

Even if the level of judicial scrutiny is heightened (and there is no basis for use of any level of scrutiny other than rational basis review in this case) the courts will still not step in to declare as "true" or "false" a well-contested legislative fact but instead will use the legislative facts chosen by the government decision-maker. The reasons for such judicial deference—the limits of the courts' competence, the uncertainty of predictions of society-wide consequences, and the wisdom of

respecting democratically made choices between competing legislative facts—still remain. Although under heightened scrutiny the courts may not accept some minimally plausible legislative fact conjured up in support of the challenged government action, they will defer to robustly supported legislative facts even if "opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety." *Vance*, 440 U.S. at 112 (quoting *Rast*, 240 U.S. at 357).

All this is demonstrated by *Grutter v. Bollinger*, 539 U.S. 306 (2003), which applied the highest and most rigorous level of judicial scrutiny because of the presence of racial classifications. The plaintiff in that case challenged the University of Michigan Law School's consideration of race and ethnicity in its admission decisions, specifically consideration in favor of applicants from three underrepresented minority groups: blacks, Hispanics, and Native Americans. This public law school's leaders made an "assessment that diversity will, *in fact*, yield educational benefits." *Id*. at 328 (emphasis added). That is the legislative fact chosen by the government decision-makers, but it was a vigorously contested legislative fact, with many able voices making powerful showings in favor of just the opposite legislative fact, that the diversity sought did not yield educational

benefits and even harmed those intended to be benefitted.[19] Nevertheless, the majority of the Supreme Court deferred, expressly and unabashedly, "to the Law School's conclusion that its racial experimentation leads to educational benefits." In the majority's own words:

> The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici.* Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university.

Id. at 328. On the basis of this deference to the government decision-maker's choice of a contested legislative fact (and, necessarily, rejection of contrary assessments), the Court upheld the law school's admissions program. The Court did not anoint one assessment as "true" and the contrary assessment as "false." It deferred to the government decision-maker's choice.

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[19] In dissent, Justice Thomas marshaled those voices and added his own, stating:

> The Court's deference to the Law School's conclusion that its racial experimentation leads to educational benefits will, if adhered to, have serious collateral consequences. The Court relies heavily on social science evidence to justify its deference. The Court never acknowledges, however, the growing evidence that racial (and other sorts) of heterogeneity actually impairs learning among black students.

539 U.S. at 364 (Thomas J., dissenting) (citations omitted).

These firmly established legal principles matter very much in this case. Here, the Plaintiffs, their experts, and their *amici* fail to do two things: one, they fail even to contest many of the legislative facts supporting Nevada's choice to preserve the man-woman marriage institution and, two, as to the rest of those supportive legislative facts, they fail to negate the reality that the people's assessments are reasonably and even robustly supported.

B. The "union of a man and a woman" meaning at the core of Nevada's marriage institution provides valuable social benefits.

The following robustly supported legislative facts sustain Nevada's Marriage Laws against all constitutional challenges:

Marriage is a vital social institution,[20] and, like all social institutions, is constituted by a unique web of shared public meanings.[21] Many of those meanings rise to the level of norms.[22]

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[20] *E.g.*, *Williams v. North Carolina*, 317 U.S. 287, 303 (1942) ("[T]he marriage relation [is] an institution more basic in our civilization than any other."); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) ("Marriage is a vital social institution.").

[21] *See, e.g.*, John R. Searle, *The Construction of Social Reality* 32 (1995) ("Searle, *Construction*"); Supplemental Excerpts of Record ("SER") 140; *see also* Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision*, 1 Duke J. Const. L. & Pub. Pol'y 1, 8–28 (2006) ("*Institutional Realities*").

[22] *See, e.g.*, Victor Nee & Paul Ingram, *Embeddedness and Beyond: Institutions, Exchange, and Social Structure, in* The New Institutionalism in Sociology 19 (Mary C. Brinton & Victor Nee eds., 1998) ("An institution is a *web of interrelated norms*—formal and informal—governing social relationships.").

The marriage institution affects individuals profoundly; institutional meanings and norms teach, form, and transform individuals, supplying identities, purposes, practices, ideals, and a moral/ethical compass for navigating the institution's realm.[23]

Just as a society creates and sustains its marriage institution (by the use of language[24]), a society can change it. Because marriage is constituted by shared public meanings, it is necessarily changed when those meanings are changed or are no longer sufficiently shared. Indeed, that is the only way marriage can be changed.[25] When marriage's previously institutionalized public meanings and norms are no longer sufficiently shared by a society, through whatever means and for whatever reason, the institution disappears.[26] This is called *de-institutionalization.* A new institution with different public meanings and norms

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[23] *See, e.g.*, Helen Reece, *Divorcing Responsibly* 185 (2003); SER 140; Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 Can. J. Fam. L. 11 (2004) ("*Judicial Redefinition*"); *see also* Richard R. Clayton, *The Family, Marriage, and Social Change* 19, 22 (2d ed. 1979); Monte Neil Stewart, *Eliding in Washington and California*, 42 Gonzaga L. Rev. 501, 503 (2007) ("*Eliding*").

[24] *See* Searle, *Construction*, *supra* note 21, at 32; John R. Searle, *Making the Social World: The Structure of Human Civilization* 90 (2010) ("Searle, *Social World*").

[25] *See, e.g.*, Eerik Lagerspetz, *The Opposite Mirrors: An Essay on the Conventionalist Theory of Institutions* 28 (1995); Eerik Lagerspetz, *On the Existence of Institutions, in* On the Nature of Social and Institutional Reality 70, 82 (Eerik Lagerspetz et al. eds., 2001).

[26] *See, e.g.*, *id.*; Searle, *Construction*, *supra* note 21, at 117.

may take the previous institution's name ("marriage"), but it will be a different institution.

Across time and cultures, a core meaning constitutive of the marriage institution has nearly always been the union of a man and a woman.[27] Marriage's man-woman *meaning* provides materially and even uniquely multiple valuable social benefits, which we address later on.

A society can have *only one* social institution denominated "marriage." Society cannot simultaneously have as shared, core, constitutive meanings of the marriage institution *both* "the union of a man and a woman" *and* "the union of any two persons"—any more than it can have monogamy as a core meaning if it also allows polygamy. One meaning necessarily displaces or at least precludes the other. Given the role of language and meaning in constituting and sustaining institutions, two "coexisting" social institutions known society-wide as "marriage" amount to a factual impossibility. Thus, every society must choose either to retain man-woman marriage or, by force of law, replace it with a radically different genderless marriage regime.[28] (The Plaintiffs' core message is that the Constitution requires this Court to mandate the latter.)

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[27] *See, e.g.*, SER 19–20, 524–34.

[28] A society actually has a third option: no normative marriage institution at all. Many of the most influential advocates of genderless marriage correctly and gladly

Although the law did not create the man-woman marriage institution,[29] it has the power to de-institutionalize it by suppressing the shared public meanings that constitute it.[30] The law's power arises from its expressive or educative function magnified by its authoritative voice.[31] With respect to the marriage institution, the Plaintiffs 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 can "marry" in any intelligible sense.) The reach of that power to suppress is large and sufficient, especially in light of the fact that, 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 constitutional imperative.

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see that as leading quite naturally to no normative marriage institution at all. For a clear example of high-level advocacy for such, see SER 690–716.

[29] Man-woman marriage is unquestionably a pre-political institution. *See, e.g.*, John Locke, *Second Treatise of Government* 47 (Richard H. Cox ed., 1982) (1690); SER 497–523; Searle, *Social World*, *supra* note 24, at 86; *see also* Richard W. Garnett, *Taking* Pierce *Seriously: The Family, Religious Education, and Harm to Children*, 76 Notre Dame L. Rev. 109, 114 n.29 (2000) (the law's provisions regulating marriage no more "created" the marriage institution than the Rule Against Perpetuities "created" dirt).

[30] *See, e.g.*, SER 59, 93, 140–41; Nancy F. Cott, *The Power of Government in Marriage*, 11 The Good Soc'y 88 (2002).

[31] *See, e.g.*, Joseph Raz, *The Morality of Freedom* 162 (1986); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 4, 69–71 (1996); Matthew B. O'Brien, *Why Liberal Neutrality Prohibits Same-Sex Marriage: Rawls, Political Liberalism, and the Family*, 1 Brit. J. Am. Legal Stud. 411, 413–15 (2012); *see also* SER 59, 93, 140–41, 683–89.

Genderless marriage is a profoundly different institution than man-woman marriage.[32] Although there is overlap in formative instruction between the two possible "marriage" institutions, the significance is in the divergence, which is seen in the nature of the two institutions' respective social benefits and also in the two institutions' respective norms, ideals, and practices. (This divergence is explained in more detail below.)

The radical difference between the two institutions could not be otherwise: fundamentally different meanings, when magnified by institutional power and influence, produce divergent social identities, aspirations, projects, and ways of behaving, and thus different social benefits.[33] Well-informed observers of marriage—regardless of their sexual, political, or theoretical orientations—uniformly acknowledge the magnitude of the differences between the two possible institutions of marriage.[34] The reality is that changing the meaning of marriage to

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[32] *See, e.g.*, O'Brien, *supra* note 31, at 413–15; Stewart, *Marriage Facts*, *supra* note 9, at 323–24.

[33] *See, e.g.*, SER 59, 93.

[34] We begin a long list (that could readily be made even longer) with the then executive director of Lambda Legal Defense and Education Fund, Thomas Stoddard, who argued that "enlarging the concept" of marriage would "necessarily transform it into something new." Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, Out/Look Nat'l Gay & Lesbian Q., Fall 1989, at 19. In addition, *e.g.*, David Blankenhorn, *The Future of Marriage* 167 (2007) ("*Future*") ("I don't think there can be much doubt that this post-institutional view of marriage constitutes a radical redefinition. Prominent family scholars on both sides of the divide—those who favor gay marriage and those who do not—acknowledge this

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.

None of the Plaintiffs, their experts, or their *amici* negate these legislative facts.[35] The Plaintiffs attempt to rely on expert witness Letitia Anne Peplau's

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reality."); Daniel Cere, *War of the Ring*, *in* Divorcing Marriage: Unveiling the Dangers in Canada's New Social Experiment 9, 11–13 (Daniel Cere & Douglas Farrow eds., 2004) ("Divorcing Marriage"); Douglas Farrow, *Canada's Romantic Mistake*, *in* Divorcing Marriage, *supra*, at 1–5; Ladelle McWhorter, *Bodies and Pleasures: Foucault and the Politics of Sexual Normalization* 125 (1999); Raz, *supra* note 31, at 393; Judith Stacey, *In the Name of the Family: Rethinking Family Values in the Postmodern Age* 126–28 (1996); Sherif Girgis et al., *What Is Marriage? Man and Woman: A Defense* 54–55 (2012); Katherine K. Young & Paul Nathanson, *The Future of an Experiment*, *in* Divorcing Marriage, *supra*, at 48–56; Angela Bolt, *Do Wedding Dresses Come in Lavender? The Prospects and Implications of Same-Sex Marriage*, 24 Soc. Theory & Prac. 111, 114 (1998); Devon W. Carbado, *Straight Out of the Closet*, 15 Berkeley Women's L.J. 76, 95–96 (2000); Gallagher, *supra* note 9, at 53 ("Many thoughtful supporters of same-sex marriage recognize that some profound shift in our whole understanding of the world is wrapped up in this legal re-engineering of the meaning of marriage."); E.J. Graff, *Retying the Knot*, The Nation, June 24, 1996, at 12; Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 Law & Sexuality 9, 12–19 (1991); Andrew Sullivan, *Recognition of Same-Sex Marriage*, 16 Quinnipiac L. Rev. 13, 15–16 (1996).

[35] Genderless marriage proponents sometimes try to contest that genderless marriage is a profoundly different institution than man-woman marriage but their "counter-argument" is driven by expediency; because of their need to elide the argument we make here, in their public pronouncements "advocates have carefully minimized the impact of the change they seek." Deborah A. Widiss, *Changing the*

opinion that "[t]here is no scientific support for the notion that allowing same-sex couples to marry would harm different-sex relationships or marriages. The facts that affect the quality, stability, and longevity of different-sex relationships would not be affected by marriages between same-sex couples." ER 306. This opinion, however, evidences a large blind spot. Peplau ignores or is ignorant of the teachings of the "new institutionalism" in the social sciences, which focus on the role of social institutions in shaping social behaviors through widely shared public meanings that form and transform individuals in profound ways.[36] Accordingly, she does not come to grips with and *certainly does not deny* the social institutional realities of marriage set forth in this Section.[37]

Marriage Equation, 89 Wash. U.L. Rev. 721, 778, 781 (2012). The proponents' "counter-argument" is also based on a quite constricted and factually inaccurate view of what man-woman marriage *is* in the American experience. In subsection C. below, we demonstrate that view's factual inaccuracy.

[36] *See generally The New Institutionalism in Organizational Analysis* (Walter W. Powell & Paul J. DiMaggio eds., 1991); Peter A. Hall & Rosemary C.R. Taylor, *Political Science and the Three New Institutionalisms*, 44 Pol. Stud. 936 (1996); Victor Nee, *Sources of the New Institutionalism*, *in* The New Institutionalism in Sociology 1 (Mary C. Brinton & Victor Nee eds., 2001); *see also* Monte Neil Stewart et al., *Marriage, Fundamental Premises, and the California, Connecticut, and Iowa Supreme Courts*, 2012 BYU L. Rev. 193, 204 ("*Fundamental Premises*").

[37] Peplau's blind spot regarding social institutional realities is evident in other ways. An example is her reliance on divorce data from Massachusetts in the few years immediately before and immediately after the 2004 inception of court-mandated genderless marriage there. ER 322–23. Her point is that the sky is not falling now that Massachusetts has a genderless marriage regime. But the undeniable reality of institutional momentum clearly invalidates this point.

The man-woman *meaning* at the core of the marriage institution does and will influence people and guide their conduct now and in the coming generations in ways positive and beneficial to children generally, to the generality of adults, and to our Nation's commitment to religious liberties. The social institutional realities recognized and chosen by Nevada and its citizens teach clearly that if the law were to suppress that meaning, the readily predicted consequence would be first the diminution over time and then the loss of the valuable social benefits that meaning uniquely provides, with a genderless marriage regime being inimical to those benefits.

The benefits for children at stake here flow from marriage's historic success in maximizing the number of children who know and are raised by their own mother and father. Those benefits include generally better life-long outcomes in the psychological, emotional, physical, educational, employment, marital, and other social realms. In trying to contest the reality of those benefits, genderless marriage proponents make a counter-argument that boils down to this: "Men and women are interchangeable. A child does not need both a mother and a father. Those who believe otherwise are bigots." The Constitution, however, does not

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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. With an institution as fundamental and deep-rooted as marriage, one must think in terms of decades to observe the full effects of changes in the public meanings.

allow a judge to buy such a counter-argument—in light of the robust, democratically chosen legislative facts against it.

Further legislative facts set forth below show genderless marriage regimes' tendency to be in conflict with and even destructive of the religious liberties of a large portion of our Nation's people of faith and their churches. A court-imposed change in the definition of marriage inevitably would create a wide variety of religious-freedom conflicts for individuals who object to genderless marriage on religious grounds. Thus, another valuable benefit of man-woman marriage at stake here is its protection of those religious liberties.

1. The man-woman marriage institution maximizes the likelihood that children will have both mother and father in their lives, an arrangement that, on a wide range of indicators of human flourishing, has been shown to generate the best life-long outcomes.

Man-woman marriage teaches an important cluster of norms and ideals: of a child knowing and being reared by her mother and father, of a child being raised by parents who can at the very least give her the benefits of gender complementarity, and of a child experiencing a father rather than fatherlessness in the home. Because it is a powerful social institution, the teachings of man-woman marriage will make more likely the realization of those ideals. The teachings of genderless marriage run counter to all those norms and ideals. Because it will completely replace the old institution, genderless marriage's contrary teaching will

make realization of those ideals less likely; indeed, the ideals will no longer be socially endorsed at all but rather seen as discredited relics. Thus, this case will determine whether our society will maximize or minimize the benefits of a child knowing and being reared by her mother and father, of experiencing gender complementarity in the home of her childhood and youth, and of being spared from fatherlessness and the ills associated with it.

Nevada has chosen to maximize those benefits. For most Nevadans, marriage is principally about the welfare of children, rather than principally about meeting the emotional needs of adults or about affirming adults' private choices.[38] The Constitution allows Nevada to maximize those benefits.

a. The man-woman meaning in marriage furthers Nevada's vital interest in maximizing the number of children who are raised by their own two biological parents.

Common sense and emerging social science findings teach that knowing and be reared by her mother and father in and of itself is a source of strength and flourishing for the child. This ideal of a child knowing and being brought up by his or her biological parents—with exceptions being justified only in the best interests of the child, not for the gratification of any adult desires—matters to

[38] O'Brien, *supra* note 31, makes an in-depth examination of the supposed "public reasons" advanced to support one or the other possible marriage institutions, concluding that no valid "public reason" sustains genderless marriage but that maximizing the benefits of a child knowing and being reared by her mother and father is a valid "public reason" sustaining man-woman marriage.

children.[39] Prof. Katharine K. Baker perceived this in her analysis of bionormativity—that is, of the norm that parental rights and obligations align with biological parenthood.[40] She perceived that the interests served by that norm must be analyzed separately for the state, parents, and children.[41] Children's interests in bionormativity differ from the state's and from parents'; children "seem to have what is potentially the strongest interest in the biology of biological parenthood."[42] Professor Baker explains that this may be because there are "psychological benefits associated with being raised by one's biological parents."[43]

A recent study confirms Prof. Baker's suggestion regarding the "psychological benefits associated with being raised by one's biological parents." That study was "the first effort to learn about the identity, kinship, well-being, and social justice experiences of young adults who were conceived through sperm donation."[44] It assembled a representative sample of 485 adults between the ages of 18 and 45 years old who said their mother used a sperm donor to conceive them, and used as comparison groups 562 young adults adopted as infants and 563 young adults raised by their biological parents . The study found that, on average, young

[39] *See, e.g.*, SER 438–78, 717–38; *cf.* SER 77.
[40] Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 Ga. L. Rev. 649, 682–91 (2008).
[41] *Id.* at 682.
[42] *Id.*
[43] *Id.* at 686.
[44] SER 304.

adults conceived through sperm donation "are hurting more, are more confused, and feel more isolated from their families."[45] Among other negative outcomes, the study found, after controlling for socio-economic factors, that sperm donor offspring are significantly more likely than their peers raised by their biological parents to manifest delinquency, substance abuse and depression and are 1.5 times more likely to suffer from mental health problems."[46]

Man-woman marriage not only supports the birthright of children to be connected to their mothers and fathers, it is the indispensable social predicate for that birthright to have meaning and reality.[47] Where man-woman marriage is a strong social institution, it is much more likely that a child knows and is raised by the man and the woman whose sexual union created her, exactly because the parents are married. Where the institution is weaker, such an outcome is less likely. Where the marriage ethos is weak or nonexistent, a child knowing and being raised by his mother and father is a mere fortuity.[48]

A genderless marriage regime is not just neutral towards the child's interest in bonding with her biological parents; as a matter of public policy and by force of

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[45] *Id.*

[46] *Id.* at 306, 338–39. For a fuller summary of the study's findings, see O'Brien, *supra* note 31, at 446–48; see also SER 546–76.

[47] *See, e.g.*, SER 58, 93; Stewart, *Fundamental Premises*, *supra* note 36, at 243–56.

[48] *Id.*

law, it thwarts that interest.[49] "The legalization of same-sex marriage, while sometimes seen as a small change affecting just a few people, raises the startling prospect of fundamentally breaking the legal institution of marriage from any ties to biological parenthood."[50] That prospect is a reality in Canada; the same bill redefining marriage to the union of any two persons also contained, in order to maintain the coherence of the scheme, a provision ending in law the concept of "natural parenthood" and replacing it with the concept of "legal parenthood" (a child's parents are who the state says the parents are).[51] After implementation of genderless marriage, a child knowing and being raised by her biological parents will not be the result of cultural, political, and institutional aspirations and objectives, but very likely a mere fortuity.

> [S]ame-sex marriage would require us in both law and culture to deny the double origin of the child. . . . It would require us, legally and formally, to withdraw marriage's greatest promise to the child—the promise that, insofar as society can make it possible, I will be loved and raised by the mother and father who made me. . . . But a society that embraces same-sex marriage can no longer collectively embrace this norm and must take specific steps to retract it. One can believe in same-sex marriage. One can believe that every child deserves a mother and a father. One cannot believe both.[52]

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49 *See, e.g.*, SER 163–66, 182–297; Blankenhorn, *Future*, *supra* note 34, at 201.
50 SER 213.
51 SER 191–92.
52 Blankenhorn, *Future*, *supra* note 34, at 201.

Additional benefits maximized by the ideal of married mother-father child-rearing and crucial for a child's and hence society's well-being, include physical, mental, and emotional health and development; academic performance and levels of attainment; and avoidance of crime and other forms of self- and other-destructive behavior such as drug abuse and high-risk sexual conduct. To maximize the possibility of achieving those outcomes in society generally, married mother-father child-rearing is the optimal mode. [53]

This is a contested point; genderless marriage advocates argue that outcomes for same-sex couple childrearing are just as good, as shown by various studies. In context, they are saying that it is not the man-woman meaning at the core of the marriage institution that materially contributes to this social good (the optimal child-rearing mode); rather, that social good results from the care of any two loving, mutually committed adults; therefore, to de-institutionalize man-woman marriage and replace it with a genderless marriage regime will not result in diminution or loss of this social good.

The Plaintiffs, most of their experts, and many of their *amici* make a rather massive effort to persuade this Court to declare their "no differences" legislative facts to be "true." However, there are robustly supported legislative facts to the

[53] *See, e.g.*, SER 1–181, 479–96, 535–60, 577–84, 593–617.

contrary. Social science sees married mother-father as the child-rearing mode with the best outcomes for the child on very important measures. "*The intact, biological, married family remains the gold standard for family life in the United States***,** insofar as children are most likely to thrive—economically, socially, and psychologically—in this family form."[54] In contrast, various social science studies have severely undermined the claim of "no difference" between married mother-father child-rearing and same-sex couple child-rearing.[55]

Almost since the beginning of judicial consideration of the constitutionality of man-woman marriage twenty years ago, genderless marriage advocates have urged the courts to declare the "no differences" assessments "true." Every

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[54] SER 11. Man-woman marriage is the most effective means humankind has developed so far to maximize the level of private welfare provided to the children conceived by passionate, heterosexual coupling. *See, e.g.*, SER 49–86; 101; 585–92; Stewart, *Judicial Redefinition*, *supra* note 23, at 44–52. In addition to the provision of physical needs such as food, clothing, and shelter, the phrase *private welfare* encompasses opportunities such as education, play, work, and discipline and intangibles such as love, respect, and security. The effective provision of private welfare to children generally is among the most significant of the social benefits conferred by man-woman marriage and constitutes the deep logic of marriage. *See* Stewart, *Judicial Redefinition*, *supra* note 23, at 44–46.

[55] Douglas W. Allen, *High school graduation rates among children of same-sex households*, 11 Review of Economics of the Household 635 (2013); Mark D. Regnerus, *Parental Same-Sex Relationships, Family Instability, and Subsequent Life Outcomes for Adult Children: Answering Critics of the New Family Structures Study with Additional Analysis*, 41 Soc. Sci. Research 1367 (2012); SER 618–53. For good summaries of the latter two studies, see O'Brien, *supra* note 31, at 443–45, and *Jackson v. Abercrombie*, 884 F. Supp. 2d. 1065, 1115 (D. Haw. 2012); see also SER 654–82.

American appellate court except one[56] has declined to do so; they have instead heeded Justice Sosman's cogent warnings that the "[i]nterpretation of the data gathered by those studies then becomes clouded by the personal and political beliefs of the investigators" and that "the most neutral and strict application of scientific principles to this field would be constrained by the limited period of observation that has been available."[57]

The assertions of various professional organizations appearing as *amici* in support of the Plaintiffs are no better than the studies from which they are purportedly derived. As a matter of good science, those assertions cannot substitute for otherwise underdeveloped or inadequate studies. In our move to good science, we long ago abandoned the notion that invoking Aristotle's name (or that of the American Psychological Association) ended inquiry; we abandoned that notion because the sole test must be what the doing of the science itself discloses. As already demonstrated, the studies underlying the organizations' assertions are robustly contested.

Further, the opinion testimony of Prof. Nancy Cott is of no avail to the Plaintiffs' position. Prof. Cott's attempted challenge to the man-woman marriage

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[56] *See Varnum v. Brien*, 763 N.W.2d 862, 873–74, 899 n.26 (Iowa 2009).

[57] *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 979–80 (Mass. 2003) (Sosman, J., dissenting); *accord* Richard E. Redding, *Politicized Science*, 50 Soc'y 439 (2013) (analyzing reaction to Regnerus study).

institution as the provider of the optimal child-rearing mode actually reaffirms that benefit's continuing validity. Prof. Cott says: "The notion that the main purpose of marriage is to provide an ideal or optimal context for raising children was never the prime mover in states' structuring of the marriage institution in the United States, and it cannot be isolated as the main reason for the state's interest in marriage today."[58] Note the careful limitation to "main purpose," "prime mover," and "main reason." Prof. Cott does *not* deny that perpetuating the optimal child-rearing mode (by perpetuating the man-woman marriage institution) continues as *an* important, even compelling, societal interest. Any quibble over whether it is the "main" or "prime" interest at stake is irrelevant to this Court's constitutional analysis; what is relevant is that the interest is real, valuable, and enduring.

b. The man-woman meaning in marriage furthers Nevada's vital interest in maximizing the number of children raised by parents who can at least give them the benefits of gender complementarity.

The man-woman marriage institution teaches powerfully the social ideal and model of a child being raised by a man and a woman, even in the absence of complete or partial biological ties. Thus, the man-woman meaning maximizes the number of children receiving the benefits of gender complementarity in their upbringing. Those benefits are real. Even when children are not reared by their own married biological fathers and mothers, children who live with a married

[58] ER 269.

mother and father, one of whom is an adoptive parent, do almost as well (again, on average) as children raised by both biological parents.[59] Research also establishes that, for whatever reasons,[60] mothers and fathers tend on average to parent differently and thus make unique contributions to the child's overall development.[61] The psychological literature on child development has long recognized the critical role that mothers play in their children's development.[62] More recent research also reveals the vital role that fathers play in their children's development.[63]

In short, gender diversity or complementarity among parents—what one scholar has called "gender-differentiated parenting"[64]—provides important benefits

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[59] *See* Regnerus, *supra* note 55, at 1367.

[60] For example, some researchers have concluded that males and females have significant innate differences that flow from differences in genes and hormones. According to these researchers, these biochemical differences are evident in the development of male and female brain anatomy, psyche, and even learning styles. *See* Leonard Sax, *Why Gender Matters: What Parents and Teachers Need to Know About the Emerging Science of Sex Differences* (2005). But whether differences in parenting styles are the result of inherent differences between the sexes or other factors, there is no question that fathers tend to parent differently from mothers.

[61] *Id.*; David Blankenhorn, *Fatherless America* (1995) ("*Fatherless*").

[62] *E.g.*, Brenda Hunter, *The Power of Mother Love: Transforming Both Mother and Child* (1997).

[63] *See, e.g.*, David Popenoe, *Life Without Father: Compelling New Evidence that Fatherhood & Marriage are Indispensable for the Good of Children and Society* 146 (1996) ("The burden of social science evidence supports the idea that gender-differentiated parenting is important for human development and that the contribution of fathers to childrearing is unique and irreplaceable.").

[64] *Id.*

to children. Accordingly, Nevada and its people understandably have elected to preserve that social institution most effective at maximizing the number of children receiving those benefits.

In the context of these discussions of child-rearing modes, our point must not be misunderstood. We do not contend that the individual parents in same-sex couples are somehow "inferior" as parents to the individual parents who are involved in married, mother-father parenting. The point, rather, is that the *combination* of male and female parents is likely to draw from the strengths of both genders in ways that cannot occur with any combination of two men or two women, and that this gendered, mother-father parenting model provides important benefits to children. That this would be so is hardly surprising. Society has long recognized that diversity in education brings a host of benefits to students. *See, e.g.*, *Grutter* v. *Bollinger*, 539 U.S. 306 (2003). If that is true in education, why not in parenting? And as the Supreme Court has taught: "[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both" and "[i]nherent differences between men and women, we have come to appreciate, remain cause for celebration . . . ." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)) (internal quotation marks omitted). And, again, man-woman

marriage effectively teaches the norm and ideal of gender complementarity in child-rearing, while genderless marriage counters them.

Plaintiffs do not and cannot negate these robustly supported legislative facts regarding gender complementarity. In the face of this argument supportive of man-woman marriage, its opponents revert to the notion that men and women are interchangeable or, at the very least, that the law must not allow any official recognition of differences between the two sexes. That notion makes sense only to people who have accepted a particular theory of gender advanced by radical social constructivists and that theory's logical extension into a "legal" principle that the law can never classify on the basis of sex.[65] These are people at the extreme constructionist end of the essentialist/constructionist spectrum. Adherents to the radical social constructionist position, to a greater or lesser extent, take it as their project to deconstruct the "gendered" differences between men and women[66] and advance this project by advocating that the law not make gender-based distinctions at all.[67]

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[65] Regarding the information set forth in this paragraph, see generally SER 739–42.

[66] *See*, *e.g.*, Jonathan Culler, *Literary Theory: A Very Short Introduction* 97–101 (1997); *The Feminists: A Political Organization to Annihilate Sex Roles*, *in* Radical Feminism 368, 368–69 (Anne Koedt et al. eds., 1973); Shulamith Firestone, *The Dialectic of Sex: The Case for Feminist Revolution* 11 (1970).

[67] *See*, *e.g.*, Kate Millet, *Sexual Politics* 33–36 (1977). Genderless marriage advocates attempt to use radical social constructionist conclusions because, they

In making the Marriage Amendment part of their constitution, Nevada's voters declined to buy into the radical social constructivists' theory of gender. Equally important, the Supreme Court has declined to accept it. *See Virginia*, 518 U.S. 515.[68] It would be bad constitutional law to do otherwise. *See, e.g.*, *Otis v. Parker*, 187 U.S. 606, 608–09 (1903) (Justice Holmes's cautioning against the tendency of judges, consciously or unconsciously, overtly or covertly, to read social theories into the constitution: "Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions . . . .").

c. The man-woman meaning in marriage minimizes fatherlessness in the lives of children, a condition particularly challenging to children's well-being generally.

In 2009, the White House announced that it was launching "a national conversation on fatherhood and personal responsibility." The conversation commenced with an event celebrating five outstanding fathers. The President explained:

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argue, there is no defensible basis under equality jurisprudence for man-woman marriage in light of the "fact" that there are no differences between men and women that matter (or should matter) in the eyes of the law.

[68] For analysis of the Supreme Court's refusal in *United States v. Virginia* to accept the radical social constructivists' theory of gender, see, for example, Sunstein, *supra* note 31, at 76; Stewart, *Judicial Redefinition*, *supra* note 23, at 92–95.

> [W]hen fathers are absent—when they abandon their responsibility to their kids—we know the damage that does to our families. Children who grow up without a father are more likely to drop out of school and wind up in prison. They're more likely to have substance abuse problems, run away from home, and become teenage parents themselves.[69]

Emphasizing the positive, the President also said: "We all know the difference that responsible, committed fathers like these guys [the five outstanding fathers] can make in the life of a child."[70]

Extensive studies have affirmed that fathers are essential to the enterprise of parenting.[71] And the costs of policies increasing the number of fatherless families have proven to be very high.[72]

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[69] Press Release, Office of the Press Secretary, The White House, *President Obama Launches National Conversation on Importance of Fatherhood and Personal Responsibility* (June 19, 2009), http://www.whitehouse.gov/the-press-office/president-obama-launches-national-conversation-importance-fatherhood-and-personal-r.

[70] *Id.*

[71] *See, e.g.*, Popenoe, *supra* note 63; Blankenhorn, *Fatherless*, *supra* note 61*;* Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families*, 65 J. Marriage and Fam. 876 (2003); Elrini Flouri & Ann Buchanan, *The role of father involvement in children's later mental health*, 26 J. Adolescence 63 (2003) (concluding "[f]ather involvement at age 7 protected against psychological maladjustment in adolescents," even when controlling for mother involvement).

[72] *See, e.g.*, note 71 *supra*; Gregory Ace et. al., *The Moynihan Report Revisited*, 6 Urban Institute 1 (2013), *available at* http://www.urban.org/UploadedPDF/412839-The-Moynihan-Report-Revisited.pdf; Bruce J. Ellis et al., *Does Father Absence Place Daughters at Special Risk for Early Sexual Activity and Teenage Pregnancy?*, 74 Child Dev. 801 (2003).

The man-woman marriage institution teaches and honors the role of "father" and prepares males to fulfill it. A genderless marriage regime, with its Parent A and Parent B, eliminates from the law the office and role of "father," teaching instead that the gender of parents does not matter. Thus, under such a regime, the law no longer can promote and valorize fatherhood or teach that fulfillment of its duties is good for children generally.[73]

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Man-woman marriage teaches the norms and ideals of a child knowing and being reared by her mother and father, of gender complementarity in child-rearing, and of responsible fatherhood. To the extent a society realizes those norms and ideals, children generally do better, flourish more fully, and have better lives. There is no mystery and should be no confusion about the objectives of Nevada's Marriage Laws. Nevada is preserving the man-woman meaning in its marriage institution to re-enforce in a powerful way those norms and ideals. Man-woman marriage teaches and valorizes them, and genderless marriage necessarily does the opposite. Thus, man-woman marriage maximizes the realization of those norms and ideals, for the enduring benefit of children generally.

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[73] The dilemma of those who seek to promote fatherhood while at the same time promoting genderless marriage is analyzed in Adam J. MacLeod, *No Interest in Fathers*, Public Discourse, Jan. 14, 2014, http://www.thepublicdiscourse.com/2014/01/11034/.

With full constitutional authority, a State may teach, by enshrining the man-woman meaning, that marriage is and ought to be principally about what is good for children generally rather than about what is good for adult desires and private choices. Because Nevada's means and objectives are fully legitimate, highly intelligent, and compelling, there is no constitutional flaw in its Marriage Laws.

Nor can the Marriage Laws' constitutionality be rationally attacked by reference to the children in same-sex couple households. Like most States, Nevada engages in two large but *different* child-welfare endeavors. One, by preserving the man-woman meaning in marriage, it seeks to maximize the number of children down through the generations who know and are reared by mother and father, who have the benefits of gender complementarity in their upbringing, and who are spared the woes of fatherlessness. Two, in various ways (including with the DPA), Nevada seeks to protect the present welfare of individual children found in varying circumstances.

As to the second important endeavor, Nevada's laws, including the DPA, provide to the children in same-sex couple households on an equal basis the same financial and other material benefits that Nevada's various statutory programs provide to children generally. Plaintiffs' can point to no Nevada-administered program that does otherwise, although they blame the Marriage Laws for

"depriving" children in same-sex couple households of access to federal benefits afforded children in married households. That blame is misplaced, for the reasons explained Section V.D. below. But that misplaced blame does set up perfectly the wisdom of Nevada's choices with its two large but *different* child-welfare endeavors. To maximize benefits to children in same-sex couple households through its second endeavor, Nevada must (so Plaintiffs argue) abandon and undo its first endeavor—it must cease to use the man-woman marriage institution to teach powerfully the norms and ideals of a child knowing and being reared by her mother and father, of gender complementarity in child-rearing, and of responsible fatherhood. Nevada must (so Plaintiffs argue) suppress that institution by implementing a genderless marriage regime, which counters those norms and ideals. Yet given the huge disparity in numbers between children connected to same-sex couple households and all other children,[74] for Nevada to abandon and undo its first endeavor is to minimize rather than maximize benefits to children generally—and that is neither rational nor moral.

[74] The most recent data indicates that about 125,000 same-sex couple households in the United States have children present. Gary J. Gates, *LGBT Parenting in the United States*, The Williams Institute, UCLA School of Law (Feb. 2013), http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf. In contrast, nearly 25,000,000 households have a married mother and father, Jonathan Vespa et. al., *America's Families and Living Arrangements: 2012*, U.S. Census Bureau, U.S. Dept. of Commerce (Aug. 2013), http://www.census.gov/prod/ 2013pubs/ p20-570.pdf, while over 10,000,000 households with children have no father present and over 3,000,000 have no mother present, *id.*

The same analysis applies with equal strength and validity to Plaintiffs' argument that the Fourteenth Amendment compels Nevada to abandon and undo its first child-welfare endeavor so as to reduce dignitary harms, or "stigma," to children in same-sex couple households.[75] Because of the compelling importance of the benefits sought by Nevada's first child-welfare endeavor for the largest number of children possible, the Constitution does not require Nevada to abandon that endeavor.

2. Man-woman marriage protects religious liberties.

Informed and thoughtful observers on both sides of the marriage issue agree that imposition of a genderless marriage regime by force of law (especially constitutional law) will materially interfere with, diminish, and otherwise injure over time the religious liberties of religious organizations and people of faith whose religious foundations support man-woman marriage and oppose genderless marriage.[76] This acknowledgment of adverse impacts on religious liberties is

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[75] We address the legal flaws in Plaintiffs' "harms" argument in Section V.E. below.

[76] *See, e.g.*, 3 W. Cole Durham & Robert Smith, *Religious Organizations and the Law* §§ 14:20 to 14:30 (2013); Girgis, *supra* note 34, at 62–64; *compare* Marc D. Stern, *Same-Sex Marriage and the Churches*, *in* Same-Sex Marriage and Religious Liberty: Emerging Conflicts 1–58 (Douglas Laycock et al. eds., 2008) *with* Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, *in* Same-Sex Marriage and Religious Liberty 123–56.

reflected in the writings of genderless marriage advocates[77] and those neutral on the marriage issue but concerned about preservation of religious liberties.[78] These adverse impacts on religious liberties matter to Nevada and to our Nation to a very great extent because their people, to a very great extent, adhere to religions firmly opposed to genderless marriage. Thus, the potential for religious conflict is enormous.[79]

A genderless marriage regime's adverse impacts on the religious liberties of churches include increased liability in private anti-discrimination lawsuits and a range of government penalties such as exclusion from government facilities, ineligibility for government contracts and licenses, and withdrawal of tax exempt status.[80] The adverse impacts on the religious liberties of individuals include government-authorized sanctions—either directly imposed by government or resulting from private anti-discrimination lawsuits—for heeding conscience and

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[77] *E.g.*, Feldblum, *supra* note 76, at 123–56.

[78] *E.g.*, Durham & Smith, *supra* note 76, §§ 14:20–14:23, 14:25–14:30.

[79] This reality is in sharp contrast to the reality of a small minority of religious believers—concentrated in a relatively small part of the country—whose religious views once cast interracial man-woman marriage as wrong.

[80] *E.g.*, *id.* Specific, concrete examples of these conflicts are given in Thomas M. Messner, The Heritage Foundation, *Same-Sex Marriage and the Threat to Religious Liberty* (2008), http://www.heritage.org/research/reports/2008/10/same-sex-marriage-and-the-threat-to-religious-liberty, and Ryan T. Anderson, *Clashing Claims*, National Review Online, Aug. 23, 2013, http://www.nationalreview.com/article/356539/clashing-claims-ryan-t-anderson#!.

declining to provide services connected to such activities as same-sex couple weddings and lodging.[81]

Nevada's same-sex couples, including the Plaintiffs, have never had a "right" to marry in Nevada, that is, to have the law impose on the State a genderless marriage regime.[82] Accordingly, this is *not* a case where the judicial task is to balance the religious liberties of people and communities of faith, on one hand, against, on the other hand, the right of same-sex couples to marry. The issue, rather, is whether Nevada has sufficiently good reasons for preserving man-woman marriage. If it does, then same-sex couples do *not* have a right to marry in the first place. In such a case, there is simply no balancing between competing rights to be done because there are no competing rights. So what matters is the demonstration of the robust legislative fact that preserving man-woman marriage protects religious liberties against the high likelihood of diminution and loss. That in itself constitutes a sufficiently good reason for Nevada's choice.

Plaintiffs argue that a genderless marriage regime will not adversely impact religious liberties because "no religion will be required to change its religious policies or practices with regard to same-sex couples, and no religious officiant will be required to solemnize a marriage in contravention of his or her religious

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[81] *See* note 80 *supra*.

[82] *See, e.g.*, Nev. Rev. Stat. § 122.020.

beliefs[.]" Opening Br. at 85 (quoting *In re Marriage Cases*, 183 P.3d 384, 451–52 (Cal. 2008)). But to say that a genderless marriage regime will not adversely impact religious practice A or B is not proof that it will not adversely impact religious practice C or D. The Plaintiffs have been silent about the adverse impacts on the religious liberties that we identified with specificity in the district court and again here—adverse impacts that even vigorous but intellectually honest genderless marriage proponents have frankly acknowledged as being highly likely. So it can hardly be said that the Plaintiffs have demonstrated a contrary legislative fact. They certainly have not negated the robustly supported legislative fact pertaining to religious liberties set forth here.[83]

* * * * * * * * * *

When Nevada's citizen-voters went to the polls in 2000 and 2002, they had to make a choice about the norms and ideals of a child knowing and being raised by her mother and father and of experiencing both gender complementarity and responsible fatherhood and the further social ideal of guarding against the diminution and loss of religious liberties and privileges of conscience. Genderless marriage proponents argued, as they always do, that as a matter of fact none of

[83] Plaintiffs also rely on the religious liberties "analyses" of the California, Connecticut, and Iowa Supreme Courts in their respective genderless marriage cases, Opening Br. at 85, without acknowledging or otherwise coming to grips with the demonstrated material defects in those analyses. *See* Stewart, *Fundamental Premises*, *supra* note 36, at 263–74.

these benefits would be adversely impacted or diminished, that letting Adam and Steve marry would not hurt any individual's marriage or marriage in general, that there would be no harm, that there would be no downside, that there would be no social, cultural, or political price to be paid. Those were their legislative facts, and Nevada's citizen-voters did not buy them. They chose, as was their right, to give credence to the contrary and robustly supported legislative facts, those demonstrated above.

Now genderless marriage proponents are asking this Court to ignore or otherwise dismiss those democratically chosen legislative facts, accept contrary legislative facts (in the few places where some are presented), and on that basis say that Nevada does not have sufficiently good reasons to preserve the man-woman marriage institution. But settled federal law does not countenance such a judicial course. In these circumstances, this Court must defer to the legislative facts chosen by the authorized government decision-makers—Nevada's citizen-voters themselves. Those legislative facts all point to man-woman marriage as maximizing valuable benefits—to children, to adults, and to society generally.

C. Plaintiffs' constricted view of what marriage *is* does not negate the legislative facts showing the institution to be much broader and deeper in its nature and purposes.

What we will call the broad description of marriage encompasses the social realities set forth above: the understanding that "the institution of marriage was created for the purpose of channeling heterosexual intercourse into a structure that supports child rearing;" "that marriage is essentially the solemnizing of a comprehensive, exclusive, permanent union that is intrinsically ordered to producing new life, even if it does not always do so;" and that "marriage has been viewed as an institution . . . inextricably linked to procreation and biological kinship."[84] The broad description also encompasses the understanding that marriage's social goods include "love and friendship, security for adults and their children, economic protection, and public affirmation of commitment,"[85] in addition to those described above.

In contrast to the broad description of marriage, the narrow view underlying all essential arguments for genderless marriage limits its description of the goods of marriage to love and friendship, security for adults and their children, economic

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[84] *United States v. Windsor*, 133 S. Ct. 2675, 2718 (2013) (Alito, J., dissenting) (citations omitted). For a more detailed explanation of the broad view of marriage, see *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 995–96 (Mass. 2003) (Cordy, J., dissenting), and Girgis, *supra* note 34, at 23–36.

[85] Linda C. McClain, *The Place of Families: Fostering Capacity, Equality, and Responsibility* 6 (2006).

protection, and public affirmation of commitment. This constricted description results from the narrow view's adherence to what scholars refer to as the "close personal relationship" model of marriage, where "marriage is seen primarily as a private relationship between two people, the primary purpose of which is to satisfy the adults who enter it. Marriage . . . and children are not really connected."[86] This view is of a relationship "that has been stripped of any goal beyond the intrinsic emotional, psychological, or sexual satisfaction which the relationship currently brings to the [two adult] individuals involved."[87] The narrow view "tend[s] to strip marriage of the features that reflect its status and importance as a social institution."[88] The narrow view insists that marriage is *no more than* what the narrow view describes.[89]

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[86] SER 144.

[87] SER 145. *See* Scott Yenor, *Family Politics: The Idea of Marriage in Modern Political Thought* 5 (2011):

> The more advocates of autonomy emphasize individual choice, the more marriage and family life are disabled from achieving serious public purposes.
>
> . . . Modern advocates of autonomy and personal independence distort the satisfactions of marriage into personal satisfactions. They underestimate how genuinely satisfying marital love creates mutual dependence that limits human autonomy and fail to see how marriage and family life are satisfying because they involve this love and dependence.

[88] SER 144.

[89] *See* Stewart, *Marriage Facts*, *supra* note 9, at 337.

The contest between the broad description and the narrow view is a contest between competing legislative facts, with those supporting the broad description clearly being the stronger.[90] Only careless, popularizing "scholars"—on whom Plaintiffs rightly do not rely—claim that the narrow view, a relatively recent phenomenon in our society, has overcome and suppressed the broad view, with its emphasis on children, family duties, and mutual dependence.[91]

That the broad description of marriage is a robustly supported legislative fact matters very much in resolving the marriage issue because the narrow vision underlies every argument the proponents of genderless marriage make.[92] These arguments invariably ignore the broad description (while at the same time generally obscuring their essential reliance on the narrow vision as such) because fair acknowledgement of the broad description is fatal to those arguments.[93]

The Plaintiffs' one serious effort to establish the factual accuracy of the narrow view and thereby negate the broad description falls far short. That effort is

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[90] *See, e.g.*, Stewart, *Marriage Facts*, *supra* note 9, at 350.

[91] *See* Stephanie Coontz, *Marriage, A History: From Obedience to Intimacy, or How Love Conquered Marriage* (2005). Critics from across the spectrum have questioned Coontz's work. *See, e.g.*, Alan Wolfe, *The Malleable Estate: Is marriage more joyful than ever?*, Slate, May 17, 2005, http://www.slate.com/id/2118816; Blankenhorn, *Future*, *supra* note 34, at 236, 239–40 ("Coontz has made a career out of arguing that her own philosophical preferences and the laws of historical inevitability are one and the same.").

[92] *See* Stewart, *Fundamental Premises*, *supra* note 36, at 197–211.

[93] *See id.*

the testimony of Prof. Nancy Cott. Although Prof. Cott lists aspects of marriage common to both the narrow and the broad descriptions, she does *not* aver that contemporary marriage is limited to those aspects or that the additional aspects of marriage ignored by the narrow view but captured by the broad description are factually false. This is particularly telling because the additional aspects were set forth in considerable detail in our district court filings and in other relevant literature before Prof. Cott prepared her declaration. Furthermore, although Prof. Cott states that marriage is an evolving and changing institution, she does not assert that the changes have eliminated the additional aspects of marriage included in the broad description. Her statements set forth *only* now-abandoned institutional meanings and practices *other than* those additional aspects. The most that Prof. Cott says regarding the validity of those additional aspects is that the "exclusion of same-sex couples from equal marriage rights stands at odds with the direction of historical change in marriage in the United States."[94] That statement carefully avoids saying that the "historical change" has overtaken and eliminated the broad description's additional aspects of marriage. Those aspects are continuing, valuable, and important components of contemporary American marriage—and fully sustain man-woman marriage's constitutionality.

[94] ER 264, 281.

One other aspect of the Plaintiffs' treatment of our account of what marriage *is* merits comment. Plaintiffs label our account as a "baseless private view that marriage equality tarnishes the institution of marriage." Opening Br. at 16. What is meant by "private view"? It probably means nothing more than "the view held by people who disagree with us." There is certainly nothing "private" in the broad description of marriage or in the literature of the new institutionalism or about the marriage institution itself. There are no "private" social institutions because social institutions are constituted by and only by webs of widely shared *public* meanings, and when those public meanings are no longer sufficiently widely shared, the institutions cease. More importantly, it is the grossest falsehood to label as "baseless" the careful account given here of the adverse impacts on marriage's valuable social benefits likely resulting from legal suppression of the man-woman meaning at the core of the institution. The hurling of this falsehood is an act of desperation. The Plaintiffs have known about the Coalition's intended defense of the Marriage Laws—the same defense set forth in this Section I—for a long time. The Coalition's Motion to Intervene was the second substantive filing in this action (right after the Complaint), Dist. Ct. Dkt. 30, and it set forth the defense in detail. *Id.* at 7–11. And even much earlier, in November 2003, three highly regarded members of the Massachusetts Supreme Judicial Court adhered to the social

institutional defense of man-woman marriage.[95] Yet, with all that time to come up with a responsible counter to that defense, the Plaintiffs, their five experts, and their seventeen *amici* have not been able to do so. They have simply failed to engage the social institutional argument for man-woman marriage in any intellectually rigorous and honest way. It is a startling and telling phenomenon, one underscored by the hurling of the "baseless" falsehood.

II. WHAT MARRIAGE *OUGHT TO BE* IS A DECISION THAT MUST BE LEFT TO DEMOCRATIC PROCESSES, ESPECIALLY WHEN THOSE PROCESSES ARE OPERATING IN A FAIR AND OPEN WAY AND WHERE GENDERLESS MARRIAGE PROPONENTS ARE EFFECTIVELY DEPLOYING VERY CONSIDERABLE POLITICAL POWER.

Plaintiffs and other genderless marriage advocates want marriage changed from what it is to something different so as to make it helpful to their personal, social, and economic aspirations and status. The argument is that marriage ought to have the core meaning of "the union of two persons without regard to gender" so as to improve and advance the situation of gay men and lesbians and any children attached to their relationships. The political question (for nearly everyone) is not whether such improvement and advancement is a good objective in the abstract; it is. The real political question is what is the cost of such a profound redefinition of marriage? Genderless marriage advocates say there is none, there is no harm or downside, only upside. The majority of the voters in Nevada and in a large

[95] *Goodridge v. Dep't Pub. Health*, 798 N.E.2d 941, 983–1005 (Mass. 2003) (Cordy, J., dissenting). Justices Spina and Sosman joined this dissent.

majority of the other States have so far concluded otherwise; in previous elections they chose, as was their right, to give credence to the contrary legislative facts set forth in the previous Section, which point to a quite heavy social cost indeed.[96]

It is definitely for democratic processes, not the courts, to answer this question of what marriage ought to be and to resolve the social-cost issue. *E.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997) ("Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society."). This approach of deferring to democratic processes is especially compelling when, as now, those processes are operating in a fair and open way and where, as in Nevada and elsewhere, genderless marriage proponents are effectively deploying very considerable political power. We previously described the political situation in Nevada, where the State legislature has started the process to repeal the Marriage Amendment, and in Hawai'i, where the legislature voted to redefine marriage as

[96] The evidence suggests that those whose own lives and neighborhoods reflect the practices and norms of the close personal relationship model of marriage, the narrow view, are generally supportive politically of genderless marriage, while those whose own lives and neighborhoods reflect the practices and norms of the broad description of marriage generally are not. *See* Stewart, *Eliding*, *supra* note 23, at 534.

the union of two persons without regard to gender.[97] We also note that, while this Answering Brief was being written, the Illinois legislature and governor changed the legal meaning of marriage in that State to the union of two persons without regard to gender.[98]

It is right that the large public debate about marriage—what it is and what it ought to be—be conducted and resolved through the free, open, democratic process. Nevadans are re-engaging in that debate, and just as before, they will resolve it through their free, open, democratic process, *if* the judges of this Court

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[97] For an overview of matters in Hawaii, see, for example, Alan Duke, *Hawaii to become 16th state to legalize same-sex marriage*, CNN.com, Nov. 13, 2013, http://www.cnn.com/2013/11/12/us/hawaii-same-sex-marriage/ (summarizing); *House hearing on same sex marriage resumes Saturday*, khon2.com, Nov. 1, 2013, http://www.khon2.com/news/house-hearing-on-same-sex-marriage-resumes-saturday (highlighting the extensive testimony hearing); Malia Zimmerman, *Experts say Hawaii's gay marriage bill worst at protecting religious freedom*, Hawaii Reporter, Oct. 30, 2013, http://www.hawaiireporter.com/experts-say-hawaiis-gay-marriage-bill-worst-at-protecting-religious-freedom/123 (summarizing the very real religious liberty concerns presented by those who support and oppose redefining marriage).

Regarding Nevada, see Sean Whaley, *Nevada Legislature advances gay marriage resolution*, Las Vegas Review Journal, May 23, 2013, http://www.reviewjournal.com/news/nevada-legislature/nevada-legislature-advances-gay-marriage-resolution; Press Release, Retail Association of Nevada, *RAN Poll Shows Nevadans Optimistic about State's Economy, but Recovery Not Felt by Most Households* (Oct. 2013), http://www.rannv.org/documents/23/Poll Release-RANOct2013Final.pdf (reporting on opinion poll which found 57% of Nevadans support repealing Nevada's Marriage Amendment).

[98] *See* Monique Garcia, *Signed and sealed: Illinois 16th state to legalize gay marriage*, Chicago Tribune, Nov. 21, 2013, http://www.chicagotribune.com/news/chi-illinois-gay-marriage-bill-signing-20131120,0,4464600.story.

resist the siren song to resolve it first by imposing on Nevada their personal views of the good.

III. NEVADANS HAVE RIGHTLY VALUED THE INTERESTS SUSTAINING NEVADA'S MARRIAGE LAWS.

Section I above sets forth the robust legislative facts demonstrating that the man-woman meaning at the core of our marriage institution provides *valuable* social benefits (or, in legal parlance, advances legitimate societal interests); that a genderless marriage regime will likely jeopardize, diminish, and even eliminate those benefits over time; and that, by using the force of law to assure the continuing institutionalization of the man-woman meaning, the Marriage Laws protect those legitimate societal interests. This Section addresses more fully the concept of *valuable*.

Different people place different values on various social benefits. For example, someone living in San Francisco, far and away this Nation's most childless large city,[99] and imbued with the cultural assumptions material to that city's status may well place low value on man-woman marriage's benefits pertaining to reproduction and child-rearing. Similarly, a single woman not desiring a husband but desiring a child and willing to use sperm from an anonymous donor will probably place little or no value on the child's interest in

[99] *See* Stewart, *Eliding*, *supra* note 23, at 534 n.186.

knowing and being reared by both his mother and father. And, someone not engaged himself in the exercise of religion and distrustful of those who are may place little value on the religious liberties at stake here. As a final example, someone who has bought in wholly to the radical social constructionist theory of gender probably will not place any value on the benefits of gender complementarity in child-rearing. To the extent anyone personally devalues man-woman marriage's benefits, he or she will probably also devalue society's efforts to preserve and perpetuate that distinct institution.

These personal valuations of man-woman marriage's unique social benefits no doubt arise in large part from what John Rawls called people's "comprehensive doctrines."[100] The Supreme Court has not written his notion of "public reason" into constitutional jurisprudence, and we do not advocate for that. We raise Rawls only to frame this issue: In assessing whether there are sufficiently good reasons to sustain Nevada's Marriage Laws against constitutional attack, how do the judges of this Court *value* the societal interests those laws protect? Certainly it should not be on the basis of their respective comprehensive doctrines. Judging on the basis of one's own comprehensive doctrines leads, in operation, to the kind of

[100] *See* John Rawls, *Political Liberalism* 13 (1995); *see also* John Rawls, *The Idea of Public Reason Revisited*, 64 U. Chi. L. Rev. 765 (1997).

problematic judging seen in *Dred Scott*,[101] in *Lochner*[102] and its progeny, and in this Court's *en banc* decision in the Washington assisted-suicide case.[103]

Judicial valuation of the societal interests that laws are designed to protect should be based on both objectively reasonable considerations and due deference to the valuations emerging from democratic processes. Applying that answer leads to a high valuation of the benefits materially and even uniquely provided by the man-woman marriage institution and therefore protected and advanced by Nevada's Marriage Laws. Society has a compelling interest in its own perpetuation, both biologically and culturally. The man-woman marriage institution is the best device humankind has yet devised to assure, to the greatest extent possible given human nature, the orderly reproduction of society. Society has a compelling interest, based in a universally shared *public* morality, both to assure that the children, the weakest and most vulnerable among it, are reared in the optimal mode, again to the greatest extent possible given human nature, and to vindicate the child's interest in knowing and being reared by her mother and father.

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[101] *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), *superseded by* U.S. Const. amend. XIII, §§ 1 & 2 and U.S. Const. amend. XIV, § 1.

[102] *Lochner v. New York*, 198 U.S. 45 (1905), *overruled in part by Ferguson v. Skrupa*, 372 U.S. 726 (1963).

[103] *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996) (en banc), *rev'd*, *Washington v. Glucksberg*, 521 U.S. 702 (1997). We reference this case with due respect, to remind that the judges of this Court, like all other judges, are not entirely immune to the temptation to substitute their own value judgments for those made democratically.

And if the first part of the First Amendment teaches anything, it is that our society and our Constitution value highly religious liberties *qua* religious liberties, thereby making their protection against the likely depredations of a genderless marriage regime both important and valuable.

IV. *BAKER V. NELSON* BINDS THIS COURT TO RULE AGAINST THE PLAINTIFFS.

On this issue, the Coalition adopts the analysis of the First Circuit in its DOMA case[104] and the portions of the Governor's and Clerk/Recorder Glover's respective Answering Briefs consistent with that analysis. We add just two observations.

One, the Supreme Court's resolution of *Baker v. Nelson* was fully consistent with, and is rightly seen as a straightforward application of, our constitutional jurisprudence on the right, power, and sovereignty of the states to define marriage within their respective borders. That jurisprudence stretches from the beginning of the Republic right through *Windsor* (as we show in the following Section).

Two, in arguing against application of the *Baker v. Nelson* judgment here, Plaintiffs quote Justice Ginsburg's comments made during oral argument in *Hollingsworth* to the lawyer arguing in favor of Proposition 8. Opening Br. at 96–97. In aid of his position, that lawyer had invoked *Baker v. Nelson.* Justice

[104] *Massachusetts v. U.S. Dep't of Health & Human Servs*., 682 F.3d 1, 8 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2884 (U.S. 2013).

Ginsburg expressed some thoughts on the precedential value of that decision in the Supreme Court. *In the Supreme Court* is the point Plaintiffs miss. A Supreme Court dismissal for want of a substantial federal question is a ruling on the merits *binding* on the lower federal courts, *e.g.*, *Hicks v. Miranda*, 422 U.S. 332, 343–45 (1975), but with a lesser precedential value at the Supreme Court itself, *e.g.*, *Tully v. Griffin, Inc*., 429 U.S. 68, 74 (1976) (a summary disposition of an appeal "is not *here* 'of the same precedential value as would be an opinion of this Court treating the question on the merits,'") (quoting *Edelman v. Jordan*, 415 U.S. 651, 671 (1974) (emphasis added)). Accordingly, Justice Ginsburg's comments add nothing to this Court's analysis of the extent to which *Baker v. Nelson* binds *this* Court. That extent, of course, is completely.

V. *WINDSOR* SUPPORTS NEVADA'S MARRIAGE LAWS.

We read *Windsor* in its entirety and as part and parcel of and consistent with the totality of Supreme Court jurisprudence in this area. Read in its entirety and not as an aberration, *Windsor* supports Nevada's Marriage Laws.

A. *Windsor* reviewed a law materially different in motivation, authority, operation, and consequences from Nevada's Marriage Laws.

To correctly understand the reason that the Supreme Court found the line-drawing in *Windsor* constitutionally offensive, it is of paramount importance to

correctly identify the classes created by DOMA[105] and the consequences of its line-drawing. 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

[105] All references here to "DOMA" are limited to section 3 of the federal Defense of Marriage Act, 110 Stat. 2419 (1996), which amended the Dictionary Act at 1 U.S.C. § 7.

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.*[106] Specifically, the 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

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[106] *Windsor* also made clear the independence of one State, in making its marriage decisions, relative to all other States. The decision states that diversity among the States regarding same-sex marriage is consistent with the "the long-established precept that the incidents, benefits, and obligations of marriage . . . may vary, subject to constitutional guarantees, from one State to the next." 133 S. Ct. at 2692.

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 Plaintiffs ignore these central aspects of *Windsor*. Consequently, their misreadings and misuses of *Windsor* are many, and we counter those in the following sections.

B. Plaintiffs wrongly ask this Court to make the same mistake that Congress made with DOMA and that *Windsor* corrected.

The Plaintiffs' challenge to Nevada's definition of marriage invites this Court to make 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.

C. The Plaintiffs wrongly equate DOMA's discrimination found unconstitutional in *Windsor* with Nevada's profoundly different decision to preserve the man-woman marriage institution.

In the exercise of its sovereign authority, New York elected to experiment with a genderless marriage regime. That meant that it conferred equal marital status on all couples it deemed married, including the couple of which the *Windsor* plaintiff was a part. The federal government through DOMA, however, created two classes of married New York couples by treating some of them—same-sex couples—as not married *despite* New York's authoritative pronouncement to the contrary. *Windsor* held unconstitutional the federal creation of those two classes of married couples and their resulting disparate treatment under federal law.

Plaintiffs seek to cast what *Windsor* held to be unconstitutional as any governmental decision about marriage that distinguishes between man-woman couples and same-sex couples. But there is no justification for such a characterization. *Windsor* itself said:

> The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in

> violation of the Fifth Amendment. This opinion and its holding are confined to those lawful marriages.

133 S. Ct. at 2696.

Further, large and compelling differences exist between DOMA's decision regarding New York married couples (what *Windsor* struck down) and Nevada's decision to preserve man-woman marriage (what *Windsor* supports). First, and most obviously, Nevada exercised, just as New York did, its sovereign powers over the marriage institution within its borders, *see, e.g.*, *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) ("[D]omestic relations [is] an area that has long been regarded as a virtually exclusive province of the States."), whereas the federal government with DOMA acted without delegated authority because "'the Constitution delegated *no authority* to the Government of the United States on the subject of marriage and divorce,'" *Windsor*, 133 S. Ct. at 2691(quoting *Haddock*, 201 U.S. at 575) (emphasis added).

Second, Nevada decided to preserve the man-woman marriage *institution*. Because of the very nature of that institution, Nevada's decision is far different, in a profoundly substantive way, from the federal government's decision in DOMA. The federal government had *no* effective or constitutional power to preserve the institution in New York exactly because that State had already used its sovereign powers to mandate a genderless marriage regime and thereby de-institutionalize

over time man-woman marriage. But Nevada has both effective and constitutional power to preserve the man-woman marriage institution and has chosen to use it. As *Windsor* pointed out in the language just quoted, DOMA had "no legitimate purpose" in infringing on New York's sovereign power over marriage in that State and on the marital status of those whom that State authorized and deemed to be married. But Nevada's project of preserving the man-woman marriage institution is far different from the DOMA project and serves powerful legitimate purposes. Those purposes, stated most succinctly, are to perpetuate the valuable social benefits materially provided by the man-woman marriage institution and likely to be lost if the law suppresses the man-woman meaning at the core of and constitutive of the institution. We have demonstrated those benefits and their jeopardy in Section I above.

Yes, Nevada made a choice different from New York's choice, but the legitimate purposes and interests to be served by Nevada's choice are at least as powerful and valid as those New York thinks it is advancing and, in the judgment of Nevada's citizens, will be most beneficial to marriage, to generations of children yet to come, and to society generally. Most importantly for present purposes, *Windsor* did not enshrine in the Constitution New York's choice any more than it did that for Nevada's choice; rather, *Windsor* protected our federal balance by

striking down DOMA's unauthorized and unjustified interference with New York's choice. Especially in light of *Windsor*, this Court should reject the Plaintiffs' importuning that this Court make its own DOMA-like interference with Nevada's choice.

D. The Plaintiffs wrongly read *Windsor* as recognizing a free-standing substantive due process right to "equal dignity" that requires judicial imposition of a genderless marriage regime.

Plaintiffs argue that judicial imposition of a genderless marriage regime is constitutionally required to vindicate the right of same-sex couples and the children connected to their relationships to "equal dignity" because perpetuation of the man-woman marriage institution violates that right. Opening Br. at 38–48. Plaintiffs purport to derive this so-called right from *Windsor*. But this is a clear misreading. The Supreme Court saw this: New York's genderless marriage regime confers an equal marital status on all couples that State authorizes and deems to be married, whether man-woman couples or same-sex couples. That status confers benefits and advances interests, including economic breaks and heightened dignity or social standing. Because the marriage status is equal for all New Yorkers who enjoy it, so too is the dignity conferred by that status. This "equal dignity" is thus a creation of the State of New York, and, indeed, its conferral and enjoyment no doubt constitute one of the reasons that State elected to

go the genderless marriage route. But this "equal dignity" is not also a creation of the federal constitution. What is a creation of the federal constitution is our federalism and the equal protection right against harm-inflicting classifications made without sufficiently good reasons. Because DOMA inflicted harm on married New York same-sex couples by diminishing, with "no legitimate purpose," their *State-conferred* "equal dignity" in marriage, *Windsor* vindicated the federal constitutional interests conjoined by the facts of this case, our federalism and equal protection of the laws.

But *Windsor* certainly did ***not*** create a free-standing substantive due process right to equal dignity for people generally or to equal dignity for gay men and lesbians or to equal dignity for same-sex couples relative to marriage. Nothing in the decision sustains the notion that it did such a thing. Much in the decision defeats that notion, including the express language limiting the holding to a situation where federal legislation operates "to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity" and thereby is operating "to displace this [State-conferred] protection and treating those persons as living in marriages less respected than others . . . . This opinion and its holding are confined to those lawful marriages." 133 S. Ct. at 2696. Beyond the decision itself is the powerful reality that the Supreme Court has not read "dignity" or

"equal dignity" into our body of constitutional law as either a free-standing right or a value or even an interpretive guide—despite (or because of) efforts by its counterparts in other countries to do that.[107] A right to "equal dignity" has no inherent boundaries or limitations and thus, if judicially recognized, must become nothing other than a powerful machine for imposition of judicial notions of the good and thereby for material constriction of the realms of national life governed by democratic processes.[108]

E. Plaintiffs wrongly read *Windsor* as basing a "right" to genderless marriage on "harm" to same-sex couples and the children connected to their relationships.

Plaintiffs devote much of their Opening Brief to discussion of the "harms" experienced by same-sex couples and the children connected to them as a consequence of the absence of a genderless marriage regime. Opening Br. at 17–29. Those harms are said to include harms (i) to social status and a sense of self-worth (that is, to a "dignity" interest); (ii) to practical or administrative interests; and (iii) to the absence of federal benefits, primarily of an economic nature, accorded married people. (Because of Nevada's DPA, there is no loss of access to State economic benefits accorded married people.) Lodged within this discussion of harms are the related notions that these harms (i) give rise to a fundamental

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107 *See* Stewart, *Judicial Redefinition*, *supra* note 23, at 100–19.

108 *See id.*

substantive due process right to a genderless marriage regime, with the resulting heavier burden on the State to justify its "interference" with this supposed right, and (ii) result in a heightened level of judicial scrutiny of the Plaintiffs' equal protection claims. These notions are wrong.

Consistent with well-settled constitutional jurisprudence, *Windsor* never suggests that the *extent* of resulting harm somehow determines the recognition or not of a fundamental substantive due process right. If an interest does not otherwise qualify as a fundamental right, or protected liberty interest, it does not qualify whether harm to the interest is great or little. If there is real and remediable harm to a protected liberty interest, whether great or little, the law will vindicate the interest.

The same holds true in the equal protection context. The State's reasons for a classification are adjudged sufficiently good or not independently of the extent of harm to the disfavored class, except where the classification impinges on a fundamental right such as freedom of speech. *Dandridge v. Williams*, 397 U.S. 471 (1970), illustrates the correct and limited role of "harm" in equal protection jurisprudence. Maryland put a cap on welfare payments so that large impoverished families received less than they needed, whereas smaller impoverished families were not so harmed. *Id.* at 472–73. The Supreme Court was not at all callous

towards the large families' harsh conditions but nevertheless held that the classification must be subjected to rational basis review.

> To be sure, the cases cited, and many others enunciating this fundamental standard [of rational basis review] under the Equal Protection Clause, have in the main involved state regulation of business or industry. The administration of public welfare assistance, by contrast, involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard. . . . [I]t is a standard that is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy.

Id. at 485–86 (citations and footnotes omitted).[109]

In substantive due process jurisprudence, the threshold question is whether the right asserted by the plaintiff is a fundamental right guaranteed by the Fourteenth (or Fifth) Amendment's due process clause. In answering this first question, it is the nature of the interest asserted, not the extent of the harm, that matters. This important principle first became clear in procedural due process cases. *E.g.*, *Bd. of Regents v. Roth*, 408 U.S. 564, 570–71 (1972) ("[T]o determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake."). It is now equally clear in substantive due process cases. Thus, in *United States v. Juvenile Male*, 670 F.3d

[109] *Dandridge v. Williams* itself explains the First Amendment exception to the general rule that the extent of harm does not alter the equal protection equation. 397 U.S. 471, 484 (1970).

999 (9th Cir. 2012), certain juveniles claimed a substantive due process right not to be registered as sex offenders because the resulting harms were grievous, amounting to an "onerous lifetime probation." *Id.* at 1011. But this Court gave no role to that harm in deciding whether to recognize the asserted right; it held against the claim of fundamental right and applied rational basis review. *Id.* at 1012–13. This Court's approach was consistent with that of the Supreme Court in *Washington v. Glucksberg*, 521 U.S. 702 (1997). There the Court did not weigh or even consider the plight of terminally ill persons who desired to end their life with "dignity" but were precluded from doing so by the statute prohibiting assisted suicide; rather, like this Court in *Juvenile Male*, it applied rational basis review. *Glucksberg*, 521 U.S. at 728.

Windsor is fully consistent with this settled law. It did *not* use the perceived harms to the disfavored class (economic and dignitary) to recognize a fundamental right or to impose heightened scrutiny. The decision contains no language suggesting it did either. The decision itself makes clear its purpose for examining at some length those perceived harms—to determine whether DOMA's discrimination between two classes of lawfully married couples was "of an unusual character" and "motivated by an improper animus or purpose." 133 S. Ct. at 2693

(referencing *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973), and *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

> The responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact the State's classifications have in the daily lives and customs of its people. DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.

Id. *Windsor*'s examination of the perceived harms demonstrated the existence of "a disadvantage, a separate status, and so a stigma" and did so as part of the larger endeavor of showing, as required by *Moreno* and *Romer*, that the "purpose and practical effect of the law here in question [was] to impose" such harms. 133 S. Ct. at 2693.

In light of the settled law set forth above and honored by *Windsor*, the Plaintiffs' extended discussion of their plight resulting from the absence of a genderless marriage regime in Nevada is simply not relevant to the substantive due process issue of a fundamental right to such a regime or to the equal protection issue of the level of judicial scrutiny applied to the decision to preserve the man-woman marriage institution.

The Plaintiffs argue one particular harm at length: because not married in the eyes of Nevada law, they do not receive the federal benefits accorded married persons. Opening Br. at 17–22. This argument has three fatal defects. First, under settled law and as already noted, this harm (like the others advanced) is not relevant to the due process fundamental right issue or to the equal protection level of judicial scrutiny issue.

Second, this lack-of-federal-benefits harm is *not* relevant to *any* issue in this case. Plaintiffs' Complaint attacks only the exercise of State power, never the exercise of federal power. Yet it is federal power that limits certain federal benefits to couples lawfully married in their jurisdiction of residence. Only federal power can expand the class of recipients of those federal benefits, and certainly Congress has the power to make those benefits available to couples lawfully married in any jurisdiction and/or to couples in a legal domestic partner relationship, such as those who take advantage of Nevada's DPA. The fact that federal law has not—or has not yet—expanded in those ways is in no way a function of State action. If the federal decision to limit benefits to couples lawfully married in their jurisdiction of residence violates any constitutional provision,[110] that provision is the Fifth Amendment, not the Fourteenth Amendment, and this is only a Fourteenth Amendment case.

[110] It does not. *See Dandridge v. Williams*, 397 U.S. 471 (1970).

Third, if this argument about lack-of-federal-benefit harms is meant to track *Windsor*'s approach to harms—to consider the existence of "a disadvantage, a separate status, and so a stigma" as part of the larger endeavor of considering whether the "purpose and practical effect of the law here in question [was] to impose" such harms—the argument fails entirely. In 2000 and 2002, when Nevada's voters passed the Marriage Amendment, DOMA was the law of the land, and it prevented federal marriage benefits to same-sex couples *regardless* of the content of State law. So it is ludicrous to suggest that the voters' motive was to deprive same-sex couples of those federal benefits. That leaves only the possibility—equally ludicrous—that after the Supreme Court's 5-4 decision in *Windsor* in June 2013, Nevada's voters suddenly developed the mean-spirited motive to maintain Nevada's Marriage Laws so as to "facilitate" the deprivation resulting from the limits in federal laws—with that motive rendering the Marriage Laws unconstitutional the hour after *Windsor* was announced.

In sum, the Plaintiffs' lengthy discussion of harms advances not at all the principled resolution of the real and important issues in this case but rather confuses work on that task.

VI. THERE IS NO FUNDAMENTAL RIGHT TO A GENDERLESS MARRIAGE REGIME.

Because the Supreme Court has repeatedly recognized the fundamental right of a man and a woman to marry,[111] Plaintiffs argue that this right must extend to same-sex couples as well. Opening Br. at 30–38. However, nearly all courts that have considered that argument have rejected it. It runs afoul of the settled law that governs recognition of a new fundamental right and polices the boundaries of fundamental rights already recognized. And, most important of all, it is constructed on a notion of what marriage *is* that is profoundly at odds with the social institutional realities of contemporary American marriage.

Over the twenty years American courts have been intensely engaged with the marriage issue, most have either expressly rejected same-sex couples' fundamental-right argument or declined to accept it although it was presented to them.[112] This rejection is right in light of the settled law governing the fundamental-rights issue generally and in light of the social realities of marriage.

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[111] *See, e.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (collecting cases).

[112] *E.g.*, ER 34 n.9; *Jackson v. Abercrombie*, 884 F.Supp.2d 1065, 1098 (D. Haw. 2012); *Wilson v. Ake*, 354 F.Supp.2d 1298, 1307 (M.D. Fla. 2005); *Standhardt v. Super. Ct.*, 77 P.3d 451, 460 (Ariz. Ct. App. 2003); *Dean v. District of Columbia*, 653 A.2d 307, 332–33 (D.C. 1995); *Baehr v. Lewin*, 852 P.2d 44, 55-57 (Haw. 1993); *Morrison v. Sadler*, 821 N.E.2d 15, 29 (Ind. Ct. App. 2005) (agreeing with due process holding in *Standhardt*); *Conaway v. Deane*, 932 A.2d 571, 624 (Md. 2007); *Lewis v. Harris*, 908 A.2d 196, 211 (N.J. 2006) ("Despite the rich diversity of this State, the tolerance and goodness of its people . . . we cannot find that a right to same-sex marriage is so deeply rooted in the traditions, history, and

This Court recently summarized that settled law:

> The Supreme Court has described the "fundamental" rights protected by substantive due process as "those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment." Those rights are few, and include the right to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, to abortion, and to refuse unwanted lifesaving medical treatment. [An asserted right must] be "so rooted in the traditions and conscience of our people as to be ranked as fundamental," . . . and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed[.]"

United States v. Juvenile Male, 670 F.3d 999, 1012 (9th Cir. 2012), (citations omitted). And importantly for present purposes, this Court also emphasized "that the analysis begins with a 'careful description of the asserted right.'" *Id.* (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)). Indeed, in case after case, the Supreme Court has insisted on "carefully formulating the interest at stake in substantive due process cases." *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997). In *Glucksberg*, for instance, the Court rejected broad statements of the asserted interest, such as "a liberty interest in determining the time and manner of one's own death" or "the right to choose a humane, dignified death," in favor of the more

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conscience of the people of this State that it ranks as a fundamental right."); *Hernandez v. Robles*, 855 N.E.2d 1, 17–18 (N.Y. 2006); *Andersen v. King Cnty.*, 138 P.3d 963, 979 (Wash. 2006) (en banc) (calling a conclusion that there is a fundamental right "astonishing").

precise formulation "whether the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so." *Id.* at 722–23 (citations omitted).

The Plaintiffs' description of the asserted right is not careful; in fact, nowhere do they explicitly describe the right, relying instead on a series of allusions and negative analogies. Opening Br. at 31–38. Thus, they suggest that the right "touches on . . . fundamental privacy rights," *id.* at 31, partakes of "freedom of personal choice," *id.* at 32, includes "'the freedom of choice' of whom to marry," *id*. at 33, and "the freedom to choose one's partner," *id*., implicates "the liberty of individuals to build important personal relationships," *id*. at 34, and includes "the right of all people to enter into intimate associations," *id*. The right Plaintiffs seek to have declared fundamental, however, is not at all difficult to describe. The existing right to marry is and unquestionably always has been the right of a man and a woman to marry. That is not the right Plaintiffs seek to vindicate. They seek "fundamental right" status for a right to marry another person of the same sex. Only this statement meets the degree of descriptive care *Glucksberg* demands. *See* 521 U.S. at 722.

Our fundamental-rights jurisprudence, applied in a quite straight-forward way, will not hold the right to marry a person of the same sex to be a fundamental

right. The right to marry a person of the same sex does not meet the test recently restated in *Juvenile Male*. Historically, this Nation never recognized the right. It did not exist anywhere in this Nation until a 4-3 decision of the Massachusetts Supreme Judicial Court mandated it in that State in 2003 (effective date 2004). Although a minority of the other States have followed suit, either by judicial mandate or legislative action,[113] at the same time that was happening something very big happened in our national life: thirty-one States amended their constitutions to protect marriage as the union of a man and a woman, and six more States continued protection by legislation.[114] So whether one looks back to the time of the Founding or to the time of the Civil War Amendments or to just the past fifteen or twenty years, the view is the same: This Nation and its people have not caused the "right" to marry a person of the same sex to be deeply rooted in our history and traditions or to be fundamental to our concept of constitutionally ordered liberty, such that neither liberty nor justice would exist if the "right" were not enshrined in constitutional law. Rather, this Nation and most of its people have sought to preserve "the union of a man and a woman" as a core meaning of our vital social institution of marriage.

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[113] *See* Addendum of Pertinent Authorities ("Add.") at A-10 to A-17; note 97 *supra*.

[114] *See* Add. at A-8 to A-15.

The cases relied on by Plaintiffs do not support a contrary conclusion. *Lawrence v. Texas*, 539 U.S. 558 (2003), expressly 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 present case does not . . . involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.* at 578. And Justice O'Connor said that "preserving the traditional institution of marriage" would be a "legitimate state interest." *Id*. at 585 (O'Connor, J., concurring).

Loving v. Virginia, 388 U.S. 1 (1967), *Zablocki v. Redhail*, 434 U.S. 374 (1978), and *Turner v. Safley*, 482 U.S. 78 (1987), hold no relevance at all. Each decision invalidated a state law withholding marriage from man-woman couples for reasons that have nothing to do with this case. Moreover, the invocation of *Loving* as part of the strategy to equate the man-woman meaning in marriage to anti-miscegenation laws (described in the Introduction) reminds that the comparison is a false analogy and therefore provides no basis for any court to mandate the redefinition of marriage.[115]

The Plaintiffs also quote a plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992), that certain

[115] Regarding the fallacy of this strategy, *see* Blankenhorn, *Future*, *supra* note 34, at 172–79; Girgis, *supra* note 34, at 77–81; Monte Neil Stewart & William C. Duncan, *Marriage and the Betrayal of* Perez *and* Loving, 2005 BYU L. Rev. 555.

"matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." Opening Br. at 39. But in a subsequent majority opinion, the Supreme Court expressly denied that its "liberty jurisprudence, and the broad, individualistic principles it reflects" safeguards a range of interests derived from "a general tradition of 'self-sovereignty'" or "deduced from abstract concepts of personal autonomy." *Glucksberg*, 521 U.S. at 724–25 (citation omitted). Instead, the Court has taught: "That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected, and *Casey* did *not* suggest otherwise." *Id.* at 727–28 (citations omitted) (emphasis added).

The social realities of the marriage institution make starkly clear just how novel, how profoundly radical, how different from the fundamental right to marry the Plaintiffs' asserted "right" is. Plaintiffs can marry or have their foreign marriages recognized only if Nevada changes or is forced to change its legal meaning of marriage from the union of a man and a woman to the union of two persons without regard to gender. That is certain. This means that the right Plaintiffs are seeking, in reality and substance, is the right to have a State-imposed

genderless marriage regime. This is the only right the State can give them. Although the State has the power through the law to suppress the man-woman meaning and thereby de-institutionalize the current marriage institution, the State has no power to usher the Plaintiffs or any other same-sex couples into that venerable institution. The very act of ushering them in will transform the old institution (not all at once, of course, but certainly over time) and make it into a profoundly different institution, one whose meanings, values, practices, and vitality are speculative but certainly different from the meanings, values, practices and vitality up until now inhering in the man-woman marriage institution.[116] Thoughtful and informed people have recognized from the beginning of the contest over the marriage issue that, although same-sex couples look to the law to let them into the privileged institution and the law may want to, it cannot; it can only give

[116] *See* Brian Bix, *Reflections on the Nature of Marriage*, *in* Revitalizing the Institution of Marriage for the Twenty-First Century: An Agenda for Strengthening Marriage 112–13 (Alan Hawkins et al. eds., 2002):

> Marriage is an existing social institution. One might also helpfully speak of it as an existing "social good." The complication in the analysis is that one cannot fully distinguish the *terms* on which the good is available from the *nature* of the good. As Joseph Raz wrote regarding same-sex marriage, "When people demand recognition of gay marriages, they usually mean to demand access to an existing good. In fact they also ask for the transformation of that good. For 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."

them access to a different regime of different value.[117] So there is both a radical and an extremely radical aspect of the "fundamental right" the Plaintiffs want this Court to recognize: a right to both State creation of a genderless marriage regime and State suppression of the man-woman marriage institution that unavoidably competes with it. That is not a "fundamental right" in our national and constitutional heritage but is the likely destroyer of one.

Because of this point, Plaintiffs and all genderless marriage advocates must of necessity embrace the narrow or close personal relationship description of marriage and try to get the courts to do the same, all the while trying to get them also to turn a blind eye to the broad description of American marriage. The narrow view posits a marriage regime already much like a genderless marriage regime, as noted in Section I.C. above. But robust legislative facts sustain the broad description of marriage and therefore sustain what we say here about the extremely radical nature of the "fundamental right" claimed by the Plaintiffs.

VII. THERE IS NO LEGAL OR FACTUAL BASIS FOR DEPLOYING "HEIGHTENED SCRUTINY" IN THIS CASE.

Plaintiffs' plea for "heightened scrutiny" fails for at least three reasons. One, Nevada's Marriage Laws infringe on no fundamental right. Two, the Supreme Court is no longer in the business of dispensing "suspect classification"

[117] *See id.*; Stewart, *Judicial Redefinition*, *supra* note 23, at 83–85.

designations to this or that identity group so as to shield them from the workings of normal democratic processes. Three, even if the Supreme Court were open to such, the gay/lesbian community cannot satisfy the requirements for such a designation, especially the "politically powerless" requirement.

The previous section establishes the first reason. As this Court recently said in *United States v. Juvenile Male:* "In a substantive due process analysis, we must first consider whether the statute in question abridges a fundamental right. If [it does] not, the statute need only bear a 'reasonable relation to a legitimate state interest to justify the action.'" 670 F.3d 999, 1012 (9th Cir. 2012) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997)). That is rational basis review.

As to the second reason, from *Romer* to *Lawrence* to *Windsor*, there has been a tremendous push to have the Supreme Court hold that sexual orientation discrimination triggers heightened scrutiny. Consistently, the Court has not done that. This reality, stretching now over almost two decades, validates this assessment from one of the leading advocates of genderless marriage:

> All classifications based on other characteristics—including age, disability, and *sexual orientation*—currently receive rational basis review. Litigants still argue that new classifications should receive heightened scrutiny. Yet these attempts have an increasingly antiquated air in federal constitutional litigation, as the last classification accorded heightened scrutiny by the Supreme Court was

> that based on nonmarital parentage in 1977. At least with respect to federal equal protection jurisprudence, *this canon has closed*.

Kenji Yoshino, *The New Equal Protection*, 124 Harv. L. Rev. 747, 756–57 (2011) (emphasis added). The district court in this case stated well the likely reason for that canon closing. ER 27–28.

As to the third reason, even if the old canon were still open to addition, the gay/lesbian community cannot meet the requirements for "suspect classification" treatment, specifically the "immutability" and "politically powerless" requirements. This "suspect classification" issue—including the continuing validity of *High Tech Gays*[118] as this Circuit's authoritative voice on the issue—has been fully ventilated. We adopt the analysis on the issue provided by the district courts in this case and in the Hawai'i marriage case.[119] We add only two points.

First, as explained in the Introduction above, the theory of political powerlessness has been mugged by a gang of facts. In most succinct terms, genderless marriage advocates by their own account are winning and will continue to win the political battle in Nevada over marriage. This account relies on legislative nose counting and credible polling data and builds on the fact that super-majorities in both houses of the Nevada legislature in 2009 overrode the

[118] *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990).

[119] ER 14–30; *Jackson v. Abercrombie*, 884 F.Supp.2d 1065, 1099–1103 (D. Haw. 2012).

then-Governor's veto of the DPA and that the legislature just this year enacted a joint resolution starting the process of repealing the Marriage Amendment. As the district court so well explained, invoking heightened scrutiny often operates to preclude resolution of policy issues through democratic processes and, although that may be appropriate in defense of a socially disdained and politically powerless class or of a clear fundamental right, such preclusion in other cases inflicts grave injury on the very structure, logic, and genius of our form of government. ER 27–28. Nevada's gay/lesbian community simply has no valid claim on this Court for immunity from the rigors of democracy.

No doubt sensing this reality, the Plaintiffs argue that "the relative political powerless of a group [must be measured nationally], not in any one state." Opening Br. at 60 n. 36. The only authority cited is *Frontiero v. Richardson*, 411 U.S. 677, 685–88 (1973), which did not have before it this particular issue and made no comment or allusion to it. It is bad logic and bad constitutional law that Nevada must have its fair, open, effective, balanced democratic processes shunted aside because of supposed political "realities" in Mississippi.

Plaintiffs also wrongly argue that somehow *Windsor* must be viewed as endorsing the Second Circuit's adoption of heightened scrutiny in cases of sexual orientation discrimination. Opening Br. at 49–50 n. 30. *Windsor* did no such

thing. It did not address at all that aspect of the Second Circuit's decision. It did not adopt as its own any part of that decision. All it did was affirm the Second Circuit's judgment, which was an affirmance of the district court's order holding DOMA unconstitutional. In these circumstances, no authority supports the Plaintiffs' argument.

In short, the law directs that the constitutionality of Nevada's Marriage Laws be determined by way of rational basis review. Without in any way qualifying or backing away from that conclusion, we note again that Nevada's reasons for preserving the man-woman marriage institution are sufficiently good and powerful to sustain the Marriage Laws regardless of the level of scrutiny used.

VIII. NEVADA'S MARRIAGE LAWS DO NOT CONSTITUTE SEX DISCRIMINATION.

Plaintiffs argue that the Marriage Laws discriminate against then on the basis of sex. Opening Br. at 86–92. This is not a hard issue. First, the courts have nearly unanimously rejected that argument in the context of marriage cases.[120]

[120] *E.g.*, ER 12–16; *Jackson*, 884 F. Supp. 2d at 1098–99; *Smelt v. Orange*, 374 F. Supp. 2d 861, 876–77 (C.D. Cal. 2005); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1307–08 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123, 143 (W.D. Wash. 2004); *In re Marriage Cases*, 183 P.3d 384, 439 (Cal. 2008); *Conaway v. Deane*, 932 A.2d 571, 599 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1, 10–11 (N.Y. 2006); *Baker v. Vermont*, 744 A.2d 864, 880 n.13 (Vt. 1999); *Andersen v. King Cnty.*, 138 P.3d 963, 987–89 (Wash. 2006)(en banc); *Singer v. Hara*, 522 P.2d 1187, 1192 (Wash. App. 1974).

Second, Nevada's Marriage Laws treat men as a class and women as a class equally.

Third, marriage's provision of the statuses and identities of *husband* and *wife* does not constitute government endorsement of the "separate spheres tradition" or an impermissible sex-role allocation or perpetuate prescriptive sex stereotypes. Although some cultures and subcultures have hung various sex-roles and hence sex-role stereotypes on the pegs of *husband* and *wife*, such sex-roles and stereotypes and any resulting separate spheres tradition are not inherent in the two statuses, and nothing in Nevada's Marriage Laws reinforces sex-role stereotypes or seeks to influence husbands and wives in their decisions regarding roles and specializations. Indeed, the *husband* and *wife* statuses are the antithesis of a separate spheres ethos exactly because the man and the woman are entering into one and the same sphere—marriage.

Fourth, the Plaintiffs' sex discrimination argument, if accepted, would have the Fourteenth Amendment's Equal Protection Clause do something—mandate genderless marriage—that the proposed Equal Rights Amendment, which was advanced to provide *greater* protection against sex discrimination than the Fourteenth Amendment provides, would *not* do.

> What of the quality of debate in states that have not ratified the ERA? Some legislators . . . have explained "nay" votes on the ground

> that the ERA would authorize homosexual marriage. The congressional history is explicit that *the ERA would do no such thing.*

Ruth Bader Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 Tex. L. Rev. 919, 937 (1979) (emphasis added).

IX. NEVADA'S MARRIAGE LAWS ARE NOT THE RESULT OF ANIMUS AND A BARE DESIRE TO HARM.

The Supreme Court in *Windsor* inquired whether DOMA's discrimination between two classes of lawfully married couples in disregard of State law was "of an unusual character" and whether DOMA was "motivated by an improper animus or purpose." *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (referencing *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973), and *Romer v. Evans*, 517 U.S. 620, 633 (1996)). We have already shown how in that case the Court got to a "yes" answer on both questions. *See* Section V.E. above. Here, in contrast, "no" is without doubt the right answer to both questions.

First, as *Windsor* reaffirmed forcefully, it is for the several States to define and regulate marriage within their respective jurisdictions; their authority there is virtually plenary. Over the history of this Nation, the States *usually* have exercised that power to give the law's imprimatur and protection to the man-woman marriage institution. Indeed, before 2003, that is exactly how *every* State had always exercised that power. Since 2003, that has continued as the *usual* way, as shown by the enshrining, protecting, and perpetuating efforts of the large majority

of the States.[121] Indeed, DOMA's rejection of New York's marriage definition was as *unusual* a government action as Nevada's perpetuation of man-woman marriage is a *usual* one. Those actions are literally at opposite ends of the *unusual/usual* spectrum.

Second, regarding the question whether Nevada's Marriage Laws were "motivated by an improper animus or purpose," the absence of any *unusual* government action is strong evidence of "no," as *Windsor* teaches. Moreover, Plaintiffs cannot derive an animus conclusion from a supposed absence of legitimate reasons for the governmental action ***because, as shown by robust legislative facts, there are multiple, compelling, legitimate reasons for Nevada's Marriage Laws***. Faced with that reality but still desiring to get traction from the Supreme Court's animus doctrine, the Plaintiffs do the only thing they can do—they whistle past the graveyard, they ignore those legislative facts, they dismissively label them as a "baseless private view that marriage equality tarnishes the institution of marriage," Opening Br. at 16, and they disingenuously assert that "Defendant Officials have not identified injury to the institution of marriage," Opening Br. at 36, while ignoring that the Coalition ***has*** identified likely injury to the institution of marriage—and that Clerk-Recorder Glover, one of the "Defendant Officials," expressly adopted the Coalition's work-product, except the

[121] *See* Add. at A-8 to A-15.

portion addressing religious liberties.[122] Plaintiffs present no credible evidence of a "bare desire to harm." In contrast, we have shown how a wide and deep body of scholarly work is in full harmony with the judgments, intuitions, perceptions, assessments, and conclusions given voice in the votes of Nevada's citizens in favor of the Marriage Amendment and therefore in favor of preserving the man-woman marriage institution and the valuable benefits it materially and even uniquely provides. That showing negates the animus slander.

X. NEVADA'S DPA REINFORCES RATHER THAN UNDERMINES THE CONSTITUTIONALITY OF NEVADA'S MARRIAGE LAWS.

The Plaintiffs appear to argue that Nevada's enactment of its DPA undercuts Nevada's stated need to preserve the man-woman meaning at the core of the marriage institution because the DPA shows the State's official assessment to be that same-sex couples are as worthy as married man-woman couples of the duties, responsibilities, and rights of marriage, including those pertaining to parenthood. Opening Br. at 16, 36, 37, and 97 n. 51. Of course Nevada law recognizes with the DPA, as its good-spirited society does generally, that gay men and lesbians are capable, worthy, and contributing citizens of our State. But that reality is relevant only to the *Romer/Windsor* issue in that it shows the absence of animus towards gay men and lesbians and the absence in Nevada society of a bare desire to harm.

[122] Dist. Ct. Dkt. 97.

The "capability" reality is *not* relevant to the big constitutional issue: Does Nevada have sufficiently good reasons to preserve the man-woman marriage institution? As demonstrated above, those reasons *are* the valuable social benefits materially provided by that institution by way of its core man-woman meaning. By expressly identifying a domestic partnership as not marriage, Nev. Rev. Stat. § 122A.510, the DPA reinforces that demonstration. That demonstration is not altered at all by the relative capability or incapability of gay men and lesbians. That relative capability is simply not relevant to the ultimate constitutional issue. It is an argument for the arena of politics and ballot campaigns where the marriage issue rightly belongs.

Any suggestion that the DPA can or does counter any of the policy assessments and decisions advanced by the Marriage Amendment is defeated as a matter of law by the legislative status of the former and the constitutional status of the latter. *King v. Bd. of Regents of Univ. of Nevada*, 200 P.2d 221, 225–26 (Nev. 1948) (Nevada legislation cannot "contravene some expressed or necessarily implied limitation appearing in the [Nevada] constitution itself," and it is "not essential that any given limitation of power be definitely expressed in the constitution. Every positive direction contains an implication against anything

contrary to it, or which would frustrate or disappoint the purpose of that [constitutional] provision.") (internal quotations omitted).

CONCLUSION

The Coalition respectfully urges this Court to hold Nevada's Marriage Laws constitutional and affirm the district court's judgment.

Dated: January 21, 2014

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Defendant-Appellee Coalition for the Protection of Marriage is aware of no related cases pending in the United States Court of Appeals for the Ninth Circuit, other than the case identified as related in the Plaintiffs-Appellants' Opening Brief.

Dated: January 21, 2014

By: s/ Monte Neil Stewart
Monte Neil Stewart

Lawyers for Appellee Coalition for the Protection of Marriage

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-4, 29-2(c)(2) and (3), 32-2 or 32-4[1] for Case Number 12-17668

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Signature of Attorney or Unrepresented Litigant: s/ Monte Neil Stewart

("s/" plus typed name is acceptable for electronically-filed documents)

Date: January 21, 2014

[1] If filing a brief that falls within the length limitations set forth at Fed. R. App. P. 32(a)(7)(B), use Form 6, Federal Rules of Appellate Procedure.

ADDENDUM OF PERTINENT AUTHORITIES

TABLE OF CONTENTS

Page(s)

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Nev. Const. art. I, §21

Only a marriage between a male and female person shall be recognized and given effect in this state.

Nev. Const. art. XIX, § 2(1)

Notwithstanding the provisions of Section 1 of Article 4 of this Constitution, but subject to the limitations of Section 6 of this Article, the people reserve to themselves the power to propose, by initiative petitions, statutes and amendments to statutes and amendments to this Constitution, and to enact or reject them at the polls.

Nev. Const. art. XIX, §2(4)

If the initiative petition proposes an amendment to the Constitution, the person who intends to circulate it shall file a copy with the Secretary of State before beginning circulation and not earlier than September 1 of the year before the year in which the election is to be held. After its circulation it shall be filed with the Secretary of State not less than 90 days before any regular general election at

which the question of approval or disapproval of such amendment may be voted upon by the voters of the entire State. The circulation of the petition shall cease on the day the petition is filed with the Secretary of State or such other date as may be prescribed for the verification of the number of signatures affixed to the petition, whichever is earliest. The Secretary of State shall cause to be published in a newspaper of general circulation, on three separate occasions, in each county in the State, together with any explanatory matter which shall be placed upon the ballot, the entire text of the proposed amendment. If a majority of the voters voting on such question at such election votes disapproval of such amendment, no further action shall be taken on the petition. If a majority of such voters votes approval of such amendment, the Secretary of State shall publish and resubmit the question of approval or disapproval to a vote of the voters at the next succeeding general election in the same manner as such question was originally submitted. If a majority of such voters votes disapproval of such amendment, no further action shall be taken on such petition. If a majority of such voters votes approval of such amendment, it shall, unless precluded by subsection 5 or 6, become a part of this Constitution upon completion of the canvass of votes by the Supreme Court.

Nev. Rev. Stat. § 122.020

122.020 Persons capable of marriage; consent of parent or guardian.

1. 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.

2. A male and a female person who are the husband and wife of each other may be rejoined in marriage if the record of their marriage has been lost or destroyed or is otherwise unobtainable.

3. A person at least 16 years of age but less than 18 years of age may marry only if the person has the consent of:

(a) Either parent; or

(b) Such person's legal guardian.

Nev. Rev. Stat. § 122A.040

122A.040 "Domestic partnership" defined.

"Domestic partnership" means the social contract between two persons that is described in NRS 122A.100.

Nev. Rev. Stat. § 122A.100

122A.100 Registration: Procedure; fees; eligibility; issuance of certificate.

1. A valid domestic partnership is registered in the State of Nevada when two persons who satisfy the requirements of subsection 2:

(a) File with the Office of the Secretary of State, on a form prescribed by the Secretary of State, a signed and notarized statement declaring that both persons:

(1) Have chosen to share one another's lives in an intimate and committed relationship of mutual caring; and

(2) Desire of their own free will to enter into a domestic partnership; and

(b) Pay to the Office of the Secretary of State a reasonable filing fee established by the Secretary of State, which filing fee must not exceed the total of an amount set by the Secretary of State to estimate:

(1) The cost incurred by the Secretary of State to issue the Certificate described in subsection 3; and

(2) Any other associated administrative costs incurred by the Secretary of State.

Nev. Rev. Stat. § 122A.200

122A.200 Rights and duties of domestic partners, former domestic partners and surviving domestic partners.

1. Except as otherwise provided in NRS 122A.210:

(a) Domestic partners have the same rights, protections and benefits, and are subject to the same responsibilities, obligations and duties under law, whether derived from statutes, administrative regulations, court rules, government policies, common law or any other provisions or sources of law, as are granted to and imposed upon spouses.

(b) Former domestic partners have the same rights, protections and benefits, and are subject to the same responsibilities, obligations and duties under law, whether derived from statutes, administrative regulations, court rules, government policies, common law or any other provisions or sources of law, as are granted to and imposed upon former spouses.

(c) A surviving domestic partner, following the death of the other partner, has the same rights, protections and benefits, and is subject to the same responsibilities, obligations and duties under law, whether derived from statutes, administrative regulations, court rules, government policies, common law or any other provisions or sources of law, as are granted to and imposed upon a widow or a widower.

(d) The rights and obligations of domestic partners with respect to a child of either of them are the same as those of spouses. The rights and obligations of former or surviving domestic partners with respect to a child of either of them are the same as those of former or surviving spouses.

(e) To 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.

(f) Domestic partners have the same right to nondiscriminatory treatment as that provided to spouses.

(g) A public agency in this State shall not discriminate against any person or couple on the basis or ground that the person is a domestic partner rather than a spouse or that the couple are domestic partners rather than spouses.

(h) The provisions of this chapter do not preclude a public agency from exercising its regulatory authority to carry out laws providing rights to, or imposing responsibilities upon, domestic partners.

(i) Where necessary to protect the rights of domestic partners pursuant to this chapter, gender-specific terms referring to spouses must be construed to include domestic partners.

(j) For the purposes of the statutes, administrative regulations, court rules, government policies, common law and any other provision or source of law governing the rights, protections and benefits, and the responsibilities, obligations and duties of domestic partners in this State, as effectuated by the provisions of this chapter, with respect to:

(1) Community property;

(2) Mutual responsibility for debts to third parties;

(3) The right in particular circumstances of either partner to seek financial support from the other following the dissolution of the partnership; and

(4) Other rights and duties as between the partners concerning ownership of property,

any reference to the date of a marriage shall be deemed to refer to the date of registration of the domestic partnership.

2. As used in this section, "public agency" means an agency, bureau, board, commission, department or division of the State of Nevada or a political subdivision of the State of Nevada.

Nev. Rev. Stat. § 122A.510

122A.510 Domestic partnership not marriage for purposes of certain provisions of Nevada Constitution.

A domestic partnership is not a marriage for the purposes of Section 21 of Article 1 of the Nevada Constitution.

Nev. Stat. § 88 (1876)

Section 1. Section two of this Act is hereby amended, so as to read as follows: Section Two. Male persons of the age of eighteen years, and female persons of the age of sixteen year, not nearer of kin than second cousins, and not having a husband or wife living, may be joined in marriage; *provided always*, that male persons under the age of twenty-one years, and female persons under the age of eighteen years, shall first obtain the consent of their fathers, respectively, or in case of the death or incapacity of their fathers, then of their mothers or guardians; and, *provided further*, that nothing in this Act shall be construed so as to make the issue of any marriage illegitimate if the person or persons shall not be of lawful age.

. . . .

Laws of the Territory of Nevada, Part 2:33: 1861

Section 1. That marriage, so far as its validity in law is concerned, is a civil contract, to which the consent of the parties capable in law of contracting, is essential.

Section 2. Every male person, who shall have attained the full age of eighteen years, and every female, who shall have attained the full age of sixteen years, shall be capable, in law, of contracting marriage, if otherwise competent; provided,

however, that nothing in this act shall be construed so as to make the issue of any marriage illegitimate, if the person shall not be of lawful age; and provided, further, that all minor who shall have attained the age provided in this act for the contracting of marriage, shall be deemed in law to have attained their majority upon entering into the bonds of matrimony.

Section 3. No marriage shall be contracted while either the parties shall have a husband or wife living, nor between parties who are nearer of kin than second cousins, computing by the rules of civil law, whether the half or the whole blood.
. . . .

The Definition of Marriage:
Ballot Measures

Alabama: 2006; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 81%/19%

Alaska: 1998; to amend constitution to enshrine man-woman marriage; legislature initiated; passed 68%/31%

Arizona: 2006; to amend constitution to enshrine man-woman marriage and prohibit civil unions; voter initiated; failed 48%/52%

Arizona: 2008; to amend constitution to enshrine man-woman marriage; legislature initiated; passed 56%/44%

Arkansas: 2004; to amend constitution to enshrine man-woman marriage and prohibit civil unions; voter initiated; passed 75%/25%

California: 2000; to enact super-legislation to enshrine man-woman marriage; voter initiated; passed 61%/39%

California: 2008; to amend constitution to restore man-woman marriage; voter initiated; passed 52%/48%

Colorado: 2006; to amend constitution to enshrine man-woman marriage; voter initiated; passed 55%/45%

Florida: 2008; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 62%/38%

Georgia: 2004; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 76%/24%

***Hawaii:** 1998; to amend constitution to give legislature sole power to define marriage; legislature initiated; passed 69%/31%

Idaho: 2006; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 63%/37%

Kansas: 2005; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 70%/30%

Kentucky: 2004; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 75%/25%

Louisiana: 2004; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 78%/22%

Maine: 2009; to preserve man-woman marriage; voter initiated following legislature vote to approve genderless marriage; passed 53%/47%

Maine: 2012; to approve genderless marriage via referendum; voter initiated; passed 53%/47%

Maryland: 2012; to approve genderless marriage legislation; voter initiated following legislature vote to approve genderless marriage; passed 52%/48%

Michigan: 2004; to amend constitution to enshrine man-woman marriage and prohibit civil unions; voter initiated; passed 59%/41%

***Minnesota:** 2012; to amend constitution to enshrine man-woman marriage; legislature initiated; failed 47%/53%

Mississippi: 2004; to amend constitution to enshrine man-woman marriage; legislature initiated; passed 86%/14%

Missouri: 2004; to amend constitution to enshrine man-woman marriage; legislature initiated; passed 71%/29%

Montana: 2004; to amend constitution to enshrine man-woman marriage; voter initiated; passed 67%/33%

Nebraska: 2000; to amend constitution to enshrine man-woman marriage and prohibit civil unions; voter initiated; passed 70%/30%

Nevada: 2000; to amend constitution to enshrine man-woman marriage; voter initiated; passed 70%/30%

Nevada: 2002; to amend constitution to enshrine man-woman marriage; voter initiated; passed 67%/33%

North Carolina: 2012; to amend constitution to enshrine man-woman marriage; legislature initiated; passed 61%/39%

North Dakota: 2004; to amend constitution to enshrine man-woman marriage and prohibit civil unions; voter initiated; passed 73%/27%

Ohio: 2004; to amend constitution to enshrine man-woman marriage and prohibit civil unions; voter initiated; passed 62%/38%

Oklahoma: 2004; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 76%/24%

Oregon: 2004; to amend constitution to enshrine man-woman marriage; voter initiated; passed 57%/43%

South Carolina: 2006; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 78%/22%

South Dakota: 2006; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 52%/48%

Tennessee: 2006; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 81%/19%

Texas: 2005; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 76%/24%

Utah: 2004; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 66%/34%

Virginia: 2006; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 57%/43%

Washington: 2012; to approve genderless marriage legislation; voter initiated following legislature vote to approve genderless marriage; passed 54%/46%

Wisconsin: 2006; to amend constitution to enshrine man-woman marriage and prohibit civil unions; legislature initiated; passed 59%/41%

*Note: In Hawaii and Minnesota, a blank vote counts in essence as a "no" vote. For purposes of this appendix, in those two states, blank votes were counted as if they were "no" votes.

The Definition of Marriage:
Statutory and State Constitutional Provisions

Alabama: Ala. Const. amend. 774 (man-woman)

Alaska: Alaska Const. art. I, § 25 (man-woman)

Arizona: Ariz. Const. art. XXX (man-woman)

Arkansas: Ark. Const. amend. LXXXII, §1 (man-woman)

California: Cal. Const. art. I, § 7.5 (man-woman) struck down as unconstitutional by *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (purportedly binding as appeals were vacated or did not address merits) (genderless);

Colorado: Colo. Const. art. II, § 31 (man-woman)

Connecticut: Conn. Gen. Stat. § 46b-20 (genderless)

Delaware: Del. Code tit. 13, § 101 (genderless)

District of Columbia: D.C. Code § 46-401 (genderless)

Florida: Fla. Const. art. I, § 27 (man-woman)

Georgia: Ga. Const. art. I, § 4 ¶ 1 (man-woman)

Hawaii: Haw. Rev. Stat. § 572-1*et seq.* (man-woman)

Idaho: Idaho Const. art. III, § 28 (man-woman)

Illinois: 750 Ill. Comp. Stat. 5/213.1 (man-woman; genderless marriage scheduled to begin June 1, 2014, for most couples; *see also Lee v. Orr*, No. 1:13-cv-08719 (N.D. Ill. Dec. 16, 2013) (genderless marriage required immediately for terminally ill couples)).

Indiana: Ind. Code Ann. § 31-11-1-1 (man-woman)

Iowa: Man-woman definition struck down by *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (genderless)

Kansas: Kan. Const. art. XV, § 16 (man-woman)

Kentucky: Ky. Const. § 233A (man-woman)

Louisiana: La. Const. art. XII, § 15 (man-woman)

Maine: Me. Rev. Stat. tit. 19-A, § 650, 701 (genderless)

Maryland: Md. Code, Fam. Law § 2-201 (genderless)

Massachusetts: Man-woman definition struck down by *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (genderless)

Michigan: Mich. Const. art. I, § 25 (man-woman)

Minnesota: Minn. Stat. §§ 517.01 to .03 (genderless)

Mississippi: Miss. Const. art. XIV, § 263A (man-woman)

Missouri: Mo. Const. art. I, § 33 (man-woman)

Montana: Mont. Const. art. XIII, § 7 (man-woman)

Nebraska: Neb. Const. art. I, § 29 (man-woman)

Nevada: Nev. Const. art. I, § 21 (man-woman)

New Hampshire: N.H. Rev. Stat. § 457:1-a (genderless)

New Jersey: Man-woman definition struck down by *Garden State Equality v. Dow*, 2013 WL 5687193 (N.J. Super. Ct. Law Div. Sept. 27, 2013)

New Mexico: *Griego v. Oliver*, ___ P.3d ___, 2013 WL 6670704 (N.M. Dec. 19, 2013) (construing New Mexico marriage laws, N.M. Stat. §§ 40-1-1 *et seq.*, to mean the voluntary union of two persons to the exclusion of all others) (genderless)

New York: N.Y. Dom. Rel. Law § 10-a (genderless)

North Carolina: N.C. Const. art. XIV, § 6 (man-woman)

North Dakota: N.D. Const. art. XI, § 28 (man-woman)

Ohio: Ohio Const. art. XV, § 11 (man-woman)

Oklahoma: Okla. Const. art. II, § 35 (man-woman), declared unconstitutional by *Bishop v. United States ex rel. Holder*, ___ F. Supp. 2d ___, 2014 WL 116013 (D. Okla. Jan. 14, 2014)

Oregon: Or. Const. art. XV, § 5a (man-woman)

Pennsylvania: 23 Pa. Cons. Stat. § 1704 (man-woman)

Rhode Island: R.I. Gen. Laws § 15-1-1 *et seq.* (genderless)

South Carolina: S.C. Const. art. XVII, § 15 (man-woman)

South Dakota: S.D. Const. art. XXI, § 9 (man-woman)

Tennessee: Tenn. Const. art. XI, § 18 (man-woman)

Texas: Tex. Const. art. I, § 32 (man-woman)

Utah: Utah Const. art. I, § 29 (man-woman), declared unconstitutional by *Kitchen v. Herbert*, ___ F. Supp. 2d ___, 2013 WL 6697874 (D. Utah Dec. 20. 2013), *appeal docketed*, No. 13-4178 (10th Cir. Dec. 20, 2013).

Vermont: Vt. Stat. tit. 15, § 8 (genderless)

Virginia: Va. Const. art. I, § 15-A (man-woman)

Washington: Wash. Rev. Code § 26.04.020 *et. seq.* (genderless)

West Virginia: W. Va. Code § 48-2-104(c) (man-woman)

Wisconsin: Wis. Const. art. XIII, § 13 (man-woman)

Wyoming: Wyo. Stat. § 20-1-101 (man-woman)

Court Decisions on the Marriage Issue Since 1993

State Appellate Court Decisions:

- *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993)
- *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995)
- *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999)
- *Standhardt v. Super. Ct.*, 77 P.3d 451 (Ariz. Ct. App. 2003)
- *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003)
- *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004)
- *Li v. Oregon*, 110 P.3d 91 (Or. 2005)
- *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005)
- *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006)
- *Andersen v. King County*, 138 P.3d 963 (Wash. 2006)
- *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006)
- *Conaway v. Deane*, 932 A.2d 571 (Md. 2007)
- *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008)
- *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008)
- *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009)
- *Garden State Equality v. Dow*, 2013 WL 5687193 (N.J. Super. Ct. Law Div. Sept. 27, 2013)
- *Griego v. Oliver*, ___ P.3d ___, 2013 WL 6670704 (N.M. Dec. 19, 2013)

Federal Court Decisions:

- *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004)
- *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005)
- *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859 (8th Cir. 2006)
- *Gill v. Office of Personnel Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010)
- *In re Balas*, 449 B.R. 567 (Bankr. C.D. Cal. 2011)
- *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012)
- *Golinski v. Office of Personnel Mgmt.*, 824 F.Supp.2d 968 (N.D. Cal. 2012)
- *Massachusetts v. Health & Human Servs.*, 862 F.3d 1 (1st Cir. 2012)
- *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012)

- *Pedersen v. Office of Personnel Mgmt*., 881 F. Supp. 2d 394 (D. Conn. 2012)
- *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065 (D. Haw. 2012)
- *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012)
- *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675 (2013)
- *Kitchen v. Herbert*, ___ F. Supp. 2d ___, 2013 WL 6697874 (D. Utah Dec. 20, 2013)
- *Bishop v. United States ex rel. Holder*, ___ F. Supp. 2d ___, 2014 WL 116013 (D. Okla. Jan. 14, 2014)

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 21, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Monte Neil Stewart
Monte Neil Stewart