Case No. 12-17668

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BEVERLY SEVCIK, et al.,

Plaintiffs-Appellants,

v.

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.

PLAINTIFFS-APPELLANTS' OPENING BRIEF

Jon W. Davidson
Tara L. Borelli
Peter C. Renn
Shelbi D. Day
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
3325 Wilshire Blvd., Ste. 1300
Los Angeles, CA 90010
Tel.: (213) 382-7600

Carla Christofferson
Dawn Sestito
Dimitri Portnoi
Melanie Cristol
Rahi Azizi
O'MELVENY & MYERS LLP
400 S. Hope St.
Los Angeles, CA 90071
Tel.: (213) 430-6000

Kelly H. Dove
Marek P. Bute
SNELL & WILMER LLP
3883 Howard Hughes Parkway, Ste. 1100
Las Vegas, NV 89169
Tel.: (702) 784-5200

Attorneys for Plaintiffs-Appellants

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INTRODUCTION

This case arises from the exclusion of same-sex couples in Nevada from one of the most profound and cherished relationships in life: civil marriage. Two of the plaintiffs, Beverly Sevcik and Mary Baranovich, met decades ago when they lived across the street from one another. After spending many months talking and visiting, Beverly realized she had fallen in love with Mary — and Mary felt the same way. They exchanged rings on October 2, 1971, to symbolize their lifelong commitment to one another. More than forty years later, Mary and Beverly are grandparents living in Carson City, Nevada. Mary has "tremendous respect and admiration" for Beverly and "cannot imagine life without her." Beverly loves, admires, and respects so many things about Mary that she "could not possibly list them all." They have stood by one another "through the joys and struggles of life," and have shown time and again that their commitment to one another is truly "'til death do us part."[1]

Despite this commitment, Beverly and Mary cannot get married in Nevada. They were turned away by the Carson City Marriage Bureau when they applied for a marriage license.[2] Although they can (and have[3]) registered as domestic partners,

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[1] Excerpts of Record ("ER") 180–181 ¶¶ 2, 7–8, 185 ¶ 2, 186 ¶ 8 (beginning of Beverly and Mary's relationship); 181 ¶ 9, 186 ¶ 9 (exchange of rings); 180 ¶¶ 4–5, 181 ¶ 8, 186–187 ¶ 9 (Beverly and Mary's status as grandmothers); 182 ¶¶ 11–12, 187 ¶ 10 (Beverly and Mary's feelings about each other).

[2] ER 182–183 ¶ 14; 187–188 ¶ 13.

domestic partnership is different than marriage. As the Supreme Court recently reaffirmed, marriage confers "a dignity and status of immense import" that uniquely provides not only government but also community "recognition" and "protection" of couples and their families. *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013). It also confers a status recognized in over a thousand federal statutes, many intended to support family stability. And it has been recognized, in numerous opinions of the Supreme Court, as a fundamental right that may be a core component of an individual's pursuit of happiness.

Nevada denies same-sex couples access to marriage by constitutional amendment and statute. Defendants enforce their "marriage ban" both by barring same-sex couples from entering marriage, and by refusing to recognize marriages validly entered in other jurisdictions. But as the Supreme Court has acknowledged, treating the relationships of same-sex couples differently has the "purpose and practical effect . . . to impose a disadvantage, a separate status, and so a stigma." *Id.* at 2693.

This case, arising under the federal Equal Protection and Due Process Clauses, was brought by Beverly and Mary and seven other same-sex couples whose relationships have flourished for a combined total of more than 100 years. Most of the couples have children, ranging from toddlers to middle-aged, and other

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[3] ER 180 ¶ 2.

couples are planning to have children soon. Some couples live near the Vegas Strip surrounded by dozens of wedding chapels, some live in northern Nevada amidst the Sierra Madres. Some have been married in other jurisdictions, some are registered as domestic partners in Nevada, and some are waiting for state-sanctioned rights until marriage is legal in their home state. One thing unites all of these couples: They wish to be married in the State of Nevada.[4]

The district court rejected Beverly, Mary, and the other Plaintiffs' claims primarily on the ground that, if same-sex couples were permitted to marry, "it is conceivable that a meaningful percentage of heterosexual persons would cease to value the civil institution as highly as they previously had and hence enter into it less frequently . . . because they no longer wish to be associated with the civil institution as redefined," ER 32 — in other words, that some might not want to join the club if "those people" are admitted. This appeal followed.

JURISDICTIONAL STATEMENT

The United States District Court for the District of Nevada (the "district court") had original subject matter jurisdiction of this matter under 28 U.S.C. §§ 1331 and 1343 because the case raises claims under the Constitution of the United

[4] *See* ER 179–88 (declarations of Beverly Sevcik and Mary Baranovich); 189–98 (declarations of Theodore Small and Antioco Carrillo); 199–207 (declarations of Karen Goody and Karen Vibe); 208–215 (declarations of Greg Flamer and Fletcher Whitwell); 216–223 (declarations of Mikyla and Katrina Miller); 224–231 (declarations of Adele and Tara Newberry); 232–239 (declarations of Caren and Farrell Cafferata-Jenkins); 240–248 (declarations of Sara Geiger and Megan Lanz).

States. Ruling on cross-motions for summary judgment, the district court issued a decision on the merits and ordered entry of judgment on November 26, 2012. Judgment was entered and Plaintiffs filed a notice of appeal on December 3, 2012. The appeal is timely under Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether the district court erred in holding that federal due process guarantees do not secure the freedom to marry for same-sex couples in Nevada, or require that their valid marriages from other jurisdictions be recognized as marriages in Nevada.[5]

2. Whether the district court erred in rejecting Plaintiffs' claim that excluding same-sex couples from marriage in Nevada, or from having their valid marriages from other jurisdictions recognized as marriages in Nevada, violates the federal right to equal protection regardless of one's sexual orientation. This claim was raised by Plaintiffs in their complaint, briefed by the parties on the merits, and decided in the district court's decision. ER 717–22 ¶¶ 86–103.

[5] While Plaintiffs did not raise this claim below, the district court ruled on the issue regardless, ER 29, rendering appellate review of that ruling appropriate. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 323 (2010) ("Citizens United raises this issue for the first time before us, but we consider the issue because it was addressed by the court below.") (internal quotation marks omitted); *Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1054 (9th Cir. 2007) ("even if a party fails to raise an issue in the district court, we generally will not deem the issue waived if the district court actually considered it").

3. Whether the district court erred in rejecting Plaintiffs' claim that excluding same-sex couples from marriage in Nevada, or from having their valid marriages from other jurisdictions recognized as marriages in Nevada, violates the federal right to equal protection regardless of one's sex. This claim was raised by Plaintiffs in their complaint, briefed by the parties on the merits, and decided in the district court's decision. ER 13–16; 719–20 ¶¶ 86–94; 721 ¶¶ 97–98, 100; 722 ¶¶ 104–05.

The Court's review of these issues is *de novo*. *See* Section I, below.

ADDENDUM OF PERTINENT AUTHORITIES

Pursuant to Ninth Circuit Rule 28-2.7, Appellants have reproduced pertinent constitutional and statutory provisions in an Addendum to this brief.

STATEMENT OF THE CASE

Plaintiffs (collectively, "Plaintiffs" or "Plaintiff Couples") filed suit against Governor Brian Sandoval and three city and county clerks ("Defendant Officials") on April 10, 2012 challenging "Nevada Constitution article 1, § 21, Nevada Revised Statutes § 122.020, and all other sources of state law that preclude marriage for same-sex couples or prevent recognition of marriages because those marriages were entered by individuals of the same sex." ER 719 ¶ 89.[6] Plaintiff

[6] The district court puzzlingly stated that, aside from the Nevada constitutional and statutory ban on marriage for same-sex couples, "Plaintiff [Couples] do not appear to challenge any other provisions of Nevada law," ER 12, overlooking

Couples sought injunctive and declaratory relief to redress the violation of their rights under the Fourteenth Amendment to the United States Constitution. ER 723 ¶¶ A–C. The Coalition for the Protection of Marriage, which was the proponent of the Nevada constitutional amendment banning access to marriage, moved to participate as a Defendant-Intervenor ("Intervenor"). Dist. Ct. Dkt. 30[7]; ER 3.

Governor Sandoval moved to dismiss the case, arguing solely that the district court lacked subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) to hear Plaintiff Couples' claims based on the Supreme Court's summary dismissal in *Baker v. Nelson*, 409 U.S. 810 (1972) (mem.). Dist. Ct. Dkt. 32. The district court, without explanation, subsequently recast this as a motion under Rule 12(b)(6). ER 4–5. Carson City Clerk-Recorder Alan Glover joined Governor Sandoval's motion. Dist. Ct. Dkt. 33. Clark County Clerk Diana Alba and Washoe County Clerk Nancy Parent[8] filed answers to the complaint. Dist. Ct. Dkt. 34, 35. Ms. Parent's answer indicated "that she has no intention to defend the

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Plaintiffs' allegations that they challenge *all* sources of state law restricting them from marriage, or from having a valid marriage from another jurisdiction recognized. ER 719 ¶¶ 88–89; 723 ¶¶ A–B.

[7] All "Dkt." references are to filings in the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit"). All "Dist. Ct. Dkt." references are to filings in the district court.

[8] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Washoe County Clerk Nancy Parent is substituted for her predecessor, Amy Harvey.

substantive merits of this case," Dist. Ct. Dkt. 35 at 2, and neither Ms. Alba nor Ms. Parent has submitted any substantive filings since.

On August 10, 2012, at the hearing that had been scheduled on both the motion to intervene and the motion to dismiss, the parties entered stipulations into the record expressing their agreement to defer argument and decision on the motion to dismiss for consideration with additional dispositive motions, and to proceed with a schedule for cross-motions for summary judgment. ER 644–45. Plaintiffs agreed to withdraw their opposition to intervention as of right but reserved the ability to revisit the issue at a later stage if necessary. ER 644-46.

The district court issued an order allowing the case to proceed accordingly and granted Intervenor's request for intervention. Dist. Ct. Dkt. 67. Cross-motions for summary judgment were filed by Plaintiffs, Governor Sandoval, Defendant Glover, and Intervenor, Dist. Ct. Dkt. 72, 74, 85, and 86, and the district court ruled on all pending motions in a November 26, 2012 order.

In that order, the district court granted Defendant Sandoval and Glover's motion to dismiss in part, finding that Plaintiff Couples' claims were precluded by *Baker v. Nelson*, except to the extent that they relied on *Romer v. Evans*, 517 U.S. 620 (1996), which was decided after *Baker*. ER 11–12. The district court found that rational basis review governs Plaintiff Couples' claim that the marriage ban violates guarantees of equal protection regardless of one's sexual orientation. ER

13. Applying this standard, the district court found that the marriage ban is supported by a governmental interest in the "protection of the traditional institution of marriage." ER 30–31. The court also held that the "perpetuation of the human race depends upon traditional procreation between men and women," and if same-sex couples are permitted to marry it is "conceivable that a meaningful percentage of heterosexual persons" would see the institution as marred and "enter into it less frequently, . . . leading to an increased percentage of out-of-wedlock children, single-parent families, difficulties in property disputes after the dissolution of what amount to common law marriages in a state where such marriages are not recognized, or other unforeseen consequences." ER 32–33.

The district court rejected Plaintiff Couples' claim that the marriage ban discriminates against them based on their sex in relation to the sex of their partner or spouse, because, according to the court, "it is homosexuals who are the target of the distinction here," and not "members of a particular gender." ER 15. Acknowledging that Plaintiff Couples had not raised a due process claim, ER 12, the district court ruled on the issue regardless, holding that the marriage ban does not deprive same-sex couples of the fundamental right to marry. ER 28–29.

In its November 26, 2012 order, the district court also granted Governor Sandoval, Defendant Glover, and Intervenor summary judgment, and denied

Plaintiff Couples the same. ER 42.[9] The court entered judgment, and Plaintiffs noticed their appeal on December 3, 2012. ER 43–45. On December 5, 2012 Intervenor filed a petition for certiorari before judgment with the Supreme Court, which was denied on June 27, 2013. Dkt. 3, 16.

STATEMENT OF FACTS

I. PLAINTIFF COUPLES.

Each unmarried Plaintiff wishes to marry his or her one irreplaceable love in life, and each married Plaintiff Couple wishes to be recognized as married in the place they call home. ER 182–83 ¶ 14; 192 ¶ 12; 202 ¶ 11; 211 ¶ 12; 218 ¶¶ 6–7; 231 ¶11; 238 ¶¶ 8–9; 248 ¶¶ 12–13. Plaintiff Couples reflect the rich diversity of Nevada and include two proud grandmothers to their four grandchildren, a social worker for abused children and an advertising executive, a teacher and a non-profit executive director who advocates for adults and children with HIV, professionals in medical sales and financial advice, a couple who work together as a civil litigator and an office manager, a Ph.D. student and a lawyer for low-income clients, the executive director of Nevada's ethics commission and the founder of a

[9] The district court also denied Plaintiff Couples' request to submit a reply brief and supplemental declarations. ER 42. The proposed reply brief and declarations sought to respond to, *inter alia*, new, unfounded attacks on Plaintiff Couples' child welfare expert, which were raised for the first time in Intervenor's summary judgment opposition. ER 46–130. The district court had informed the parties that it would accept reply briefs on summary judgment if needed to respond to new material, ER 655:18 – 656:5, and the district court erred in thereafter denying Plaintiff Couples the opportunity to do precisely that.

sign language academy, and a professional flutist and a college music instructor. ER 180 ¶ 5; 186–87 ¶ 9; 190 ¶ 3; 195 ¶ 3; 200 ¶ 3; 204 ¶ 3; 209 ¶¶ 5–6; 213 ¶ 4; 217 ¶ 3; 221 ¶ 3; 225 ¶ 3; 229 ¶ 3; 233 ¶ 3; 237 ¶ 5; 241 ¶ 4; 246 ¶ 4. All couples have devoted years of their lives to each other, with relationships ranging from six to more than forty years together. *See, e.g.*, ER 180 ¶ 2; 190 ¶ 2. Six couples are raising or have raised children together, and others plan to adopt in the near future. ER 186–87 ¶ 9; 191 ¶ 9; 210 ¶ 8; 218 ¶ 8; 226 ¶ 8; 237 ¶ 5; 247 ¶ 8.

The enforcement of the marriage ban denies Plaintiff Couples access to marriage — the venerated hallmark of a couple's commitment to build a family life together. This denial touches every aspect of their lives. Some Plaintiffs have encountered medical professionals who tried to block them from their partner's bedside during medical emergencies, or made clear that one partner could be dismissed from the hospital room at staff whim. ER 218 ¶ 6; 222 ¶ 10; 242 ¶ 11; 247 ¶ 8. Other Plaintiff Couples have struggled to obtain health insurance or equal treatment by government agencies and businesses. ER 218–19 ¶¶ 8–9; 222 ¶¶ 9, 11; 229–30 ¶¶ 7–9; 234–35 ¶¶ 7–8; 238 ¶ 10; 247–48 ¶¶ 10–11. Plaintiffs routinely struggle to correct confusion about the nature, depth, and permanence of their relationships in work, family, and doctor's office settings because they cannot honestly state that they are married in Nevada. ER 182 ¶ 13; 192 ¶ 11; 197 ¶ 10; 201–02 ¶¶ 9–10; 206–07 ¶¶ 11, 13–14; 214 ¶ 9; 226–27 ¶¶ 10. Even children

understand that marriage is a cherished status in society. The State's consignment of same-sex couples to a second-class status, therefore, sends profoundly hurtful messages to Plaintiffs' children, teaching them that their families do not deserve the same societal status and respect as others. ER 191–92 ¶ 9; 196 ¶ 8; 210–11 ¶ 11; 214 ¶ 8; 218 ¶ 8; 231 ¶ 11; 238 ¶ 10; 242–43 ¶ 12.

II. NEVADA'S AND DEFENDANT OFFICIALS' EXCLUSION OF SAME-SEX COUPLES FROM MARRIAGE.

Nevada's exclusion of same-sex couples from marriage is enshrined both in state constitutional amendment and statute. Nev. Const. art. 1, § 21 ("Only a marriage between a male and female person shall be recognized and given effect in this state."); Nev. Rev. Stat. § 122.020(1) ("a male and a female person . . . may be joined in marriage"). Defendant Officials play various roles in enforcing the marriage ban, including Governor Sandoval's responsibility for executing the marriage ban, Nev. Const. art. 5, §§ 1, 7, and the roles of City and County Clerks Alba, Parent, and Glover in, *inter alia*, issuing marriage licenses, solemnizing marriages or certifying other persons to solemnize marriages, and maintaining records relating to marriage licenses, all in compliance with the marriage ban. Nev. Rev. Stat. §§ 122.040, 122.064, 122.173, 122.240; Washoe Cnty., Nev., Code § 5.460; Dkt. 34 ¶ 3; Dkt. 35 ¶ 15; ER 698–99 ¶¶ 14–15; 144 ¶¶ 1–2; 148–58; 182–83 ¶ 14; 192–93 ¶ 12; 207 ¶¶ 15–16; 211 ¶ 12.

Nevada's constitutional amendment was enacted in 2002, after voters in the 2000 and 2002 general elections approved the initiative known as "Question 2" biennially, as required to amend the state constitution. ER 144 ¶¶ 3–4; 159–69. Some of the campaign messages used to persuade voters to amend the state constitution relied on false, stigmatizing messages that same-sex couples are inferior to different-sex couples, and that both the institution of marriage and children need to be protected from same-sex couples. For example, one 2002 flier urged voters to adopt the constitutional amendment by saying "Let's not experiment with Nevada's children." ER 250 ¶ 2; 251–52. Intervenor, which managed the campaign, also issued a flier warning that, if same-sex couples could marry, "we would be unable to stop the proliferation of teaching that promotes homosexuality in our schools." ER 250 ¶ 3; 253–56.

Nevada's public policy now, however, recognizes that committed same-sex couples should be treated equally with respect to virtually every state law right and responsibility Nevada affords spouses.[10] Enacted in 2009, the Nevada Domestic Partnership Act (the "Act") allows same-sex couples who have "chosen to share one another's lives in an intimate and committed relationship of mutual caring" to

[10] As described further below, domestic partners are treated differently in the way they must register with the State, as compared to solemnizing a marriage, and with respect to adopting a common last name.

register with the State as domestic partners. Nev. Rev. Stat. §§ 122A.100, 122A.010 *et seq.*[11]

The Act provides that registered 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." Nev. Rev. Stat. § 122A.200(1)(a).[12] Registered domestic partners thus assume rights and responsibilities related to, for example, community property and community debt, Nev. Rev. Stat. § 123.220 *et seq.*; pre-marital agreements, Nev. Rev. Stat. § 123A.010 *et seq.*; postnuptial agreements, Nev. Rev. Stat. § 123.070 *et seq.*; dissolution of the relationship in family court, Nev. Rev. Stat. § 125.010 *et seq.*; and spousal support obligations, Nev. Rev. Stat. § 125.150 *et seq.* The Act similarly provides the rights and responsibilities of former spouses to former domestic partners, and of surviving spouses to surviving domestic partners. Nev. Rev. Stat. § 122A.200(1)(b), (c).

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[11] Although different-sex couples may register as domestic partners, Nev. Rev. Stat. § 122A.100, they also are provided the choice to marry — an option denied same-sex couples.

[12] As discussed below, however, by not allowing access to marriage itself Defendants preclude same-sex couples from being able to obtain the full panoply of federal rights and benefits afforded to married couples and their families.

The Act expressly provides that the "rights and obligations of domestic partners with respect to a child of either of them are the same as those of spouses," and includes the same protections for former or surviving domestic partners who are parents. Nev. Rev. Stat. § 122A.200(1)(d).

SUMMARY OF THE ARGUMENT

Defendant Officials' enforcement of the marriage ban inflicts serious, sweeping harms on Plaintiff Couples and their families. Same-sex couples' exclusion from the institution of marriage brands them as less deserving of equal dignity and respect and demeans them and their children. The marriage ban also blocks same-sex couples from rights and responsibilities across the entire spectrum of federal law. Relegating same-sex couples to registered domestic partnership is no remedy. That novel, inferior status qualifies unmarried same-sex couples for virtually no federal benefits, and instead designates same-sex couples as second-class citizens and subjects them to a host of practical difficulties and vulnerabilities.

The marriage ban violates core principles of due process by depriving same-sex couples of the fundamental right to marry. This fundamental right cannot be denied based on wordplay — the claim that Plaintiff Couples seek a different right of "same-sex marriage," rather than the fundamental right to marry. Rather, the right has always been defined by its nature and not the identity of those who seek

it. And lesbians and gay men, as *Windsor* and *Lawrence v. Texas* demonstrate, seek to create the enduring bonds that make a marriage. Excluding same-sex couples from marriage also impermissibly infringes upon the due process right to liberty, privacy, and autonomy in core personal decisions regarding intimate association, structuring one's family, and child-rearing. Due process guarantees recognize that each individual's essential dignity, worth, and independence is core to our system of ordered liberty. *Windsor* held that same-sex couples share in this right, by speaking of their right to "equal dignity." The marriage ban violates all of these rights in the most manifest way.

Nevada's marriage ban also violates same-sex couples' right to equal protection without discrimination based on sexual orientation and sex. The ban should be subjected to heightened scrutiny on both grounds, because, as confirmed in case law and expert testimony, lesbians and gay men have faced a history of discrimination based on a fixed trait that is unrelated to the ability to contribute to society, and they remain politically vulnerable. The marriage ban should be subjected to heightened scrutiny also because it discriminates with respect to fundamental rights and liberty interests.

Defendant Officials' exclusion of same-sex couples from marriage, however, cannot survive even rational basis review. Rational basis is not met when officials merely want to continue a historical practice of discrimination, or

because of a baseless private view that marriage equality tarnishes the institution of marriage. Different-sex couples' decisions about whether to marry or have children are not affected by whether same-sex couples may share in the celebrated institution of marriage. Instead, the marriage ban serves only to punish the children of same-sex couples, depriving them of the myriad tangible benefits and societal status that accompany access to marriage. The expert testimony offered below and the consensus among all major medical and mental health organizations confirm that the children of same-sex and different-sex couples are equally well-adjusted. Nevada already acknowledges that same-sex couples are worthy of parenting rights and responsibilities of spouses by providing those rights and responsibilities through registered domestic partnership.

ARGUMENT

I. THE STANDARD OF REVIEW IS DE NOVO.

Although the district court erroneously ruled on Governor Sandoval and Defendant Glover's motion to dismiss as if it had been raised under Rule 12(b)(6) instead of Rule 12(b)(1), ER 4, this Court reviews motions under both Rules *de novo*. *Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1156 (9th Cir. 2007) ("We review *de novo* dismissals under Rules 12(b)(1) and 12(b)(6)."). The Court also reviews "*de novo* a district court's grant or denial of summary judgment." *Lopez-Valenzuela v. County of Maricopa*, 719 F.3d 1054, 1059 (9th Cir. 2013).

II. NEVADA'S MARRIAGE BAN INFLICTS PROFOUND HARMS UPON SAME-SEX COUPLES AND THEIR CHILDREN, AND SHUNTING SAME-SEX COUPLES INTO REGISTERED DOMESTIC PARTNERSHIPS DOES NOT CURE THESE HARMS.

The district court failed to appreciate the extraordinary injuries inflicted by the marriage ban. *See, e.g.*, ER 29 (minimizing the burdens imposed by the marriage ban on Plaintiff Couples). Those harms have only increased — in fact, exponentially — since Section 3 of the federal Defense of Marriage Act ("DOMA") was held unconstitutional. The marriage ban now subjects unmarried same-sex couples to the same deprivation of federal rights and responsibilities that *Windsor* held unconstitutional, imposes practical hardships on same-sex couples, and inflicts dignitary harms on same-sex couples and their families.

A. The Marriage Ban Deprives Same-Sex Couples' Families of a Sweeping Safety Net of Federal Protections.

On June 26, 2013, the Supreme Court found Section 3 of DOMA unconstitutional. *Windsor*, 133 S. Ct. at 2695–96. As a result, the federal government no longer treats the valid marriages of same-sex couples as nullities, or the spouses in those marriages as strangers to each other for all federal purposes. *Windsor*, 133 S. Ct. at 2695–96 (finding unconstitutional 1 U.S.C. § 7, which provided that for all federal purposes, "marriage" and "spouse" could only refer to different-sex married couples). DOMA's effect was far-reaching, comprising "a directive applicable to over 1,000 federal statutes and the whole realm of federal

regulations." *Id.* at 2690; *see also id.* at 2694 ("Among the over 1,000 statutes and numerous federal regulations that DOMA controls are laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits.").

Windsor confirmed both that our federalist system delegates authority to the states as gatekeepers to marriage, and that all marriage eligibility rules must comport with basic federal constitutional guarantees. *Id.* at 2691 ("[State marriage laws], of course, must respect the constitutional rights of persons, . . . but, subject to those guarantees, regulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States.") (internal citation and quotation marks omitted). As the arbiter of which couples may be married in the State, Nevada thus holds the key to access for the sweeping array of spousal rights and responsibilities available under federal law, and keeps them locked away from same-sex couples under the marriage ban. By foreclosing same-sex couples from marriage, Nevada inflicts virtually the same collection of federal harms and deprivations on unmarried same-sex couples as DOMA previously did, since nearly all federal benefits are unavailable to unmarried couples, regardless of whether they are registered domestic partners. Same-sex couples married in other jurisdictions also face harms, as discussed below.

The federal benefits and obligations now barred to unmarried same-sex couples in Nevada include, for example, exemptions from income tax payments on

health care coverage for a spouse, 26 U.S.C. §§ 105, 106(a), 26 C.F.R. § 1.106-1 (1960); access to COBRA coverage for a spouse and a spouse's children, 29 U.S.C. §§ 1163(1)–(6), 1167(3); health insurance coverage for federal employees' spouses, 5 U.S.C. §§ 8901(5), 8901(10), 8905; payment of money to a "widow or widower" of a deceased federal employee, 5 U.S.C. § 5583(a); certain public safety officers' death benefits, 42 U.S.C. §§ 3796(a), 3796d(3), 3796d-1(a)(1), 28 C.F.R. §§ 32.3, 32.33; bankruptcy code protections for domestic-support obligations and other debts to a spouse or child, 11 U.S.C. §§ 101(14A), 507(a)(1)(A), 523(a)(5), 523(a)(15); and a citizen's ability to sponsor a spouse for immigration purposes, 8 U.S.C. § 1186a. In addition, after *Windsor* a number of federal agencies have issued implementation guidance, and "the clear trend has been . . . to limit the extension of benefits to only those same-sex couples in legally recognized marriages." *Garden State Equal. v. Dow*, No. MER L-1729-11, slip op. at 15 (Sup. Ct., Mercer Cnty. Div. Sept. 27, 2013), *available at* www.judiciary.state.nj.us/samesex/Decision_Summary_Judgment_and%20Order.pdf.[13] The

[13] The federal agencies that have extended benefits to only married same-sex couples include:

1. Office of Pers. Mgmt., "Benefits Administration Letter," at 2 (July 17, 2013), *available at* http://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2013/13-203.pdf ("[S]ame-sex couples who are in a civil union or other forms of domestic partnership other than marriage will remain ineligible for most Federal benefits programs.").

2. Office of Gov't Ethics, "LA-13-10: Effect of the Supreme Court's Decision in *United States v. Windsor* on the Executive Branch Ethics Program," at 2 (Aug. 19, 2013), *available at* www.oge.gov/OGE-Advisories/Legal-Advisories/LA-13-10--Effect-of-the-Supreme-Court-s-Decision-in-United-States-v--Windsor-on-the-Executive-Branch-Ethics-Program (explaining that the term "spouse" does not "include a federal employee in a civil union, domestic partnership, or other legally recognized relationship other than a marriage").

3. Internal Revenue Serv., "Treasury and IRS Announce That All Legal Same-Sex Marriages Will Be Recognized for Federal Tax Purposes . . ." (Aug. 29, 2013), *available at* http://www.irs.gov/uac/Newsroom/Treasury-and-IRS-Announce-That-All-Legal-Same-Sex-Marriages-Will-Be-Recognized-For-Federal-Tax-Purposes;-Ruling-Provides-Certainty,-Benefits-and-Protections-Under-Federal-Tax-Law-for-Same-Sex-Married-Couples (announcing equal federal tax treatment for same-sex spouses, clarifying that "the ruling does not apply to registered domestic partnerships, civil unions or similar formal relationships recognized under state law").

4. Dep't of Health & Human Servs., "Impact of *United States v. Windsor* on Skilled Nursing Facility Benefits . . ." at 1 (Aug. 29, 2013), *available at* http://www.cms.gov/Medicare/Health-Plans/HealthPlansGenInfo/Downloads/SNF_Benefits_Post_Windsor.pdf (defining spouse to include only "individuals of the same sex who are lawfully married under the law of a state, territory, or foreign jurisdiction").

5. Dep't of Labor, Wage & Hour Div., "Fact Sheet #28F: Qualifying Reasons for Leave under the Family and Medical Leave Act," at 2 (August 2013), *available at* http://www.dol.gov/whd/regs/compliance/whdfs28f.htm (clarifying that a spouse must be "recognized under state law for purposes of marriage in the state where the employee resides").

6. Dep't of Labor, "Technical Release No. 2013-04, Guidance to Employee Benefit Plans on the Definition of 'Spouse' and 'Marriage' under ERISA . . ." (Sept. 18, 2013), *available at* http://www.dol.gov/ebsa/newsroom/tr13-04.html (providing that same-sex spouses shall be recognized for purposes of ERISA, but not "individuals in a formal relationship recognized by a state that is not denominated a marriage under state law, such as a domestic partnership or a civil union").

7. Dep't of State, "U.S. Visas for Same-Sex Spouses, FAQs for Post-Defense of Marriage Act," *available at* http://travel.state.gov/visa/frvi/frvi_6036.html

federal rights and responsibilities Nevada now denies these couples, like DOMA itself, burdens these couples' lives "by reason of government decree, in visible and public ways . . . touch[ing] many aspects of married and family life, from the mundane to the profound." *Windsor*, 133 S. Ct. at 2694.

Same-sex couples married in another state may be recognized — at most — as domestic partners under Nevada law, if they take the additional step of registering in compliance with the same rules for domestic partners (something not required of different-sex married couples). Nev. Rev. Stat. § 122A.500. But, even if married same-sex couples take that step, the language of a number of statutes and regulations governing access to certain federal rights and benefits (including family medical leave, certain copyright rights, and certain spousal veterans' benefits) refer to whether an individual's state of residence or domicile recognizes

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("[O]nly a relationship legally considered to be a marriage in the jurisdiction where it took place establishes eligibility as a spouse for immigration purposes.").

Thus far, only the Department of Defense and Department of Veterans Affairs have suggested they may or will provide benefits more broadly than to validly married same-sex couples. *See* 78 Fed. Reg. 54,633 (Sept. 5, 2013); 78 Fed. Reg. 57,067 (Sept. 17, 2013) (to be codified at 38 C.F.R. pt. 17) (allowing domestic partners access to services, but only for certain kinds of counseling).

In addition, a mere handful of benefits may be available to same-sex registered domestic partners in Nevada, where the federal government also allows access based on a state's laws of intestacy, but these are rare exceptions to the rule. *See, e.g.*, 42 U.S.C. § 416(h)(1)(A)(ii) (defining family status for purposes of the Social Security Act).

them as married.[14] Nevada's refusal to recognize marriages legally entered by same-sex couples as marriages under Nevada law thus prevents those couples from obtaining federal rights and benefits available to all other legally-married couples.

Countless of these rights have tangible and financial consequences for same-sex couples and their families, in many instances depriving them of resources that different-sex couples may use as a matter of course to support family needs, such as their children's education. *See Windsor*, 133 S. Ct. at 2695 ("DOMA also brings financial harm to children of same-sex couples."). Nevada's marriage ban, like DOMA before it, "writes inequality into the entire United States Code," and "divests married same-sex couples of the duties and responsibilities that are an essential part of married life and that they in most cases would be honored to accept." *Id.* at 2694, 2695.

B. The Marriage Ban Visits a Host of Other Practical Harms and Difficulties upon Same-Sex Couples' Families.

Nevada's marriage ban "instructs all . . . officials, and indeed all persons with whom same-sex couples interact, including their own children, that their

[14] *See, e.g.*, Family Medical Leave Act ("FMLA") of 1993, 29 U.S.C. §§ 2601 *et seq.*, 29 C.F.R. § 825.102 (defining "spouse" for purposes of the FMLA as "a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides"); 17 U.S.C. § 101 ("author's 'widow' or 'widower' is the author's surviving spouse under the law of the author's domicile"); 38 U.S.C. § 103(c) ("In determining whether or not a person is or was the spouse of a veteran, their marriage shall be proven as valid . . . according to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued.").

[relationship] is less worthy than the [relationships] of others." *See Windsor*, 133 S. Ct. at 2696. This treatment frustrates same-sex couples' goals and dreams, personal happiness and self-determination, and it triggers disrespect in virtually every sphere of their lives.[15]

For many, the pinnacle of entering married life is a wedding with loved ones present to bear witness to their commitment. Conducted pursuant to the State's requirement that marriages be solemnized, these ceremonies carry not only deep personal significance, but also the imprimatur of State approval. Nev. Rev. Stat. § 122.010(1). While many heterosexual couples remember their wedding day as among the best in their life, there is no such ritual for domestic partnership, which instead is done merely by filing a notarized form with the Secretary of State. Nev. Rev. Stat. § 122A.100.[16] Same-sex couples' inability to marry also can negatively affect how family and others view their relationship.[17]

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[15] *See also* ER 314 ¶¶ 38–40 (expert testimony reviewing a large body of research demonstrating that marriage fosters "psychological well-being, physical health, and longevity").

[16] *See* ER 192 ¶ 10 (when Plaintiffs Theodore Small ("Theo") and Antioco Carrillo ("Antioco") registered as domestic partners, it was a sterile process devoid of any celebration, and Theo "recall[s] standing in the middle of a bank lobby with our right hands raised to swear that the information on the form was true. That is not the equivalent of a wedding on any level, where two people take vows to love and care for each other in sickness and in health, through a public celebration that melds their families as one.").

[17] *See* ER 221–22 ¶ 8 (although Plaintiffs Mikyla Jewel Miller ("Mikyla") and Katrina Miller ("Katie") previously had a commitment ceremony with friends and

In a further signal of the State's official view that domestic partnerships are less significant and enduring, they may be summarily terminated through the Secretary of State, rather than through the family court proceedings required to dissolve a marriage. Nev. Rev. Stat. § 122A.300; ER 313–14 ¶ 36 (testimony of expert psychologist describing how barriers to ending a relationship increase couples' likelihood of staying together).

Nevada law also denies registered domestic partners the same streamlined process for one partner to adopt the other's surname, an important rite for many couples to signify to themselves, their children, and the community that they are forming a family. Unlike different-sex spouses, however, who may change a last name in connection with their marriage, registered domestic partners must obtain a court order. ER 234 ¶ 7; 143–44; 170–76. The partner wishing to adopt a common name must file a state court petition certifying that she is neither a felon

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family, it was only after they were legally married in California that Mikyla's parents began referring to Katie publicly as their daughter-in-law); ER 197 ¶ 10 (although Antioco's family knows he and Theo are a couple, Antioco's family "believes that marriage is the honorable way to show respect for your relationship and your intentions for the future, and our registered domestic partnership simply is not adequate to do that"); ER 202 ¶ 10 (Plaintiff Karen Goody's testimony that, "Marrying [her partner Karen Vibe] would legitimize our relationship in the eyes of our family in a way that nothing else ever will"); ER 214 ¶ 9 (Plaintiff Fletcher ("Fletcher") Whitwell's mother acknowledges his brother's wedding anniversary each year, but does not acknowledge any anniversary for Fletcher and his partner Greg Flamer ("Greg"), even though both couples have been together for the same amount of time).

nor attempting to defraud creditors, and to publish notice of the petition in a newspaper. Nev. Rev. Stat. §§ 41.270, 41.280. As Plaintiff Caren Cafferata-Jenkins testified, having to undertake this process "was a demeaning reminder of how lesbian and gay couples are treated as inferior to heterosexual couples: while heterosexual couples' marriages are profiled in the society pages, lesbian and gay couples who merely want to change their names to unite their family must publicly attest that they are not criminals." ER 234 ¶ 7.

The government is a powerful teacher of discrimination to others. Bearing the government's imprimatur, Nevada's marriage ban, and relegation of same-sex couples to the unfamiliar and lesser status of domestic partnership proliferates confusion and results in a wide range of harms.[18] Many private entities defer to marital status in defining "family" for an array of important benefits, often excluding same-sex couples and their children from important safety nets such as private employer-provided health insurance for family members.[19] The State also

[18] *See*, *e.g.*, ER 218–19 ¶ 8 (Mikyla and Katie had to struggle with hospital staff to have Katie listed as a parent on their child's birth certificate as the domestic partnership law requires); ER 201 ¶ 9; ER 206 ¶ 131 (because Plaintiffs Karen Goody and Karen Vibe cannot use the word "spouse," they find themselves repeatedly having to correct others' mistaken assumption in workplace and social settings that they are merely business partners).

[19] *See* ER 226–27 ¶ 12 (Plaintiffs Adele ("Adele") and Tara ("Tara") Newberry, whose valid marriage is not recognized in Nevada, have had to pay higher premiums for family health insurance than the insurer provides to different-sex spouses); ER 229–30 ¶¶ 7–8 (after hospital staff refused to list Tara on their birth

encourages disrespect of committed same-sex couples and their children by others in workplaces, schools, businesses, and other major arenas of life, in ways that would be less likely to occur and more readily corrected if marriage were available to same-sex couples.

Children from a young age understand that marriage signifies an enduring family unit. They likewise understand when the State has deemed a class of families as less worthy than other families, undeserving of marriage, and not entitled to the same societal and governmental recognition and support as other families.[20] Under Nevada's marriage ban, same-sex couples and their children must live with the vulnerability and stress inflicted by the ever-present possibility that others may question their familial relationship — in social, educational, and

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certificate for their first child, Tara went through a year-and-a-half ordeal with government agencies to obtain a birth certificate correctly listing her as the second parent; after the birth of the couple's second child, hospital staff required Tara to leave the hospital to retrieve extensive documentation before she could be listed as a parent on the birth certificate).

[20] *See* ER 210–11 ¶ 11 (Fletcher and Greg worry that as their toddler grows older she "will be deprived of a sense of normalcy and may feel socially outcast" because the government deems her parents unworthy of marriage); ER 242–43 ¶ 12 (Plaintiffs Sara Geiger ("Sara") and Megan Lanz ("Megan") fear that their young daughter will absorb the message that the State sees their family as inferior, and make it harder for her to feel "proud" of their family).

medical settings and in moments of crisis — in a way that spouses can avoid by simple reference to being married.[21]

C. The Marriage Ban Inflicts Profound Dignitary Harms upon Same-Sex Couples' Families.

Marriage has been described by the Supreme Court as "one of the vital personal rights essential to the orderly pursuit of happiness" and "the most important relation in life." *Zablocki v. Redhail*, 434 U.S. 374, 383, 384 (1978) (internal quotation marks omitted).[22] The California Supreme Court and numerous

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[21] *See* ER 222 ¶ 9 (as Katie testified, "People have questioned my status as a parent and often consider me A.L.M.'s stepparent rather than her mother. Some have challenged the veracity of my claim that Mikyla is my wife. I try to treat these moments as educational opportunities, but it can be frustrating and tiresome."); ER 247 ¶ 8 (when Sara gave birth to the couple's daughter, hospital staff said to Megan words to the effect of, "we don't have to let you stay here, but we're just going to look the other way"); ER 226 ¶ 10 (when Adele and Tara took one of their children to the emergency room, hospital staff asked which one of them was "the mom"; when they responded that they were both their child's mother, the staff asked "which one is the real mom?"); ER 210 ¶ 9 (Greg carries a letter from an attorney with him at all times documenting his relationship as a father to his daughter, for fear that his relationship will be questioned).

[22] *See also Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 970 (N.D. Cal. 2010) ("Domestic partnerships lack the social meaning associated with marriage, and marriage is widely regarded as the definitive expression of love and commitment in the United States."); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 417 (Conn. 2008). For similar reasons, the Massachusetts Supreme Judicial Court advised the state senate in 2004 — after the court had ruled that same-sex couples must be allowed to marry — that the senate could not implement the court's ruling by merely providing civil unions. *See Opinions of the Justices to the Senate*, 440 Mass. 1201, 1207–08 (2004) ("The dissimilitude between the terms 'civil marriage' and 'civil union' is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex . . . couples to second-class status.").

other courts have held that domestic partnership cannot compare to marriage. *In re Marriage Cases*, 183 P.3d 384, 445 (Cal. 2008) (stating that because of the widespread understanding that marriage "describes a union unreservedly approved and favored by the community," granting same-sex couples access "to only a novel alternative designation, realistically must be viewed as constituting significantly unequal treatment to same-sex couples"); ER 263 ¶ 9; 265 ¶ 12 (testimony of expert marriage historian about the unparalleled status marriage holds in society). The difference in stature also is borne out in different-sex couples' preferences: In jurisdictions that allow both domestic partnerships and marriages, most eligible different-sex couples choose marriage. For example, in California in 2000, 98% of different-sex couples whose age allowed them to enter a domestic partnership were instead legally married. ER 360–62 ¶¶ 40–44 (expert testimony reviewing research that demonstrates domestic partnerships are widely viewed as less desirable than marriage).

The district court held that "[t]he State has not crossed the constitutional line by maintaining minor differences in civil rights and responsibilities . . . or by reserving the label of 'marriage' for one-man–one-woman couples in a culturally and historically accurate way." ER 31. But it was also "culturally and historically accurate" that women could not serve on juries, be executors of estates, or pay alimony before those sex-based distinctions were held unconstitutional. *See Taylor*

v. Louisiana, 419 U.S. 522, 531 (1975); *Reed v. Reed*, 404 U.S. 71, 77 (1971); *Orr v. Orr*, 440 U.S. 268, 283 (1979). Attempts to reserve a privileged status for a favored group through creation of a separate, inferior status for the excluded group have been rejected over several painful chapters in this country's history. *See, e.g.*, *Sweatt v. Painter*, 339 U.S. 629, 634 (1950); *United States v. Virginia*, 518 U.S. 515, 554 (1996). As the Supreme Court has "repeatedly emphasized, discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants" in the community, can cause serious "injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984) (footnote and citations omitted).

Windsor powerfully answers the district court's claim that consigning same-sex couples to domestic partnership cures the constitutional violation. The Supreme Court's observations about the effect of DOMA on same-sex couples' valid marriages apply equally here: Nevada undermines "both the public and private significance" of same-sex couples' relationships, "for it tells those couples, and all the world" that their relationships are "unworthy" of governmental recognition, and "places same-sex couples in an unstable position of being in a second-tier" relationship that "demeans the couple." 133 S. Ct. at 2694.

III. NEVADA'S MARRIAGE BAN VIOLATES SAME-SEX COUPLES' FUNDAMENTAL RIGHTS AND LIBERTY INTERESTS, INCLUDING THEIR RIGHT TO EQUAL DIGNITY.

By denying same-sex couples access to civil marriage and instead consigning them to the novel, inferior status of domestic partnership, Defendant Officials violate Plaintiffs' due process rights under the U.S. Constitution. Defendant Officials' enforcement of the marriage ban denies Plaintiffs the fundamental right to marry, and the concomitant freedom to marry the spouse of their choice, free from interference from government. This fundamental right of liberty, privacy, and autonomy is defined by the attributes and singular status that attaches to marriage — not by the identity of the people who seek to exercise it or who have been excluded from doing so in the past. In addition, Defendant Officials' enforcement of the marriage ban denies Plaintiff Couples equal dignity in contravention of the Fourteenth Amendment's Due Process Clause, which does not permit the government to command whom individuals may or may not marry unless necessary to satisfy a compelling state interest. Nevadans are not mere instrumentalities of the State; they are autonomous individuals, with the right to build personal bonds of an enduring nature with those whom they choose, and to be free from stigma imposed by the government relegating one individual's personal bonds to a less valuable status than another's.

A. The Marriage Ban Denies Same-Sex Couples the Fundamental Right to Marry and Other Important Liberty Interests.

"The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). "Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of [the Supreme] Court confirm that the right to marry is of fundamental importance for all individuals." *Zablocki*, 434 U.S. at 384; *see also Maynard v. Hill*, 125 U.S. 190, 205 (1888) (characterizing marriage as "the most important relation in life"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (recognizing that the right "to marry, establish a home and bring up children" is a central part of the liberty protected by the Due Process Clause).

The right to marry also is protected as part of the fundamental "right of privacy" implicit in the Due Process Clause. *See Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring). "While the outer limits of [the right of personal privacy] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage . . . ." *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684–85 (1977). And the right to marry touches on other fundamental privacy rights, including decisions each individual makes about how to structure one's family, *see Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), and child-rearing and education, *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535

(1925); *see also Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment").

The Supreme Court has found numerous restraints on marriage and family relationships to be unconstitutional — even some far less restrictive than Nevada's blunt, absolute denial of marriage to same-sex couples. *Boddie v. Connecticut*, for example, held that filing fees for divorce actions violated the due process rights of indigents unable to pay the fees, by burdening the freedom of indigents to marry another person. 401 U.S. 371, 380–81 (1971). Similarly, in *Zablocki*, the Court overruled a statute that required parents with existing child-support obligations to show the parent was current on those obligations and obtain court approval, prior to marriage. 434 U.S. at 375–77.[23]

[23] The *Zablocki* Court distinguished another case, *Califano v. Jobst*, 434 U.S. 47 (1977), decided earlier the same term. In *Jobst*, the Court upheld certain sections of the Social Security Act providing for termination of a dependent child's benefits upon marriage to a person not entitled to benefits. The Court in *Jobst* noted that the rule terminating benefits upon marriage was not "an attempt to interfere with the individual's freedom to make a decision as important as marriage." *Id.* at 54. The *Zablocki* Court noted further that the Social Security provisions "placed no direct legal obstacle in the path of persons desiring to get married, and . . . there was no evidence that the laws significantly discouraged, let alone made practically impossible, any marriages." 434 U.S. at 387 n.12 (citation and quotation marks omitted). Here, of course, Nevada has made the marriages of certain people more than "practically" impossible, and so the regulation of marriage is direct and substantial.

Indeed, the Supreme Court has not hesitated to strike down laws directly interfering with the freedom to marry, such as Nevada's marriage ban, without a supportable basis, making clear that an essential part of the fundamental right to marry is the "freedom of choice" of whom to marry that "resides with the individual and cannot be infringed by the State." *Loving*, 388 U.S. at 12. The freedom to marry without the freedom to choose one's partner is no freedom to marry at all, because it robs marriage of the love and autonomy that are the center of that relationship. *See Lawrence v. Texas*, 539 U.S. 558, 567 (2003) ("When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."). As the Supreme Court explained in *Lawrence*, "our laws and tradition afford constitutional protection to personal decisions relating to marriage . . . [and] family relationships" because of "the respect the Constitution demands for the autonomy of the person in making these choices" — and "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." 539 U.S. at 574.

To be sure, one could imagine a world where government is simply not necessary to marriage. "The state has been a relative latecomer in the regulation of marriage," and only in the eighteenth century did marriage become more than "a

purely private transaction." Mary Ann Case, *Marriage Licenses*, 89 Minn. L. Rev. 1758, 1766 (2005). If the state did not hold a monopoly on authorizing marriage and divorce, individuals might be free to hold religious or secular ceremonies, hold themselves out as married, rear children, and otherwise live in an intimate relationship that is a fundamental part of the pursuit of happiness. But our history has played out differently. The state currently has a monopoly over both marriage and divorce. *See Boddie*, 401 U.S. at 375. The law determines, for example, whether society will recognize one partner as a widow or surviving spouse after death, *see, e.g.*, *Obergefell v. Kasich*, No. 1:13-cv-501, 2013 WL 3814262 (S.D. Ohio July 22, 2013). Having assumed the monopoly over marriage from the individual, the state cannot deny it categorically to some of its citizens unless that is the least restrictive means of meeting the strongest of government interests, a test Defendant Officials cannot satisfy.

The Supreme Court has instructed states to beware of measures that would restrict the liberty of individuals to build important personal relationships. The right of all people to enter into intimate associations, and develop those associations into enduring bonds, cannot be lightly denied. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) ("Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as of basic importance in our society") (internal quotation marks omitted). "This, as a

general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects." *Lawrence*, 539 U.S. at 567.

There is no reason why same-sex partners are not capable of participating in matrimony. In *Turner v. Safley*, the Supreme Court held that the constitutional right to marry was available to prison inmates, notwithstanding the obvious limitations on a prisoners' conduct. 482 U.S. 78 (1987). In so doing, the Court recognized the many fundamental aspects of marriage. These include "expressions of emotional support and public commitment," 482 U.S. at 95, "an exercise of religious faith as well as an expression of personal dedication," *id.* at 96, and the fact that marriage is "a pre-condition to the receipt of government benefits . . . property rights . . . and other, less tangible benefits (*e.g.*, legitimation of children outside of wedlock)." *Id.* These "religious and personal aspects of the marriage commitment" are "important and significant" and, more importantly, protected by the Due Process Clause of the Fourteenth Amendment. *Id.* As the Court further explained in *Zablocki*:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

434 U.S. at 384 (quoting *Griswold*, 381 U.S. at 486).

Lawrence, of course, established that same-sex partners suffer no disability preventing them from creating these enduring personal bonds. 539 U.S. at 567. Likewise, after *Windsor* it is beyond debate that those in same-sex relationships can benefit in multiple tangible and intangible ways from the protection and dignity that marriage affords. 133 S. Ct. at 2692. And the Court has never conditioned the right to marry on the power to "naturally" procreate. In *Turner*, 428 U.S. at 95, the Court extended the right to marry to individuals — inmates — who lack the present power to procreate with their spouse, and in *Griswold*, 381 U.S. at 485–86, the Court made clear that individuals have the right to choose to procreate or not regardless of whether they are married.

It is beyond cavil that there is a fundamental right to marry; countless pronouncements of the Supreme Court tell us so. The Supreme Court also warns against "attempts . . . to define the meaning of the relationship or to set its boundaries absent injury . . . ." *Lawrence*, 539 U.S. at 567. But Defendant Officials have not identified injury to the institution of marriage. Nor can they. Same-sex partners participate equally in the personal and spiritual aspects of marriage. They support each other in the same way different-sex partners do. And same-sex parents raise children next door to different-sex parents. Nevada recognized the absence of harm when it enacted the domestic partnership statute and when it afforded same-sex registered domestic partners all the same parenting

rights and responsibilities as spouses. In the face of Supreme Court precedent, it is clear that Nevada cannot now directly and substantially restrict the liberties of Nevadans through the marriage ban.

The district court alluded to a question about whether it is the fundamental right to marry at stake, and not the "right to marry a person of the same sex," ER 31, but fundamental rights are defined by what they are, not who can exercise them. This critical distinction — that history guides the *what* of due process rights, but not the *who* of which individuals have them — is central to due process jurisprudence. If it were otherwise, it would be difficult to square with *Loving*'s overruling — on due process grounds — of a statute outlawing interracial marriage. *See Planned Parenthood v. Casey*, 505 U.S. 833, 847–48 ("[I]nterracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving* . . . ."). Supreme Court cases have not recast the fundamental right to marry as merely "the right to interracial marriage," "the right to inmate marriage," or "the right of people owing child support to marry." *See Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 983 n.5 (N.D. Cal. 2012) (citing *Loving*, 388 U.S. at 12); *Turner*, 482 U.S. at 94–96; *Zablocki*, 434 U.S. at 383–86. The same is true for

Plaintiff Couples, who seek the fundamental right to marry — nothing more, and nothing less.

B. The Marriage Ban Improperly Infringes the Right to Equal Dignity.

"[T]he essential dignity and worth of every human being [is] a concept at the root of any decent system of ordered liberty." *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring); *see also* William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. Tex. L. Rev. 433, 438 (1986) (stating that the Constitution "is a sublime oration on the dignity of man, a bold commitment by a people to the ideal of libertarian dignity protected through law").

The Constitution limits the scope of government's intrusion into the decisions that men and women make about how to conduct their private lives, and how the government can treat individuals within our democratic system. The Supreme Court has recognized claims, rooted in both due process and equal protection, that involve fundamental limitations on the government's power to strip individuals of their personal autonomy. These claims center around the extent to which the state may permissibly intrude on an intrinsically private and personal sphere of life.

The Supreme Court has recognized a protection of dignity as inherent in our constitutional structure, where dignity may be synonymous with or closely related

to concepts of autonomy, *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."); *Casey*, 505 U.S. at 851 (opinion of O'Connor, J., Kennedy, J., and Souter, J.) ("These 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."); freedom from government-endorsed stigma, *Lawrence*, 539 U.S. at 574–75 (discussing stigma created by criminalization of intimate contact by gay people); the freedom of individuals to an equal opportunity to achieve social status or rank, *Windsor*, 133 S. Ct. at 2689 (discussing New York's decision to grant same-sex couples the right to marry "and so live with pride in themselves and their union and in a status of equality with all other married persons"); and the freedom of personal conscience, *Casey*, 505 U.S. at 851 ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."). At its heart, these concepts of dignity reflect an understanding that human beings ought never be treated as mere instruments of government, because men and women possess a dignity, autonomy, and individuality that is an essential component of humanity.[24]

[24] This concept of dignity and the authority to govern one's own existence was present at the founding on both sides of the Atlantic Ocean. *See* Markus Dirk Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 Hastings L.J.

A protection of dignity need not always, but often may, intersect with the protection of equal protection. The Supreme Court has held, for instance, that "[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 746 (2007) (quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2000)); *see also id.* at 797 (Kennedy, J., concurring) ("To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society."); *Korematsu v. United States*, 323 U.S. 214, 240 (1944) (Murphy, J., dissenting) ("To give constitutional sanction [to the detention of U.S. citizens of Japanese descent] . . . is to adopt one of the cruelest of rationales used by our enemies to destroy the dignity of the individual and to encourage and open

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509, 542–43 (2004); Michael J. Meyer, *Kant's Concept of Dignity and Modern Political Thought*, *in* 8 Hist. of Eur. Ideas 319, 327 (1987). Indeed, a Kantian notion that ties the rights of men as against the power of the government was celebrated by James Madison as "the capacity of mankind for self-government." The Federalist No. 39 (James Madison); *see also* The Federalist No. 1 (Alexander Hamilton) (urging citizens to adopt the Constitution as "the safest course for your liberty, your dignity, and your happiness"); Thomas Paine, Rights of Man 41 (Gregory Claeys ed., Hackett Pubs. 1992) (1791) (arguing that the "natural dignity of man" was the reason to protect individual rights that transcend authoritative rule); *id.* at xvii (noting in introduction Thomas Jefferson's positive reception to Paine's views in the Rights of Man).

the door to discriminatory actions against other minority groups . . . .").[25] The overlap of due process and equal protection as mutually reinforcing guarantees runs throughout federal jurisprudence, as explained further below in Section IV(D) *infra* (describing the well-established principle that invidious discrimination with respect to fundamental rights and liberty interests warrants heightened scrutiny). *See Truax v. Corrigan*, 257 U.S. 312, 332 (1921) (holding the provisions "overlap" such "that a violation of one may involve at times the violation of the other, [though] the spheres of the protection they offer are not coterminous"). At least one decision of the Supreme Court has also emphasized that dignity is an overlapping concept, by equating it to "equal liberty," a term that inherently

[25] Dignity is a significant constitutional concept even outside equal protection and due process. For instance, the Supreme Court has noted, in holding that a particular punishment must conform to "evolving standards of decency," that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958); *see also Hope v. Pelzer*, 536 U.S. 730, 745 (2002) (holding a particular punishment "antithetical to human dignity" because it was "degrading and dangerous"). The Court has also held that "the constitutional foundation underlying the privilege [against self-incrimination embodied by the Fifth Amendment] is the respect a government — state or federal — must accord to the dignity . . . of its citizens." *Miranda v. Arizona*, 384 U.S. 436, 460 (1966). The Court has noted that the "overriding function" of the Fourth Amendment's protection against unreasonable search and seizure is "to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber v. California*, 384 U.S. 757, 767, 769–70 (1966) ("The interests in human dignity and privacy which the Fourth Amendment protects forbid [invasive behavior by the state]."). In the Fourth Amendment, thus, dignity is bound up with privacy. Although neither amendment is directly relevant in this case, the protections underlying these amendments emphasize a zone where the government has no right to intrude.

embodies principles of both equal protection and due process. *Stenberg v. Carhart*, 530 U.S. 914, 920 (2000); *see also Windsor*, 133 S. Ct. at 2693 (explaining how DOMA interferes with "equal dignity" of marriages of same-sex couples).

The protection of human dignity creates both a zone of legitimate government interest, and a zone where government may not intrude. This concept of liberty has its roots in decisions of the Supreme Court protecting an individual's right, for instance, to make personal and fundamental decisions in child-rearing free from government interference. *See, e.g.*, *Pierce*, 268 U.S. at 535 (overruling state statute requiring children to attend public, not parochial schools, because of the autonomy of parent and child, and because the state may not "standardize its children" since "[t]he child is not the mere creature of the state"); *Meyer*, 262 U.S. at 399 (overruling state law prohibiting the education of children in the German language, because it interfered with an autonomy that is "essential to the orderly pursuit of happiness by free men.") Indeed, courts have long recognized "the private realm of family life which the state cannot enter." *Prince*, 321 U.S. at 166.[26]

[26] In *Moore v. East Cleveland*, 431 U.S. 494 (1977), the Court reiterated this point with a caveat: "[T]he family is not beyond regulation." *Id.* at 499. But the Court distinguished regulation that treats families equally, like those at issue in *Prince*, and those that "intrude[] on choices concerning family" where the court

The protection of dignity has experienced its most profound and explicit expression when states have sought to regulate intimate associations. In *Lawrence*, the Court invalidated a statute criminalizing same-sex couples' intimate relationships on the basis that the statute violated individuals' due process rights. 539 U.S. 558. Significantly, the Court declined to rule on two, arguably narrower, grounds. The Court declined to conceive of the statute solely as a violation of privacy, *id.* at 564–65 (describing right to privacy but then considering the statute as a violation of general liberty), or as a violation solely of the equal protection rights of gay people who were specifically targeted by some sodomy statutes, such as one challenged in Texas, *id.* at 574–75. Instead, the Court overruled all remaining sodomy statutes, regardless of whether they targeted gay people alone, or physical intimacy by heterosexual couples too, based on a broader liberty interest involving "'the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy.'" *Id.* at 574 (quoting *Casey*, 505 U.S. at 851). These intimate choices, the Court continued, are critical if individuals are to "retain their dignity as free persons." *Id.* at 567. In addition to an autonomy-based understanding of dignity, the Court also understood that dignity is the antithesis of government-sponsored stigma, resting its ruling in part on how this particular statute essentially labeled all gay people as criminals, "with

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"must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." *Id.*

all that imports for the dignity of the persons charged." *Id.* at 575. And irrespective of whether the statutes applied to homosexual or heterosexual sodomy, they sought "to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals." *Id.* at 567. The Court held:

> This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries . . . . It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

Id.

The Supreme Court emphasized the important relationship between marriage and dignity in *Windsor*.[27] New York "sought to protect . . . personhood and dignity" by granting to all couples the right to marry. 133 S. Ct. at 2696. That liberty to marry "conferred upon" same-sex couples "a dignity and status of immense import," and, when New York so conferred that right, it "enhanced the

[27] This connection also was made, or at least implied, by Justice Jackson's concurrence in *Skinner v. Oklahoma*, 316 U.S. 535 (1942). Justice Jackson noted that "[t]here are limits to the extent to which a legislatively represented majority may conduct biological experiments," in that case the forced sterilization of inmates, "at the expense of the dignity and personality and natural powers of a minority." *Id.* at 546 (Jackson, J., concurring).

recognition, dignity, and protection of the class in their own community." *Id.* at 2692. DOMA, by contrast, caused an "injury and indignity" to "an essential part of the liberty" protected by the Due Process Clause of the Fifth Amendment. *Id.* DOMA thus "interfere[d] with the equal dignity of same-sex marriages." *Id.* at 2693.

Cases surrounding marriage for same-sex couples in California similarly ground the right to marry as governed by a right to dignity. In first holding that marriage for same-sex couples is a protected right under the California Constitution, the California Supreme Court observed that "the core set of basic *substantive* legal rights and attributes traditionally associated with marriage . . . are so integral to an individual's liberty and personal autonomy" that these "core substantive rights include . . . the opportunity of an individual to establish — with the person with whom the individual has chosen to share his or her life — an *officially recognized and protected family* possessing mutual rights and responsibilities and entitled to the same respect and dignity accorded a union traditionally designated as marriage." *Marriage Cases*, 183 P.3d at 399 (emphasis in original). The Court elaborated,

> One of the core elements of the right to establish an officially recognized family that is embodied in the California constitutional right to marry is a couple's right to have their family relationship accorded dignity and respect equal to that accorded other officially recognized families, and assigning a different designation for the family relationship of same-sex couples while reserving the historic

> designation of "marriage" exclusively for opposite-sex couples poses at least a serious risk of denying the family relationship of same-sex couples such equal dignity and respect.

Id. at 400. The California Supreme Court thus understood dignity as being inherently opposed to stigmatization by being accorded a different designation and a right to stand on equal footing. In sum, the liberty interest in possessing mutual rights and responsibilities, respected on equal footing with heterosexual counterparts, represents the zone where government may not tread.

To be sure, dignity is not a limitless concept. *See Washington v. Glucksberg*, 521 U.S. 702 (1997) (declining to find a right to assistance from others in order to die a dignified death). While the Supreme Court has sometimes allowed states to regulate the ability to enlist *other individuals* to assist with the exercise of a right, *e.g.*, *Glucksberg*, the Supreme Court has recognized the right of individuals to directly exercise an important right — which is at issue in this case too. *See, e.g., Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 279 (1990) (assuming "that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition" and thereby to end one's life). Moreover, the heart of this dignity right has always been described as the right to make "'personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.'" *Glucksberg*, 521 U.S. at 726 (quoting *Casey*, 505 U.S. at 851). There is little

question, therefore, that impositions on marriage, family relationships, and child-rearing of the kind at issue here clearly impinge on Plaintiff Couples' dignity rights.

Marriage is a key, personal, and individual decision, and the protections of the Constitution shield individuals against having the government as their match-maker. The dignity right certainly provides that the State cannot tell individuals that they can get married, but only to a person of a certain race. *See Loving v. Virginia*, 388 U.S. 1 (1967).[28] But the dignity right goes further than that. Absent narrow tailoring to a compelling government interest, Nevada likewise could not decree that its citizens could only marry other Nevadans, or only marry non-Nevadans, or only marry persons from their own counties. Still less can Nevada

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[28] The Court held:

> To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.

Loving, 388 U.S. at 12.

deprive lesbians and gay men of any opportunity to marry, or to be recognized as married, to their one cherished partner in life.[29]

Of course, as noted, the protection of dignity under the Due Process Clause carries extra force. In *Lawrence*, for instance, the Court emphasized that the imposition of a law with discriminatory impact bore special consideration under a due process analysis. 539 U.S. at 575. There, the Court held that "[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Id.* Nevada's decision to ban marriage for same-sex couples "demeans the lives of homosexual persons," *id.*, and it is fundamentally outside the role of any State to demean the lives of any person with respect to decisions fundamental to that person's autonomy and self-determination.

IV. NEVADA'S MARRIAGE BAN VIOLATES THE FOURTEENTH AMENDMENT'S GUARANTEE OF EQUAL PROTECTION.

Nevada's marriage ban violates the central command of the Fourteenth Amendment's Equal Protection Clause that "all persons similarly circumstanced shall be treated alike." *Reed*, 404 U.S. at 76 (internal quotation marks omitted).

[29] It is thus no answer, as was argued below, that each of the plaintiffs here *can* get married, so long as they choose to marry a person of the different sex. It is not the government's province to limit such decisions, unless Defendant Officials and Intervenor meet their burden of demonstrating that limitation is the least restrictive way of achieving a compelling state interest.

The ban violates equal protection guarantees on three principal grounds. First, it classifies same-sex couples for differential treatment based on their sexual orientation, warranting heightened scrutiny or, at a minimum, meaningful rational basis review. Defendant Officials' exclusion of same-sex couples from marriage cannot, however, survive even the most glancing review for the reasons described below. Second, the marriage ban discriminates against same-sex couples based on their sex in relation to their cherished life partner or spouse, requiring heightened review. Third, the marriage ban discriminates with respect to Plaintiff Couples' exercise of fundamental rights and liberty interests, also warranting heightened review.

A. Heightened Review Applies to Sexual Orientation Discrimination.

A growing number of federal courts have recognized that any faithful application of the test for heightened constitutional review requires such scrutiny for sexual orientation classifications. *Windsor v. U.S.*, 699 F.3d 169, 181 (2d Cir. 2012); *Pedersen v. Ofc. of Pers. Mgmt.*, 881 F. Supp. 2d 294, 333 (D. Conn. 2012); *Golinski*, 824 F. Supp. 2d at 989; *In re Balas*, 449 B.R. 567, 573–75 (Bankr. C.D. Cal. 2011) (decision of 20 bankruptcy judges); *Perry*, 704 F. Supp. 2d at 997.[30] As

[30] A number of state courts have reached the same conclusion. *Varnum v. Brien*, 763 N.W.2d 862, 885–96 (Iowa 2009); *Marriage Cases*, 183 P.3d at 442–45; *Kerrigan*, 957 A.2d at 432–61.

Notably, the Second Circuit's heightened scrutiny finding was squarely presented for the Supreme Court's review in *Windsor*, which neither overruled nor

explained further below, the level of review remains unsettled in this Court's jurisprudence and the district court erred in concluding that the traditional hallmarks of heightened scrutiny do not apply to sexual orientation. Additionally, as *Witt* found by looking to *Lawrence*, this Court should find that *Windsor*'s "careful consideration" of the sexual orientation classification in that case requires at least some form of heightened review here. *Witt v. Dep't of Air Force*, 527 F.3d 806, 819 (9th Cir. 2008).

1. No Ninth Circuit precedent forecloses heightened scrutiny.

Other than a cursory citation to earlier opinions in a limited context, this Court last examined the level of scrutiny for sexual orientation classifications 23 years ago in *High Tech Gays v. Defense Industrial Security Clearance Office*. 895 F.2d 563, 571 (9th Cir. 1990). That precedent and its progeny, however, are no longer sound and do not bind this Court. *High Tech Gays* rested in part on the since-overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), concluding that laws classifying lesbians and gay men for adverse treatment are not subject to heightened scrutiny "because homosexual conduct can . . . be criminalized." *Id.* at 571. But *Lawrence* definitively renounced that premise. 539 U.S. at 578 ("*Bowers*

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even expressed doubt about the holding. *Compare Windsor*, 133 S. Ct. at 2684 (noting that the Second Circuit had "applied heightened scrutiny to classifications based on sexual orientation, as both the Department [of Justice] and Windsor had urged") *with City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442 (1985) (expressly overruling the Fifth Circuit's ruling that classifications based on developmental disabilities should receive intermediate scrutiny).

was not correct when it was decided, and it is not correct today."). Where an intervening decision of a higher court is clearly irreconcilable with a Ninth Circuit decision, "a three-judge panel should consider itself bound by the later and controlling authority, and should reject the prior circuit opinion as having been effectively overruled." *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc).[31] In fact, this Court has interpreted *High Tech Gays* itself as applying something more than traditional rational basis review. *See Pruitt v. Cheney*, 963 F.2d 1160, 1165–66 (9th Cir. 1992) ("it is clear that [in *High Tech Gays*] we applied the type of 'active' rational basis review employed by the Supreme Court in *City of Cleburne v. Cleburne Living Center, Inc.*"). *Pruitt* noted that *High Tech Gays* had engaged in a heightened form of review "despite our conclusion that *Bowers v. Hardwick* . . . militated against a higher level of scrutiny." *Id.* at 1166 n.5. In light of *Bowers*' demise, some form of heightened review is even more appropriate here.

This Court did not decide whether sexual-orientation classifications are subject to heightened review in *Witt*, 527 F.3d 806, which involved a challenge to the military's defunct "Don't Ask, Don't Tell" ("DADT") policy for gay service

[31] The district court misunderstood this argument, which is not that *Lawrence* "adopt[ed] a[] standard of review applicable to distinctions drawn according to sexual orientation," as the district court said. ER 16–17. Rather, Plaintiff Couples argue that to the extent *High Tech Gays* relied on *Bowers*, that analysis simply is no longer applicable law.

members. Instead, the Court merely noted in a single sentence — in the context of the military, where judicial deference "is at its apogee" — that if rational basis review were applied, DADT would survive that inquiry. *Id.* at 821; *see also id.* at 823–24 (Canby, J., concurring in part, dissenting in part) (noting that Major Witt did not pursue an equal protection claim comparing differential treatment of gay people to heterosexuals, instead preserving it for en banc review).[32]

2. Although this Court already has found a history of discrimination against gay people, the district court refused to follow that holding.

While no single consideration is dispositive, *see Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 321 (1976), the presence of any heightened scrutiny consideration is a sign that the particular classification is more likely "to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective." *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982).

[32] *Witt* did not hold, as the district court suggested, that "*High Tech Gays* survived *Lawrence*." ER 17. Rather, *Witt* noted prior Ninth Circuit authority that DADT survives rational basis review, and assumed without deciding that such analysis applied. 527 F.3d at 821. Where the Court assumes a legal principle without expressly addressing it, subsequent panels remain free to consider the merits of the issue anew in a subsequent case. *See Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) (where prior cases have not "squarely addressed . . . and have at most assumed the applicability" of the relevant standard, "we are free to address the issue on the merits") (superseded by statute on other grounds, as stated in *Gutierrez v. McGinnis*, 389 F.3d 300, 304 (2d Cir. 2004)); *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (holding that where an issue was not "raised in briefs or argument nor discussed in the opinion of the Court . . . the case is not a binding precedent on this point"); *Sethy v. Alameda Cnty. Water Dist.*, 545 F.2d 1157, 1159–60 (9th Cir. 1976) (en banc).

Both the evidence and settled law recognize that lesbians and gay men have been subjected to a long and painful history of discrimination. ER 391–426 (testimony of expert historian); *High Tech Gays*, 895 F.2d at 573 ("homosexuals have suffered a history of discrimination"); *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 954 (9th Cir. 2009) (observing that defendants would be "hard pressed to deny that gays and lesbians have experienced discrimination in the past in light of the Ninth Circuit's ruling in *High Tech Gays*"); *Pickup v. Brown*, Nos. 12-17681, 13-15023, 2013 U.S. App. LEXIS 18068, at *8–9 (9th Cir. Aug. 29, 2013) (describing history of efforts to change individuals' sexual orientation, instituted at a time when homosexuality was considered a mental illness, including inducing nausea, vomiting, or paralysis; providing electric shocks; and castration); *Lawrence*, 539 U.S. at 571 ("for centuries there have been powerful voices to condemn homosexual conduct as immoral").

Pronouncing itself bound by *High Tech Gays*, the district court nonetheless rejected *High Tech Gays*' holding that gay people have suffered a history of discrimination. ER 19. Citing no authority, the district court improvised a novel standard regarding history of discrimination, insisting that because "homosexuals do not in effect inherit the effects of past discrimination through their parents," "it is contemporary disadvantages that matter" most, and that "[a]ny such disabilities with respect to homosexuals have been largely erased since 1990." ER 19. No

federal case supports the district court's invention, which defeats the very purpose of *historical* discrimination as a consideration. The district court also ignored the sweeping discrimination against gay people in the decades after 1990, which saw some of the most virulent targeting of gay people at the ballot box and state houses and produced patently unconstitutional laws such as those finally reversed in *Romer*, *Windsor*, and *Perry*.

3. Sexual orientation is not related to the ability to contribute to society.

Rather than resting on "meaningful considerations," *Cleburne*, 473 U.S. at 441, laws that discriminate based on sexual orientation, like laws that discriminate based on race, national origin, or sex, target a characteristic that "bears no relation to ability to perform or contribute to society." *Id.* (internal quotation marks omitted). This principle is embedded in Nevada's state public policy, which recognizes that in every realm of life — from employment to family life, to daily transactions in society — sexual orientation discrimination has no place. *See* Nev. Rev. Stat. §§ 613.330, 122A.200, 651.070. This view is the consensus among mainstream social scientists, and was confirmed most recently by *Windsor*. *See* ER 311–12 ¶ 29–31; 353 ¶ 14; *Windsor*, 133 S. Ct. at 2694 (affirming that same-sex couples are equally worthy of the federal responsibilities of marriage, which, as well as rights, "enhance the dignity and integrity of the person").

4. Sexual orientation is a core, defining, and immutable characteristic.

Sexual orientation classifications violate the fundamental principle that burdens should not be distributed — particularly by a majority that would not inflict them upon itself — on "groups disfavored by virtue of circumstances beyond their control." *Plyler*, 457 U.S. at 216 n.14. Courts have considered a trait "immutable" when altering it would "involve great difficulty, such as requiring a major physical change or a traumatic change of identity," or when the trait is "so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change [it]." *Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring); *Golinski*, 824 F. Supp. 2d at 987; *Pedersen*, 881 F. Supp. 2d at 326.

Although federal equal protection doctrine never has treated the immutability of a personal trait as a prerequisite for heightened scrutiny,[33] this Court has held and reaffirmed that sexual orientation should be considered immutable. *See, e.g.*, *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) ("Sexual orientation and sexual identity are immutable; they are so

[33] Laws that classify based on religion, alienage, and legitimacy all are subject to some form of heightened scrutiny, despite the fact that religious people may convert, undocumented people may naturalize, and illegitimate children may be adopted. *See Windsor*, 699 F.3d at 181 (holding that immutability and relative political powerlessness are not necessary factors for identifying a suspect classification; collecting authorities).

fundamental to one's identity that a person should not be required to abandon them.") (overruled in part on other grounds by *Thomas v. Gonzales*, 409 F.3d 1177, 1187 (9th Cir. 2005)); *Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005) (affirming that sexual orientation is "a fundamental aspect of . . . human identity"); *see also Perry*, 704 F. Supp. 2d at 966 (after a 12-day trial, finding that "[n]o credible evidence supports a finding that an individual may . . . change his or her sexual orientation").

This understanding follows the settled consensus of the major professional psychological and mental health organizations. *Pickup*, 2013 U.S. App. LEXIS 18068, at *13 (describing "the well documented, prevailing opinion of the medical and psychological community that SOCE [sexual orientation change effort] has not been shown to be effective and that it creates a potential risk of serious harm");[34] ER 310–11 ¶¶ 26–27 (psychologist's expert testimony that "[s]exual orientation is highly resistant to change" and "there is no credible evidence that [sexual orientation change efforts] are . . . effective"); *see also generally* ER 308–11 ¶¶

[34] The Court explained that this overwhelming consensus is documented in materials "published by . . . the American Psychological Association, the American Psychiatric Association, the American School Counselor Association, the American Academy of Pediatrics, the American Medical Association, the National Association of Social Workers, the American Counseling Association, the American Psychoanalytic Association, the American Academy of Child and Adolescent Psychiatry, and the Pan American Health Organization." *Id.*, 2013 U.S. App. LEXIS 18068, at *13.

21–28. But "[s]cientific proof aside, it seems appropriate to ask whether heterosexuals feel capable of changing *their* sexual orientation." *Watkins*, 875 F.2d at 726 (Norris, J., concurring) (emphasis in original).

Yet, the district court relied on *High Tech Gays*, ER 13, 16–20, which found that sexual orientation is "behavioral," rather than a deeply rooted, immutable characteristic warranting heightened judicial protection. 895 F.2d at 573. But the Supreme Court has authoritatively rejected this artificial distinction, noting that its "decisions have declined to distinguish between status and conduct in th[e] context" of sexual orientation. *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2990 (2010); *see also Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring) (a law criminalizing same-sex intimacy is "targeted at more than conduct . . . [i]t is instead directed toward gay persons as a class"). Conditioning equal treatment on the sacrifice of a trait so fundamental to individual conscience ignores the Supreme Court's recognition that same-sex couples in a "relationship may seek autonomy for these purposes, just as heterosexual persons do." *Lawrence*, 539 U.S. at 574; *see also Windsor*, 133 S. Ct. at 2696 (holding that same-sex couples who have married should not have to abandon their commitment to each other to receive equal federal treatment).

5. The District Court erred by ruling that relative political powerlessness requires a group's chances of legislative success to be "virtually hopeless."

Two key errors infect the district court's holding that political powerlessness precludes heightened scrutiny for sexual orientation. First, the district court distorted the weight of this element, which is not required for heightened scrutiny. ER 25; 20 (describing relative political powerlessness as not only "a critical factor," but also the one that figured "[m]ost importantly" in the district court's analysis). While the political powerlessness of a group "may be relevant, . . . that factor is neither necessary, as the gender cases demonstrate, nor sufficient, as the example of minors illustrates." *Cleburne*, 473 U.S. at 472 n.24 (Marshall, J., concurring and dissenting). For this reason the Supreme Court repeatedly has referred to this requirement in the disjunctive: "a suspect class is one saddled with such disabilities, *or* subjected to such a history of purposeful unequal treatment, *or* relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Murgia*, 427 U.S. at 313 (emphasis added) (internal quotation marks omitted); *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (referring to whether a group is "a minority *or* politically powerless") (citing *Murgia*, 427 U.S. at 313–14) (emphasis added).

Second, the district court ignored the governing standard for this element, improvising its own requirement that a group be "so weak and ineffective as to make attempts to succeed democratically utterly futile," and show its "chances of democratic success [to] be virtually hopeless." ER 22; 28. But when the Supreme Court has considered this element, the Court always has examined relative, not absolute, political powerlessness, *i.e.*, whether the "discrimination is unlikely to be *soon rectified* by legislative means." *Cleburne*, 473 U.S. at 440 (emphasis added); *Windsor*, 699 F.3d at 184 ("The question is not whether homosexuals have achieved political successes over the years; they clearly have. The question is whether they have the strength to politically protect themselves from wrongful discrimination.").

The Supreme Court's analysis of race- and sex-based classifications clearly illustrates this point. *Korematsu v. United States* applied heightened review to race-based classifications, even though race discrimination was prohibited by three federal constitutional amendments and federal civil rights enactments dating back to 1866. 323 U.S. at 216; ER 473–74 ¶¶ 85–86. When the Supreme Court applied heightened review to sex-based discrimination in *Frontiero v. Richardson*, Congress had already "manifested an increasing sensitivity to sex-based classifications" by enacting protections under Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963, and by approving the federal Equal Rights

Amendment for ratification by the states. 411 U.S. 677, 685–687 (1973) (plurality); see also ER 472 ¶ 83. In stark contrast, gay people lack any express statutory protections from discrimination in employment, housing, or public accommodations at the federal level, and the majority of states still offer no express protection in any of those spheres. ER 416 ¶ 77; 417 ¶ 80.[35] Moreover, the relevant inquiry is not just the degree of current political powerlessness; the Supreme Court has reaffirmed application of heightened scrutiny to race- and sex-based classifications despite still further political progress by racial minorities and women. *See United States v. Virginia*, 518 U.S. at 524; *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).[36]

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[35] The district court tries to explain away *Frontiero* by noting that women were previously denied the right to vote, serve on juries, and own property, and faced discrimination based on the "high visibility" of one's sex. ER 24–25. But as heightened scrutiny of legitimacy-based classifications illustrates, none of these historical features are required. Moreover, the fact that sexual orientation can be concealed points to political vulnerability rather than strength; the decision to hide one's sexual orientation — an understandable one given the severe societal approbation one may face — dampens the community's ability to mobilize and attract allies. ER 463–65 ¶¶ 57–64. *See also* ER 460–72 ¶¶ 49–81 (expert political scientist's testimony about the many systemic barriers contributing to gay people's marked disparity in political power).

[36] The district court contorts the analysis by looking to Nevada's anti-discrimination statutes, ER 20, 22, 24, but the examination of a federal equal protection claim looks to the relative political powerless of a group nationally, not in any one state. To perform the analysis differently might lead to varying conclusions state-by-state, which plainly is not consistent with equal protection jurisprudence. *See, e.g.*, *Frontiero*, 411 U.S. at 685–88 (examining the relative

High Tech Gays is not dispositive on the issue. *High Tech Gays*' conclusion that lesbians and gay men are too politically powerful to warrant heightened protection is irreconcilable with the Supreme Court's treatment of race- and sex-based classifications, and was so even when *High Tech Gays* was decided. *Compare Frontiero*, 411 U.S. at 685, 686 n.17 (finding that women still faced barriers in the political arena, even though "the position of women in America has improved markedly in recent decades" and "viewed in the abstract, women do not constitute a small and powerless minority") *with High Tech Gays*, 895 F.2d at 574 n.10 (holding that gay people had demonstrated power through the enactment of limited anti-discrimination statutes in three states, and a smattering of governor's executive orders and local ordinances). Since then, however, the nation has seen widespread and virulent political backlash against lesbians and gay men — with the Hawaii Supreme Court's 1993 decision about marriage for same-sex couples spawning a reaction that led to the adoption of DOMA and state constitutional amendments barring marriage equality in three-fifths of the states. ER 459 ¶ 45.

Rather than affording lesbians and gay men effective means to protect themselves from discrimination, the legislative process has in some ways uniquely disadvantaged them. No other group has been stripped so persistently of basic

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political powerlessness of women generally, without regard to the fact that the suit arose in Alabama).

antidiscrimination and family protections through the legislative and initiative process. ER 459 ¶ 44 (according to testimony of expert political scientist, "the initiative process has now been used specifically against gay men and lesbians more than against any other social group"); *cf. Romer*, 517 U.S. at 634 (considering one of these measures, the Supreme Court observed lesbians and gay men constitute a "politically unpopular group") (internal quotation marks omitted).

B. At a Minimum, Rational Basis Review of the Marriage Ban Must Be Meaningful, Although the Marriage Ban Cannot Withstand Any Form of Rational Review.

1. The Court must closely consider a law that targets and demeans a historically disfavored group, or impinges upon important relationships.

While any challenged law must, at a minimum, rationally relate to a legitimate government purpose, Defendant Officials' class-based exclusion of Plaintiff Couples from marriage requires particularly meaningful review. As Justice O'Connor explained in *Lawrence*, the Supreme Court has applied "a more searching form of rational basis review" when a law exhibits "a desire to harm a politically unpopular group" or "inhibits personal relationships." 539 U.S. at 580 (O'Connor, J., concurring); *see also Kelo v. City of New London*, 545 U.S. 469, 490–91 (2005) (Kennedy, J., concurring) (distinguishing between the rational basis test applied to "economic regulation" versus "a government classification that is

clearly intended to injure a particular class of private parties"); *Golinski*, 824 F. Supp. 2d at 996.

Windsor powerfully reinforces this doctrine, reviewing DOMA with a form of "careful consideration" that clearly breaks from deferential rational basis review. To assess *Windsor*'s mode of analysis, this Court should engage in the same thoughtful inquiry as it did in *Witt*, where this Court "carefully" reviewed *Lawrence* "by considering what the Court actually *did*, rather than by dissecting isolated pieces of text." *Witt*, 527 F.3d at 816 (emphasis in original); *see also id.* (holding that the Court "[could not] reconcile . . . *Lawrence* with the minimal protections afforded by traditional rational basis review"). *Witt* relied on three features of *Lawrence* to discern that the Supreme Court had applied something more than deferential rational basis review, all of which are shared by *Windsor*:

1) *Witt* noted that *Lawrence* focused on "the extent of the liberty at stake," a consideration irreconcilable with rational-basis emphasis on judicial deference and interests conceived *post hoc*. 527 F.3d at 817. *Windsor* — which marries liberty and equality principles, and focuses on the extent of the harm to same-sex couples — shares this feature. 133 S. Ct. at 2693 (referring to a right of "equal dignity"); *id.* at 2692–96 (discussing extensively the scope of the harms DOMA inflicted on same-sex spouses, from dignitary injuries to the couple and their children, to other tangible and financial harms).

2) *Witt* also noted that *Lawrence* relied on a number of cases that applied heightened scrutiny, and found particularly significant that *Lawrence* overturned *Bowers* because *Bowers*' "'continuance as precedent demean[ed] the lives of homosexual persons.'" *Witt*, 527 F.3d at 817 (quoting *Lawrence*, 539 U.S. at 575). *Windsor* similarly relied on *Lawrence* and focused heavily on the ways in which DOMA "demeans" same-sex couples. 133 S. Ct. at 2692, 2694.

3) Finally, *Witt* noted that *Lawrence*'s analysis was inconsistent with rational basis review because *Lawrence* "declared: 'The Texas statute furthers no legitimate state interest *which can justify its intrusion into the personal and private life of the individual*.'" *Witt*, 527 F.3d at 817 (quoting *Lawrence*, 539 U.S. at 578). *Witt* explained that were *Lawrence* "applying rational basis review, it would not identify a legitimate state interest to 'justify' the particular intrusion of liberty . . . [because] any hypothetical rationale for the law would do." *Id*. *Windsor* uses very similar balancing-test language: "no legitimate purpose *overcomes the purpose and effect to disparage and to injure*" same-sex couples. 133 S. Ct. at 2696 (emphasis added). And unlike rational basis review, where "any hypothetical rationale . . . would do," *Windsor* found several interests raised in DOMA's defense — including those relating to procreation and child welfare — so inadequate that the Court did not even address them. *See* Br. on the Merits for Resp't the Bipartisan Legal Advisory Group of the U.S. House of Representatives

at 44–49, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) ("Br. on the Merits for Resp't BLAG"), 2013 U.S. S. Ct. Briefs LEXIS 280, at *74–82.

But even in the ordinary equal protection case "calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632. A governmental interest must, at a minimum, "find some footing in the realities of the subject addressed by the legislation." *Heller v. Doe*, 509 U.S. 312, 321 (1993); *Mathews v. Lucas*, 427 U.S. 495, 510 (1976) (rational basis analysis is not "toothless"). These protections ensure that "classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633.

The district court erred in holding that the marriage ban can be justified by the tradition of privileging only different-sex couples with access to marriage, and by some individuals' private dislike of gay people. ER 30–33. These rationales fail at the threshold because, as a matter of law, they are not even legitimate. Still other rationales raised by Defendant Officials and Intervenor lack any rational connection to the marriage ban. Nevada's marriage ban thus utterly fails rational basis review, as described further below.

2. Same-sex couples may not be barred from marriage merely to sustain the tradition of excluding them, or based on a private view that their inclusion mars the institution.

In sustaining the marriage ban, the district court primarily relied on two rationales, both of which are not legitimate governmental purposes as a matter of law. First, the district court held that Nevada can maintain "the traditional institution of marriage" because a state is permitted to "prevent[] abuse of an institution the law protects." ER 30–31 (internal quotation marks omitted). Second, the district court explained that:

> Should [marriage] be expanded to include same-sex couples with the state's imprimatur, it is conceivable that a meaningful percentage of heterosexual persons would cease to value the civil institution as highly as they previously had and hence enter into it less frequently, opting for purely private ceremonies, if any, whether religious or secular, but in any case without civil sanction, because they no longer wish to be associated with the civil institution as redefined, leading to an increased percentage of out-of- wedlock children, single-parent families, difficulties in property disputes after the dissolution of what amount to common law marriages in a state where such marriages are not recognized, or other unforeseen consequences.

ER 32–33 (footnote omitted). As a matter of law, these purported interests are not legitimate governmental purposes.

a. Tradition.

A tradition of a excluding a minority group merely describes rather than explains the challenged practice, and is by itself insufficient to justify maintaining a discriminatory classification. "[N]o one acquires a vested or protected right in

violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it." *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (internal quotation marks omitted); *see also Williams v. Illinois*, 399 U.S. 235, 239 (1970) (holding that a law failed rational basis scrutiny even where the custom at issue "dates back to medieval England and has long been practiced in this country"). The Supreme Court has not hesitated to strike down "historic" laws targeting gay people, recognizing that the antiquity of such discrimination does not make it rational. *Lawrence*, 539 U.S. at 577–78 (recognizing that "neither history nor tradition could save a law prohibiting miscegenation from constitutional attack") (internal quotation marks omitted); *Windsor*, 133 S. Ct. at 2689 (finding that, notwithstanding a long history of discrimination against same-sex couples in marriage, DOMA violated equal protection guarantees).

Far from adhering to "tradition for the sake of tradition," the institution of marriage has shed many inveterate discriminatory practices, including the doctrine of coverture (depriving wives of any separate legal or economic existence), the requirement of fault for divorce, and restrictions on interracial marriage. *See generally* ER 280–82 ¶¶ 73–83 (describing how marriage has thrived precisely

because of its ability to adapt to changing societal needs).[37] Nevada's historical exclusion of same-sex couples from marriage thus speaks powerfully to the length of the injustice, not a reason to continue perpetrating it.

The district court relied on Justice O'Connor's concurrence in *Lawrence* to bolster its ruling, but this does not sustain the district court's conclusion. ER 30–31 (citing 539 U.S. at 585 (referring to "preserving the traditional institution of marriage")). Justice O'Connor referred opaquely to this potential state interest in her solo concurrence, but did not even speculate about its application in a future case. 539 U.S. at 585. Since then, the Supreme Court rejected precisely this argument in *Windsor*. Both the intervenor in that case and DOMA's legislative history attempted to justify the law based on tradition. *See* Br. on the Merits for Resp't BLAG at 10, 2013 U.S. S. Ct. Briefs LEXIS 280, at *25–26; 133 S. Ct. at 2693 (describing legislative references to "traditional heterosexual marriage") (internal quotation marks omitted). The argument was sufficiently insubstantial that the majority opinion did not even dignify it with a response.

[37] The district court's invocation of the protection of traditional marriage is tinged with a certain irony, given Nevada's unique history in the development of no-fault divorce laws in the country. In fact, Nevada was at the forefront of this trend, adopting laws in 1931 that made it the easiest venue in the nation to obtain a divorce, with only a six-week residency requirement and expanded grounds for divorce. ER 278–79 ¶¶ 68–69. "Reno and Las Vegas fueled the state's economy by marketing nation-wide the availability there of quick and easy divorce, as well as quick and easy marriage." ER 278–79 ¶ 68.

b. Caution.

Proceeding "cautiously" by continuing to deny equal treatment to an unpopular group also is not a legitimate state interest. Contrary to the district court's suggestion, a law cannot be justified based on speculation that, absent any justification today, one may appear in the future. ER 33 (holding that the State could have reasoned that there may be future consequences from "altering the traditional definition of civil marriage"). *See Pedersen*, 881 F. Supp. 2d at 345–46 ("Categorizing a group of individuals as a 'vast untested social experiment' . . . to justify their exclusion, . . . until long-term evidence is available to establish that such a group will not have a harmful effect upon society is a rationale, which, . . . would eviscerate the doctrine of equal protection by permitting discrimination until equal treatment is proven, by some unknown metric, to be warranted."); *Golinski*, 824 F. Supp. 2d at 1001 ("Congress cannot, like an ostrich, merely bury its head in the sand and wait for [the purported] danger to pass, especially at the risk of permitting continued constitutional injury" upon same-sex couples).

Even if proceeding cautiously were a legitimate interest, the State's marriage ban does not rationally advance that interest. Nevada's constitutional amendment adopted an absolute ban, unlimited in time, intended to erect a fundamental barrier

to adoption of a different policy.[38] In fact, the supporting ballot argument was that existing statutes failed to do *enough* to exclude same-sex couples from marriage. ER 144 ¶ 3–4; 159–62; 165–68. By enshrining the marriage ban in the State Constitution, the voters did not enact a time-specific moratorium to allow more study, but rather ensured a blunt, definitive prohibition that could not be changed without "enlisting the citizenry of [Nevada] to amend the State Constitution," yet again. *Romer*, 517 U.S. at 631.[39]

c. Private bias.

The district court's other primary rationale for upholding the exclusion of same-sex couples from marriage must be unmasked for what it is: elevation of the

[38] Nevada's marriage ban also is constitutionally suspect because it locks same-sex couples out of the normal political process, making it uniquely more difficult for them to secure access to marriage. Unlike a citizen seeking to effect a different change in Nevada's marriage eligibility rules, such as lowering the age at which persons may marry without parental consent, same-sex couples are uniquely burdened with having to amend the Nevada constitution. It is well-established that imposing a selective disparity that disadvantages a targeted class in the ability to advocate for change in the law is constitutionally suspect. *See Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 467–68 (1982); *Hunter v. Erickson*, 393 U.S. 385, 391 (1969); *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 701 F.3d 466, 477 (6th Cir. 2012) (en banc), *cert. granted sub nom. Schuette v. Coal. to Defend Affirmative Action*, 185 L. Ed. 2d 615 (U.S. Mar. 25, 2013). Nevada's marriage ban is the kind of selective burden that "undermines the Equal Protection Clause's guarantee that all citizens ought to have equal access to the tools of political change." *Coal. to Defend*, 701 F.3d at 470.

[39] Neither the Defendants nor the district court has explained how Nevada's decision to afford same-sex couples virtually all rights and responsibilities of spouses, while withholding only the honored designation of marriage, exhibits a "cautious" approach.

private opposition of some into a "moral code" for all. *See Lawrence*, 539 U.S. at 571. The district court worried that if marriage included same-sex couples, some different-sex couples might shun it. ER 32. Such arguments have a disreputable pedigree. *See Palmore v. Sidoti*, 466 U.S. 429, 433–34 (1984) (collecting and denouncing cases in which state officials relied on private disquietude to defend a housing ordinance requiring segregation and delaying desegregation of city parks); *United States v. Virginia*, 518 U.S. at 543–45 (reviewing various prophecies that institutions would be degraded when forced to admit women to practice law, attend schools of law and medicine, and join police forces). The Supreme Court has not hesitated to reject these claims, recognizing that the "Constitution cannot control such prejudices but neither can it tolerate them," and although private biases "may be outside the reach of the law, . . . the law cannot, directly or indirectly, give them effect." *Palmore*, 466 U.S. at 433; *see also Lawrence*, 539 U.S. at 577 ("the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice") (internal quotation marks omitted).

3. No additional rationales offered by Defendant Officials or Intervenor can survive rational basis review.

a. Excluding same-sex couples from marriage promotes neither "responsible procreation" nor interests in child welfare, serving instead only to harm Plaintiff Couples' children.

The district court's primary concern about procreation was that affording same-sex couples the freedom to marry will somehow taint the institution for different-sex couples, causing them to "enter into it less frequently . . . leading to an increased percentage of out-of-wedlock children" and "single-parent families." ER 32–33. But as described above, the private disapproval of a few is not a legitimate basis on which to govern all. The expert evidence introduced below established, and *Windsor* helps confirm, that although no one else's children are harmed by allowing same-sex couples to marry, the marriage ban hurts same-sex couples' children immeasurably. A law that accomplishes the opposite of its supposed purpose is the height of irrationality. While the district court relied primarily on the rationale that allowing same-sex couples to marry would sully marriage, driving different-sex couples to form their families outside of it, ER 32–33, the court also cited *Jackson v. Abercrombie* with approval, *id.*; 884 F. Supp. 2d 1065 (D. Haw. 2012), and Plaintiff Couples accordingly address the reasoning in both decisions.

i. Channeling procreation.

The district court's analysis of procreation is premised on the idea that "[h]uman beings are created through the conjugation of one man and one woman," upon which the "perpetuation of the human race depends," and that marriage by same-sex couples would threaten that regime. ER 31–32.[40] *Jackson* relied on the notion that maintaining "the prestige and social significance of marriage" — by excluding same-sex couples — might induce different-sex couples to marry and thus increase the likelihood of children being raised within marriage. 884 F. Supp. 2d at 1112. The theory posits that those who may "accidentally" conceive particularly need inducements to marry, while those who plan for children, such as same-sex couples, do not require the same support and protections.

But the idea that allowing same-sex couples to marry would somehow make different-sex couples less likely to have children, or less likely to do so within the bounds of marriage, is unworthy of credence. In fact, neither the district court nor any other party has offered a wisp of explanation about how bolting the doors of marriage to same-sex couples would affect the profound, life-altering decision by different-sex couples to wed — either before, after, or in the absence of children —

[40] The district court belittlingly refers to same-sex couples' means of creating their families (means also used by many different-sex couples) as merely "a social backstop for when traditional biological families fail." ER 32. But *Windsor* confirms that these children, regardless of their means of conception, are no less sheltered by constitutional guarantees protecting their dignity. 133 S. Ct. at 2694–96.

aside from the offensive suggestion that excluding same-sex couples makes marriage more desirable to different-sex couples. ER 32–33.

A host of courts have concluded that it is nonsensical to suggest that a heterosexual person — otherwise on bended knee and poised to propose lifelong matrimony — would abandon marriage or flee the institution simply because same-sex couples are allowed to marry. *See, e.g.*, *Perry*, 704 F. Supp. 2d at 972 ("Permitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages."); *Golinski*, 824 F. Supp. 2d at 998 ("Denying federal benefits to same-sex married couples has no rational effect on the procreation and child-rearing practices of opposite-sex married (or unmarried) couples."); *Windsor*, 699 F.3d at 188 ("DOMA does not provide any incremental reason for opposite-sex couples to engage in 'responsible procreation.' Incentives for opposite-sex couples to marry and procreate (or not) were the same after DOMA was enacted as they were before.") (footnotes omitted).

The argument that preventing same-sex couples from marriage causes more heterosexual couples to marry is not only impossible to credit, but also disproven by the evidence. As the expert testimony below demonstrated, the factors that contribute to the stability or instability of different-sex relationships (such as communication styles and ways of handing conflict) or that contribute to divorce

(such as age at marriage) are well-understood, and function independently of whether same-sex couples may marry. ER 141 ¶ 6; 321 ¶ 59. Allowing same-sex couples to marry, as thirteen states and the District of Columbia currently do, has not adversely affected the institution of marriage. ER 140–41 ¶ 5.

Equally important, reducing the significance of marriage to merely the regulation of sexual relations diminishes its unparalleled role in civic society — and cannot be harmonized with either its historical development or contemporary reality. Just as *Lawrence* found that *Bowers* had demeaned same-sex couples by reducing their family relationships to "the right to engage in certain sexual conduct," rather than "a personal bond that is more enduring," it similarly "would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." *Lawrence*, 539 U.S. at 567; *see also Griswold*, 381 U.S. at 486 ("[M]arriage is an association that promotes a way of life, . . . a harmony in living, . . . [and] a bilateral loyalty.").

Procreation is not now, nor has it ever been, "the prime mover in states' structuring of the marriage institution in the United States." ER 269 ¶ 26. No state in the country has barred couples either unwilling or unable to produce children from marriage. ER 268 ¶ 24. Rather, as an expert marriage historian testified below, marriage has served throughout American history to create stable households, create public order and economic benefit, legitimate children, assign

providers to care for dependents and limit the public's liability for them, facilitate property ownership and inheritance, and facilitate governance. ER 267–68 ¶¶ 20–23. All of these interests apply equally to same-sex couples, making the effort to apply a procreation-based conception of marriage to gay people alone (and not any others such as the elderly, the infertile, or the sterile) all the more indefensible. *See Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) (holding that a law may be "so woefully underinclusive as to render belief in [its purported] purpose a challenge to the credulous"); *Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting) ("[W]hat justification could there possibly be for denying the benefits of marriage to homosexual couples exercising '[t]he liberty protected by the Constitution'? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.") (internal citation omitted); *Eisenstadt v. Baird*, 405 U.S. 438, 449 (1972) (holding that where a law is "so riddled with exceptions," the asserted interest "cannot reasonably be regarded as its aim").

For all of these reasons, federal jurisprudence already has settled as a matter of law that the ability to "naturally procreate" is not a ground upon which access to marriage can be restricted. The Supreme Court has not allowed marriage to be denied to those who could not procreate when they married, such as prisoners. *Turner*, 482 U.S. 78; *id.* at 95–96 (describing the significant qualities of marriage, all of which would benefit same-sex couples equally); *see also Windsor*, 133 S. Ct.

at 2689 (referring to the right to marry as the ability to "live with pride in themselves and their union and in a status of equality with all other married persons"). Conversely, the Supreme Court has made clear that individuals have the right to choose to procreate or not regardless of their marital status. *See Eisenstadt*, 405 U.S. at 453 ("[I]t is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as a decision whether to bear or beget a child."); *Griswold*, 381 U.S. at 485–86 (recognizing the right of married couples to access contraception).

But the irrationality of the marriage ban is nowhere more evident than in its effect: the exclusion does nothing to help different-sex couples' children, but affirmatively harms same-sex couples' children. In fact, any potential governmental interest in channeling childrearing into marriage, so that children may benefit from its stabilizing effects, applies with equal force to same-sex couples' children. Plaintiff Couples' children are no less worthy than different-sex couples' children of the security and family safeguards marriage offers. *Windsor*, 133 S. Ct. at 2694; *Marriage Cases*, 183 P.3d at 433 ("[A] stable two-parent family relationship, supported by the state's official recognition and protection, is equally as important for the numerous children . . . who are being raised by same-sex couples . . . ."); *Pedersen*, 881 F. Supp. 2d at 339 ("[I]t is irrational to strive to incentivize the rearing of children within the marital context by affording benefits

to one class of marital unions in which children may be reared while denying the very same benefits to another class of marriages in which children may also be reared.").

ii. Promoting children's well-being.

While the marriage ban does not affect, let alone help, anyone else's children, same-sex couples' children are profoundly harmed when their family is deprived of the same safety net as all others. Ruling pre-*Windsor*, *Jackson* found it "debatable" whether it would be best for children to be raised by different-sex biological parents. 884 F. Supp. 2d at 1115–16. This argument fails for two independent reasons. First, the marriage ban does not result in any child having different-sex biological parents rather than same-sex biological parents and therefore is not rationally related to a government aim of fostering "optimal" parenting — and a law cannot punish children to deter their parents. Second, the overwhelming scientific consensus, based on decades of peer-reviewed research, shows unequivocally that children raised by same-sex and different-sex couples are equally well-adjusted.

The marriage ban has no effect on whether same-sex couples form life-long relationships with each other and raise children together, as many same-sex couples are doing across Nevada. ER 353 ¶ 13 (approximately 17% of same-sex

couples in Nevada are raising a child under the age of 18).[41] The marriage ban ensures, however, that these parents must raise their children without the dignity and instant, assured recognition of those bonds that flow from marriage. Like DOMA, this exclusion "humiliate[s]" the "children now being raised by same-sex couples" and "makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, 133 S. Ct. at 2694. To the extent that the marriage ban visits these harms on children in an attempt (albeit irrationally) to deter same-sex couples from having children, the Supreme Court has invalidated similar efforts to incentivize parents by punishing children as "'illogical and unjust.'" *Plyler*, 457 U.S. at 220 (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)). "'Obviously, no child is responsible for his

[41] As numerous courts have found, it defies rationality to think that, simply because lesbians and gay men cannot marry their partner, they will end their same-sex relationships to marry a different-sex partner. *See, e.g.*, *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 389 (D. Mass. 2010) ("[T]his court cannot discern a means by which the federal government's denial of benefits to same-sex spouses might encourage homosexual people to marry members of the opposite sex."), *aff'd sub nom.*, *Massachusetts v. United States Dep't of Health and Human Servs.*, 682 F.3d 1, 14–15 (1st Cir. 2012) ("Certainly, the denial [of benefits under DOMA] will not affect the gender choices of those seeking marriage.").

birth and penalizing the . . . child is an ineffectual — as well as unjust — way of deterring the parent.'" *Id.* (quoting *Weber*, 406 U.S. at 175).[42]

Because the State's interest in child welfare is not conceivably furthered by the marriage ban, that ends the inquiry and Intervenor's arguments fail as a matter of law. But even if the Court considers whether there is any legitimate basis for preferring different-sex parents over same-sex ones, the answer is clear. An undeniable consensus among the leading authorities in pediatrics, psychology, and child welfare has long confirmed that the children of same-sex parents are equally likely to be well-adjusted as the children of different-sex parents. As Professor Lamb, a preeminent researcher on children's adjustment and well-being, explained below, decades of scholarship and empirical study overwhelmingly demonstrate that children raised by same-sex parents are as likely to be emotionally healthy and educationally and socially successful as those raised by different-sex parents. ER 508 ¶ 29 (describing approximately 30 years of scholarship of same-sex couples and their children, including more than 100 articles and 50 peer-reviewed empirical reports); 502 ¶ 14 (it is "beyond scientific dispute" that the factors that account for the adjustment of children are the quality of the youths' relationships

[42] Any law adopted with the purpose of burdening gay people's ability to procreate would also warrant strict scrutiny for implicating the fundamental right to decide "'whether to bear or beget a child.'" *Casey*, 505 U.S. at 851 (quoting *Eisenstadt*, 405 U.S. at 453); *see also Pedersen*, 881 F. Supp. 2d at 341.

with their parents, the quality of the relationship between the parents or significant adults in the youths' lives, and the availability of resources — not the parents' sex or sexual orientation).

This consensus has been confirmed by the preeminent national medical, mental health, and child welfare authorities — many of which have issued statements affirming that same-sex parents are as effective as different-sex parents in raising well-adjusted children and should not face discrimination — including the American Psychological Association, the American Psychiatric Association, the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, the American Psychoanalytic Association, the National Association of Social Workers, and the Child Welfare League of America. ER 510 ¶ 34. Courts across the country also have acknowledged this consensus. *See Perry*, 704 F. Supp. 2d at 1000; *Golinski*, 824 F. Supp. 2d at 991; *Gill*, 699 F. Supp. 2d at 388.

Moreover, by enacting the domestic partnership law, the State has acknowledged that registered same-sex domestic partners should be treated equally to different-sex spouses for the State's full spectrum of parental obligations and protections.[43] Through registered domestic partnership, same-sex couples in

[43] The district court misunderstood Plaintiff Couples' arguments about the significance of Nevada's domestic partnership law. ER 35–36 (claiming that Plaintiff Couples' argument "would permit a plaintiff to show an equal protection

Nevada have access to parenting rights identical to those of married couples, including the presumption of parenthood for any child born into the relationship, adoption, child custody and visitation, and obligations of child support. *See* Nev. Rev. Stat. § 122A.200(1)(d). Nevada, as a matter of policy and law, thus recognizes that lesbians and gay men "are fully capable of . . . responsibly caring for and raising children." *Marriage Cases*, 183 P.3d at 428; *see also Perry*, 704 F. Supp. 2d at 1000 (finding that same-sex couples can and do have children, and

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violation by the very fact that a state had recently *increased* his rights"). Plaintiff Couples argue not that the domestic partnership law *creates* the equal protection violation, but rather that the purported governmental interests in the marriage ban must be tested *in light of* the domestic partnership law. *See, e.g.*, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) ("[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist."); *Brown v. Bd. of Educ.*, 347 U.S. 483, 492–93 (1954) ("in [evaluating segregated schools], we cannot turn the clock back to 1868 . . . [and instead] must consider public education in the light of its full development and its present place in American life . . . ."). Where a purported governmental interest defies the state's policy and practice, that interest cannot be credited. *See, e.g.*, *Eisenstadt*, 405 U.S. at 448 (recognizing that regardless of the governmental interest in a law when it is first passed, the government can "abandon[]" that interest through subsequent lawmaking).

The district court makes the odd suggestion that the domestic partnership law might be relevant if the State first offered a lesser status to same-sex couples at the same time that it restricted the superior status to different-sex couples. ER 35. This has never been the law. At the time the Fourteenth Amendment was adopted virtually no African-American children attended school in the South; that did not prevent the Supreme Court from holding unconstitutional the later-created system of segregated education. *Brown*, 347 U.S. at 489–90, 495. Surely the district court would blanch at the idea that interracial couples could be relegated to a lesser status of "interracial partnership," so long as that status was created *after* a state instituted marriage itself.

under California's domestic partnership law, "[w]hen they do, they are treated identically to opposite-sex parents"). The exclusion of same-sex couples from marriage thus has absolutely no effect on the ability of same-sex couples to become parents, or the manner in which children are raised in Nevada.[44]

Although Nevada affords same-sex couples the same methods of securing their parental bonds with their children, it nonetheless withholds the dignity and immediate recognition of those bonds that marriage secures. The State's marriage ban thus not only fails to further the State's interest in promoting its children's welfare, but instead hinders it. *Windsor*, 133 S. Ct. at 2694; *Golinski*, 824 F. Supp. 2d at 992.

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[44] In an en banc opinion issued just this month, the Nevada Supreme Court confirmed that this state policy applies to same-sex couples without regard to either parent's genetic connection to the child or gender. *St. Mary v. Damon*, No. 58315, 129 Nev., Advance Opinion 68 (Oct. 3, 2013) (en banc). The case involved a custody dispute between a same-sex couple who had a child before Nevada's domestic partnership law took effect, and later separated. *Id.* at 3–4. One mother's fertilized egg had been implanted in the other mother, who carried the child to term. *Id.* The Court found the trial court had erred in treating the mother who had carried the child as a mere surrogate, and in refusing to consider the former couple's co-parenting agreement. *Id.* at 3. The Court confirmed that under Nevada law, "a determination of parentage rests upon a wide array of considerations rather than genetics alone." *Id.* at 9; *see also id.* (holding that Nevada law "clearly reflects the legislature's intent to allow nonbiological factors to become critical in a [parentage] determination") (internal quotation marks omitted). The "best interest of the child is the paramount concern," *id.* at 11, and that "interest is served by maintaining two actively involved parents," regardless of whether those parents are same-sex, *id.* at 12.

The Chicken Little predictions described above also were raised by the respondent in *Windsor*, to absolutely no effect. Br. on the Merits for Resp't BLAG at 44–49, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 U.S. S. Ct. Briefs LEXIS 280 at *74–82. *Windsor* found instead that where the government denies official recognition to same-sex couples' relationships — in that case, their valid marriages — the government "diminish[es] the stability and predictability of basic personal relations." 133 S. Ct. at 2694. Rather than credit alleged concerns about "irresponsible procreation" or stereotypes about the ability of same-sex couples to parent, *Windsor* found the only child-related harm worth discussing was the grievous injury caused to the children of same-sex couples when their families are cast out of the same family protection system afforded all others. *Id.* That ends the inquiry here too.

b. Affording same-sex couples access to civil marriage will have no effect on religious liberties.

Allowing same-sex couples to marry does not affect the First Amendment rights of those who are opposed. Although Intervenor raised religious liberty as a purported rationale for the marriage ban, the district court declined to address it — a sensible response given the argument's implausibility. *See* Nev. Rev. Stat. § 122.010 (marriage "is a civil contract"). Affording same-sex couples access to civil marriage "will not impinge upon the religious freedom of any religious organization, official, or any other person" — any more than lawful interfaith

marriages threaten the freedom of those religious entities and leaders who forbid them. *Marriage Cases*, 183 P.3d at 451. "[N]o 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 beliefs," *id.* at 451–52 — such requirements would violate the First Amendment. In fact, the Supreme Court's recent decision upholding the Westboro Baptist Church's right to picket military funerals displaying crass anti-gay messages without any legal liability shows that the First Amendment remains a bulwark of protection for religious expression. *Snyder v. Phelps*, 131 S. Ct. 1207 (2011). For these reasons, analysis of Plaintiff Couples' claims must be guided by constitutional standards and not private religious views; the Court is "not permitted to do less and would damage our constitution immeasurably by trying to do more." *Varnum*, 763 N.W.2d at 905 (Iowa 2009); *see also Perry*, 704 F. Supp. 2d at 976–77; *Kerrigan*, 957 A.2d at 475–76.[45]

[45] Intervenor also argued below that allowing same-sex couples to marry would result in a parade of horribles, including the loss of tax-exempt status and liability due to anti-discrimination lawsuits. Dist. Ct. Dkt. 72 at 26–27. But no church has ever lost its tax exempt status for refusing to perform marriages it does not approve. And Nevada's marriage ban does nothing to alter state anti-discrimination laws, which prohibit sexual orientation discrimination in public accommodations regardless of Nevada's marriage ban. *See, e.g.*, Nev. Rev. Stat. § 651.050(3); § 651.070 (prohibiting sexual orientation discrimination in public accommodations).

C. Nevada's Marriage Ban Also Discriminates Based on Sex, Further Warranting Heightened Review.

Nevada's exclusion of same-sex couples from marriage requires heightened scrutiny for an additional reason: it denies Plaintiff Couples equal protection based on their sex in relation to the sex of their committed life partners. For example, if Plaintiff Karen Goody were a man, she could marry her beloved partner, Plaintiff Karen Vibe. Simply because she is a woman, however, Defendant Officials deny her this socially-cherished right.[46] Such sex-based classifications require heightened scrutiny. *See United States v. Virginia*, 518 U.S. at 524.

Courts have recognized that discrimination against gay people because they form a life partnership with a same-sex rather than a different-sex partner is sex discrimination. *See Perry*, 704 F. Supp. 2d at 996; *Golinski*, 824 F. Supp. 2d at 982 n.4; *In re Balas*, 449 B.R. at 577–78; *In re Levenson*, 560 F.3d 1145, 1147 (9th Cir. EDR Op. 2009); *Baehr v. Lewin*, 852 P.2d 44, 67–68 (Haw. 1993). Sex and sexual orientation "are necessarily interrelated," because entering into an intimate relationship with someone based on that person's sex "is a large part of what defines an individual's sexual orientation." *Perry*, 704 F. Supp. 2d at 996;

[46] When Karen Goody and Karen Vibe went to the Washoe County Marriage Bureau to obtain a marriage license, the security officer asked, "Do you have a man with you?" ER 207 ¶ 16. When Karen Vibe said they did not, and explained that she wished to marry Karen Goody, she was told she could not even obtain or complete a marriage license application. *Id.* (stating that employee of Defendant Harvey told them "Two women can't apply" for a marriage license and the security guard added that marriage is "between a man and a woman").

Golinski, 824 F. Supp. 2d at 982 n.4 ("Sexual orientation discrimination can take the form of sex discrimination."). Indeed, sexual orientation cannot be understood without sex-based references and distinctions. A restriction such as Nevada's, arising because a lesbian or a gay man has a same-sex life partner, thus constitutes discrimination based on sex as well as sexual orientation. *Perry*, 704 F. Supp. 2d at 996.

As the district court recognized, *Loving* establishes that Nevada's restriction on marriage is not gender-neutral simply because it denies both men *and* women the right to marry a same-sex life partner. ER 14. *Loving* discarded "the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations." *Id.* at 8; *see also McLaughlin v. Florida*, 379 U.S. 184, 191 (1964) (holding that equal protection analysis "does not end with a showing of equal application among the members of the class defined by the legislation"); *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127 (1994) (holding that the government may not strike jurors based on sex, even though such a practice, as a whole, does not favor one sex over the other). After all, "[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities." *Romer*, 517 U.S. at 633 (internal quotation marks omitted); *see also Shelley v. Kraemer*, 334 U.S. 1, 21–22 (1948) (holding that it is no answer, in a

challenge to racially restrictive covenants, that they may also be enforced against prospective white property owners).

The district court rejected the sex discrimination claim, however, incorrectly treating *Loving*'s equal application holding as cabined to the context of race. ER 15. But *Loving*'s wisdom is not so limited; rather, *Loving* found that even if racial discrimination had not been at play and the Court presumed "an even-handed state purpose to protect the 'integrity' of all races," Virginia's anti-miscegenation statute still was "repugnant to the Fourteenth Amendment." 388 U.S. at 12 n.11; *see also J.E.B.*, 511 U.S. at 140–41 (holding that individual jurors have a right to nondiscriminatory jury selection, and "this right extends to both men and women"). Nevada's marriage ban is equally repugnant to the Fourteenth Amendment, and there is no refuge in its equal application to men and women.[47]

The district court also claimed the marriage ban cannot constitute sex discrimination because "there is no indication of any intent to maintain any notion of male or female superiority." ER 15; *see also id.* (holding that no "gender-based animus can reasonably be perceived" in the marriage ban). Two fundamental

[47] *See also* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 202–03 (1994) ("In the same way that the prohibition of miscegenation preserved the polarities of race on which white supremacy rested, the prohibition of homosexuality preserves the polarities of gender on which rests the subordination of women. . . . [S]tigmatization of gays in contemporary American society functions as part of a larger system of social control based on gender.").

errors lie therein: First, *no* showing of intent is necessary because the sex-based restriction is clear on the face of the marriage ban. *See Wayte v. United States*, 470 U.S. 598, 609 n.10 (1985) (facial discrimination obviates the need to show intent); Nev. Const. art. 1, § 21 ("Only a marriage between a *male* and *female* person shall be recognized and given effect in this state.") (emphasis added); Nev. Rev. Stat. § 122.020(1) ("a *male* and a *female* person . . . may be joined in marriage") (emphasis added). Second, no gender-based notions of "superiority" or "animus" are required to prove discrimination based on sex. *See, e.g.*, *Locke v. Davey*, 540 U.S. 712, 732 (2004) (Scalia, J., dissenting) (racial segregation could not have been saved by "a well-meaning but misguided belief that the races would be better off apart"); *also compare* ER 15 (district court's observation that there is no indication that "the members of a particular gender were targeted") *with J.E.B.*, 511 U.S. at 140–41 (holding that "individual jurors themselves have a right to nondiscriminatory jury selection procedures" and "this right extends to both men and women"). It matters not whether the sex-based classification is motivated by a well-intentioned but misplaced desire to provide for "women and their need for special protection," or even "to compensate for and ameliorate the effects of past discrimination." *Orr*, 440 U.S. at 283. The Fourteenth Amendment's prohibition is simple: the government may not without an exceedingly persuasive justification

classify its citizens for differential treatment "based on sex," *United States v. Virginia*, 518 U.S. at 524, and the marriage ban is such a classification.

Nevada's marriage ban fails for the additional reason that it is premised on impermissible sex stereotyping, by perpetuating the idea that proper women should marry and raise children with men, and proper men should marry and raise children with women. Intervenor's papers, rife with gender-typed notions, lay bare these stereotyped ideas. *See* Dist. Ct. Dkt. 72 at 19 (referring to mother as "often vulnerable" and portraying father as the source of support and stability); *id.* at 25 (describing marriage for different-sex couples as "bridging the male-female divide," which requires a "massive cultural effort . . . at all times and in all places"). Indeed, Intervenor's suggestion that a marriage becomes "genderless" when entered by same-sex couples rests on the idea that only when a man and a woman are paired do they retain sufficient masculinity and femininity respectively to remain gendered in a "man-woman marriage." *See id.* 2, 13 (asserting that "[g]enderless marriage is a profoundly different institution than man-woman marriage"); *id.* at 13, 29 (referring to "heteronormativity" as a legitimate government interest, rather than an unconstitutional interest in perpetuating sex-stereotyped treatment of men and women); *id.* at 24–25 (asserting that so-called "man-woman marriage" is the only means of "confer[ring] the status of husband and wife" and "prepar[ing] a male for the role, status and identity of husband,

transform[ing] him into a husband, and sustain[ing] him over time in his performance of that role. The same is true for a female relative to wife."). The district court itself adopted this gendered language. ER 34 (accepting the idea that allowing same-sex couples to marry would constitute a "'genderless marriage' regime"); ER 13 (claiming that the marriage ban "at most, [intends to maintain notions] of heterosexual superiority or 'heteronormativity' by relegating . . . homosexual legal unions to a lesser status").[48]

The unmistakable sex stereotyping underlying Nevada's marriage ban constitutes impermissible sex discrimination. *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) ("Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions [based on sex]."); *Craig v. Boren*, 429 U.S. 190, 202 n.14 (1976) (overturning Oklahoma's differential treatment of young men and women regarding access to alcohol and

[48] Intervenor's assertion below that "heteronormativity" is a purported state interest for the marriage ban offers a surprisingly candid window into the marriage ban's purpose: to stigmatize gay people as less worthy members of society, and to elevate heterosexuals as embodying the superior "norm." This purpose has been rejected by federal courts. *See Lawrence*, 539 U.S. at 567 (lesbians and gay men have a constitutionally protected liberty interest in forming enduring family relationships); *Windsor*, 133 S. Ct. at 2694 ("[DOMA's] differentiation demeans [same-sex] couple[s], whose moral and sexual choices the Constitution protects . . . ."). Premising the marriage ban on such a government goal could not more strongly violate *Romer*'s command that "the Constitution neither knows nor tolerates classes among citizens" (quoting Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 557, 559 (1896)), and instead must "rest[] on a commitment to the law's neutrality where the rights of persons are at stake." 517 U.S. at 623.

discussing the distorting effects of gender-based stereotypes); *Orr*, 440 U.S. at 283 (holding that where a gender-neutral law will serve a state's purposes, the state may not adopt one that "gender classifies and therefore carries with it the baggage of sexual stereotypes").

The marriage ban is the last vestige of sex-based discrimination in Nevada's marriage laws. *See Perry*, 704 F. Supp. 2d at 998 (holding that the now-defunct California marriage ban is "nothing more than an artifact of a foregone notion that men and women fulfill different roles in civic life"). The marriage ban thus warrants the heightened judicial review afforded to sex-based classifications, which it cannot survive.

D. Nevada's Marriage Ban Discriminates with Respect to Fundamental Rights and Liberty Interests and Must Be Afforded Heightened Scrutiny for that Reason as Well.

Nevada's marriage ban warrants heightened scrutiny for the additional reason that it restricts the exercise of fundamental rights and liberty interests, *see* Section III *supra*, along invidious lines. Some rights acquire such importance that, absent a sufficiently important governmental interest in discrimination, they must be distributed evenhandedly. *See Skinner*, 316 U.S. at 541 (holding that it is "essential" that courts employ strict scrutiny when a state law denies "groups or types of individuals" rights such as "[m]arriage and procreation [that] are fundamental"); *see also* Erwin Chemerinsky, *Constitutional Law: Principles and*

Policies, § 10.1.1 ("[O]nce a right is deemed fundamental, under due process *or equal protection*, strict scrutiny is generally used.") (emphasis added).[49] This marriage ban targets a particular segment of the population, lesbians and gay men, to deny them both a right to marry and equal dignity under the law. "[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966).

With respect to classifications restricting access to marriage, the Supreme Court has held that "the right to marry is of fundamental importance, and since the classification at issue here significantly interferes with the exercise of that right, we believe that 'critical examination' of the state interests advanced in support of the classification is required." *Zablocki*, 434 U.S. at 383 (citation omitted) (finding the challenged statute to violate equal protection guarantees). *Zablocki* examined, and rejected, Wisconsin's rule that no state resident under a court order to support a

[49] The Supreme Court has applied heightened review to state action that selectively denies important rights in a wide range of contexts. *See, e.g.*, *Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 254 (1974) (holding that a residency requirement for free medical care that discriminates with respect to the right to travel must be justified by a compelling state interest); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 99 (1972) (observing that an ordinance treating one class of picketing differently from others "must be tailored to serve a substantial governmental interest"); *Harper*, 383 U.S. at 670.

child not in his custody could marry without court permission, to be granted only upon proof of compliance with the support obligation, and a showing that his children were not presently, nor likely to become, public charges. *Id*. at 375. The Court explained that, for those who could not or would not satisfy the state's concern of providing for existing offspring, blocking marriage for that targeted group was improper because it did not promote the welfare of those children and it well might lead to harm for an individual's future children, for whom the law's "only result [is] in the children being born out of wedlock, as in fact occurred in appellee's case." *Id*. at 390. The same is true here. The marriage ban cannot be justified as an attempt to encourage gay people to marry a different-sex partner, or to impose legal disabilities on them and their children under any standard of review, let alone the "critical examination" that *Zablocki* requires.

The district court claimed, without support, that the fundamental right to marry does not include access to the term "marriage," and rather encompasses merely the family formation rights already available to registered domestic partners. ER 29. Whether or not the name "marriage" is considered a core element of that fundamental right, having now provided this status of unparalleled stature in society, the State may not withhold it from some along invidious lines of sexual orientation and sex. *See Eisenstadt*, 405 U.S. at 453 ("[W]hatever the rights of the individual to access to contraceptives may be, the rights must be the same

for the unmarried and the married alike."). The ban "significantly interferes with the exercise of a fundamental right [and] it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate those interests." *Zablocki*, 434 U.S. at 388. The Defendant Officials will not meet this test. *See infra* at III.

The Equal Protection Clause thus secures mutually reinforcing guarantees of freedom both from unequal treatment on the basis of invidious classifications, *and* from invidious classifications with respect to important rights and liberty interests. Nevada's marriage ban violates these dual principles and cannot stand.

V. BAKER V. NELSON PRESENTS NO BARRIER TO RELIEF IN THIS CASE.

The District Court held that Plaintiff Couples' claims were largely precluded by the Supreme Court's summary dismissal in *Baker v. Nelson*, which arose from a suit filed by a same-sex plaintiff couple seeking to marry in early 1970s Minnesota. ER 9–12; *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971). When the *Baker* plaintiffs sought review of their loss in the Minnesota Supreme Court under former 28 U.S.C. § 1257(2), the Supreme Court summarily dismissed the appeal. 409 U.S. 810 (1972) (mem.).

The Supreme Court has recognized that summary decisions "are obviously not of the same precedential value as would be an opinion of this Court . . . on the merits," *Richardson v. Ramirez*, 418 U.S. 24, 83 n.27 (1974). The District Court

failed to recognize that subsequent doctrinal developments may vitiate any force a summary decision might have had. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975); *Jones v. Bates*, 127 F.3d 839, 852 n.13 (9th Cir. 1997). In the more than 40 years since *Baker* was decided, the Supreme Court has recognized that sex-based classifications require heightened scrutiny, *Frontiero*, 411 U.S. at 688; held that a bare desire to harm gay people cannot constitute a legitimate government interest, *Romer*, 517 U.S. at 634–35; and recognized that lesbian and gay individuals have the same liberty interest in intimate family relationships as heterosexuals, *Lawrence*, 539 U.S. at 578.[50]

Any lingering shadow *Baker* may have cast, however, was extinguished by *Windsor*. Justice Ginsburg previewed the Court's skepticism when the issue was raised during oral argument about California's marriage ban in *Hollingsworth*, saying,

> Mr. Cooper, *Baker v. Nelson* was 1971. The Supreme Court hadn't even decided that gender-based classifications get any kind of heightened scrutiny. . . . And the same-sex intimate conduct was

[50] While it attempted to atomize *Romer* by treating it as distinct from equal protection doctrine, ER 11–12 (distinguishing between "*Romer* doctrine" and a "traditional equal protection claim"), the district court conceded that arguments pursuant to *Romer* could not be precluded by *Baker*. ER 11–12. *Romer* informs constitutional doctrine as a whole, as the Supreme Court recognized in relying on the decision both in *Lawrence*, 539 U.S. at 574–76, and *Windsor*, 133 S. Ct. at 2692, 2693. The district court's artificial treatment of *Romer* as creating a new, severable doctrine underscores the court's failure to appreciate that *Baker* simply has been superseded.

> considered criminal in many States in 1971, so I don't think we can extract much in *Baker v. Nelson*.

Tr. of Oral Arg. at 12, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144), 2013 U.S. Trans. LEXIS 40, at *10. Ultimately, *Baker* did not earn so much as a passing reference in any of the Supreme Court's merits opinions about same-sex couples and marriage last term. *See, e.g.*, *Windsor*, 133 S. Ct. at 2705–11 (Scalia, J., dissenting) (discussing the merits of DOMA's constitutionality without referencing *Baker*); *id.* at 2714–20 (Alito, J., dissenting) (same). In light of *Windsor*'s ruling that DOMA is unconstitutional because it imposes "a disadvantage, a separate status, and so a stigma" on same-sex couples, as Nevada does now, it is no longer plausible that Plaintiff Couples' claims fail even to raise a federal question. 133 S. Ct. at 2693.[51]

[51] Even were this Court to conclude that *Baker* precludes a merits ruling on a due process or broad equal protection claim, *Baker* certainly is not a bar to any ruling in Plaintiffs' favor. A summary dismissal's limited precedential value extends only to "prevent lower courts from coming to opposite conclusions on the *precise* issues presented and *necessarily decided* by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam) (emphasis added). The Court could resolve this case in a manner tailored to Nevada's state policy, which recognizes that same-sex couples are worthy of the rights and responsibilities of spouses by providing them through domestic partnership, even as the state denies them the honored designation of marriage. *Baker* could not even have imagined, let alone decided, that question in 1971, when no state in the country offered any relationship protection for same-sex couples.

CONCLUSION

In the first case to fulfill same-sex couples' freedom to marry, Massachusetts' high court observed that the "plaintiffs are members of our community, our neighbors, our coworkers, our friends. . . . [They] volunteer in our schools, worship beside us in our religious houses, and have children who play with our children, to mention just a few ordinary daily contacts. We share a common humanity and participate together in the social contract that is the foundation" of a shared society. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 973 (Mass. 2003) (Greaney, J., concurring). Plaintiff Couples, like other same-sex couples across Nevada, yearn for recognition of their shared humanity and a family life accorded equal dignity by the State. They also hope "that someday lesbian and gay youth in Nevada will be able to grow up with the same dreams of marrying their one, cherished partner as their heterosexual peers, with all of the validation, dignity, and respect that this shared dream communicates to others." ER 195–96 ¶ 4. Federal guarantees of due process and equal protection require nothing less. The district court's judgment should be reversed.

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DATE: October 18, 2013

Respectfully submitted,

Jon W. Davidson
Tara L. Borelli
Peter C. Renn
Shelbi D. Day
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.

Carla Christofferson
Dawn Sestito
Dimitri Portnoi
Melanie Cristol
Rahi Azizi
O'MELVENY & MYERS LLP

Kelly H. Dove
Marek P. Bute
SNELL & WILMER LLP

By: s/ Tara L. Borelli
Tara L. Borelli

Attorneys for Plaintiffs-Appellants

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Plaintiffs-Appellants are aware of only one other related case pending in the United States Court of Appeals for the Ninth Circuit which raises some issues closely related to those in the instant case: *Jackson*, et al. *v. Abercrombie*, Nos. 12-16995 and 12-16998 (9th Cir. filed Sept. 7, 2012).

Dated: October 18, 2013

By: s/ Tara L. Borelli
Tara L. Borelli

Attorneys for Plaintiffs-Appellants

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

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (check appropriate option):

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Signature of Attorney or Unrepresented Litigant: s/ Tara L. Borelli

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

Date: October 18, 2013

[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

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. 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.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.

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 October 18, 2013. 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/ Tara L. Borelli