Case No. 12-17668

IN THE
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, No. 2:12-CV-00578-RCJ-PAL, Robert C. Jones, District Judge

BRIEF OF THE STATES OF INDIANA, ALABAMA, ALASKA, ARIZONA, COLORADO, IDAHO, MONTANA, NEBRASKA, OKLAHOMA, SOUTH CAROLINA AND UTAH AS *AMICI CURIAE* IN SUPPORT OF AFFIRMANCE

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INTEREST OF THE *AMICI* STATES[1]

The *amici* States file this brief in support of the Governor and Attorney General of Nevada. The majority of States—thirty-three in all—limit marriage to the union of one man and one woman, consistent with the historical definition of marriage.[2] As the Supreme Court affirmed just last term, "[b]y history and tradition the definition and

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[1] No party's counsel authored the brief in whole or in part, and no one other than the amicus curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. This brief is filed as of right under Fed. R. App. P. 29(a); thus no motion for leave to file is required.

[2] Twenty-nine States have done so by constitutional amendment: Alabama (Ala. Const. art. I, § 36.03), Alaska (Alaska Const. art. 1, § 25; Arizona (Ariz. Const. art. 30, § 1); Arkansas (Ark. Const. amend. 83, § 1); Colorado (Colo. Const. art. 2, § 31); Florida (Fla. Const. art. 1, § 27); Georgia (Ga. Const. art. 1, § 4 ¶ I); Idaho (Idaho Const. art. III, § 28); Kansas (Kan. Const. art. 15, § 16); Kentucky (Ky. Const. § 233A); Louisiana (La. Const. art. XII, § 15); Michigan (Mich. Const. art. I, § 25); Mississippi (Miss. Const. art. 14, § 263A); Missouri (Mo. Const. art. I, § 33); Montana (Mont. Const. art. XIII, § 7); Nebraska (Neb. Const. art. I, § 29); Nevada (Nev. Const. art. I, § 21); North Carolina (N.C. Const. art. XIV, § 6); North Dakota (N.D. Const. art. XI, § 28); Ohio (Ohio Const. art. XV, § 11); Oklahoma (Okla. Const. art. 2, § 35); Oregon (Or. Const. art. XV, § 5a); South Carolina (S.C. Const. art. XVII, § 15); South Dakota (S.D. Const. art. XXI, § 9); Tennessee (Tenn. Const. art. XI, § 18); Texas (Tex. Const. art. 1, § 32); Utah (Utah Const. art. 1, § 29); Virginia (Va. Const. art. I, § 15-A); and Wisconsin (Wis. Const. art. XIII, § 13). Another four States restrict marriage to the union of a man and a woman by statute: Indiana (Ind. Code § 31-11-1-1); Pennsylvania (23 Pa. Cons. Stat. Ann. § 1704); West Virginia (W. Va. Code § 48-2-603); and Wyoming (Wyo. Stat. Ann. § 20-1-101).

regulation of marriage . . . [is] within the authority and realm of the separate States." *United States v. Windsor*, 133 S. Ct. 2675, 2689-90 (2013). Indeed, the Court has long recognized that authority over the institution of marriage lies with the states. *See, e.g., Sosna v. Iowa*, 419 U.S. 393, 404 (1975) ("'The State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created . . . .'") (quoting *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1877)). Primary state authority over family law is confirmed by definite limitations on federal power, as even the broadest conception of the commerce power forbids any possibility that Congress could regulate marriage. *See United States v. Lopez*, 514 U.S. 549, 624 (1995) (Breyer, J., dissenting) (agreeing with majority that commerce power cannot extend to "regulate marriage, divorce, and child custody") (quotations omitted).

Nor can federal judicial power do what Congress cannot. In finding a lack of federal habeas jurisdiction to resolve a custody dispute, the Supreme Court long ago identified the axiom of state sovereignty that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws

of the United States." *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890). The Court has recognized that "the domestic relations exception . . . divests the federal courts of power to issue divorce, alimony, and child custody decrees." *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992).

Particularly in view of traditional, exclusive state prerogatives over marriage, the *amici* States have an interest in protecting state power to adhere to the traditional definition of marriage.

SUMMARY OF THE ARGUMENT

As the district court concluded, *Baker v. Nelson*, 409 U.S. 810 (1972), controls this case. There, the Supreme Court rejected summarily—but on the merits—a Fourteenth Amendment challenge to Minnesota's traditional definition of marriage. That case has never been overruled or even called into question, and the lower federal courts are not permitted to anticipate its demise. Because the *amici* States have little to add to the district court's resolution of this issue, this brief will focus on alternative legal arguments in support of Nevada's traditional definition of marriage.

First, no fundamental right to same-sex marriage exists, and traditional marriage laws do not target sexual orientation as such, so

even aside from *Baker*, rational-basis scrutiny applies. Traditional marriage is too deeply imbedded in our laws, history and traditions for a court to hold that the choice to adhere to that definition is irrational.

As an institution, marriage has always enjoyed the protection of the law everywhere in our civilization. For the Founding generation, those who enacted and ratified the Fourteenth Amendment, the institution of marriage was a given—antecedent to the state in fact and theory. Until recently, "it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex." *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006). Consequently, it is utterly implausible to suggest, as the legal argument for same-sex marriage necessarily implies, that states long-ago invented marriage as a tool of invidious discrimination against homosexuals. *See, e.g.*, *Andersen v. King County*, 138 P.3d 963, 978 (Wash. 2006); *Hernandez*, 855 N.E.2d at 8; *Conaway v. Deane*, 932 A.2d 571, 627-28 (Md. 2007).

The Supreme Court has observed the longstanding importance of traditional marriage in its substantive due process jurisprudence, recognizing marriage as "the most important relation in life," and as

"the foundation of the family and of society, without which there would be neither civilization nor progress." *Maynard v. Hill,* 125 U.S. 190, 205, 211 (1888). The right "to marry, establish a home and bring up children" is a central component of liberty protected by the Due Process Clause, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and "fundamental to the very existence and survival of the race." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

All of these pronouncements, recognizing the procreative function of marriage and family, implicitly contemplate the historic definition of marriage. That definition, in turn, arises not from a fundamental impulse of animus, but from a cultural determination that children are best reared by their biological parents. The theory of traditional civil marriage, that is, turns on the unique qualities of the male-female couple for procreating and rearing children under optimal circumstances. As such, it not only reflects and maintains deep-rooted traditions of our Nation, but also furthers the public policy of encouraging biological parents to stay together for the sake of the children produced by their sexual union.

In contrast, redefining marriage as nothing more than societal validation of personal bonds of affection leads not to the courageous elimination of irrational, invidious treatment, but instead to the tragic deconstruction of civil marriage and its subsequent reconstruction as a glorification of the adult self. And unlike the goal of encouraging responsible procreation that underlies traditional marriage, the mere objective of self-validation that inspires same-sex marriage lacks principled limits. If public affirmation of anyone and everyone's personal love and commitment is the single purpose of civil marriage, a limitless number of rights claims could be set up that evacuate the term "marriage" of any meaning.

Denying traditional marriage its long-recognized underpinnings without identifying an alternative *public* interest yields no principled limitation on the relationships government must recognize. Once the natural limits that inhere in the relationship between a man and a woman can no longer sustain the definition of marriage, it follows that any grouping of adults would have an equal claim to marriage. This Court should reject a theory of constitutional law that risks eliminating marriage as government recognition of a limited set of relationships.

ARGUMENT

I. No Fundamental Rights or Suspect Classes are Implicated

A. Same sex marriage is not a fundamental right deeply rooted in this Nation's history and tradition

Fundamental rights are those that are "objectively, 'deeply rooted in this Nation's history and tradition' . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quoting *Moore v. E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion) and *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)). A "'careful description' of the asserted fundamental liberty interest" is required, and the Supreme Court has noted that "[b]y extending constitutional protection to an asserted right or liberty interest, [courts], to a great extent, place the matter outside the arena of public debate and legislative action. [Courts] must therefore 'exercise the utmost care whenever [they] are asked to break new ground in this field . . . .'" *Id.* at 720, 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993) and *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)).

Accordingly, in a substantive due process analysis, definitions matter. "Marriage" is a foundational and ancient social institution that predates the formation of our Nation. "[M]arriage between a man and a woman [has] been thought of . . . as essential to the very definition of that term and to its role and function throughout the history of civilization. *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013). Until very recently, its meaning was internationally and universally understood to be limited to the union of a man and a woman. *See id.* at 2715 (Alito, J., dissenting) (noting that the Netherlands first extended marriage to same-sex couples in 2000). Indeed, the word and concept, as historically understood—required by the *Glucksberg* analysis, 521 U.S. at 720-21—presuppose an exclusive union between one man and one woman. The plaintiffs cannot, therefore, seek to assert a fundamental right to "marriage," because they, as same-sex couples, plainly fall outside the scope of the right itself.

Unable to assert a fundamental right to "marriage," Plaintiffs also cannot assert a fundamental right to same-sex marriage, as this concept is clearly not "'deeply rooted in this Nation's history and tradition' . . . and 'implicit in the concept of ordered liberty.'" *Glucksberg*, 521 U.S. at

720-21. Barely a decade ago, in 2003, Massachusetts became the first State to extend the definition of marriage to a union between individuals of the same sex. It did so through a 4-3 court decision, without a majority opinion and by interpreting its *state* constitution. *Goodridge v. Dep't. of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003). In 2008, a closely divided Supreme Court of Connecticut similarly held that its state constitution established a right of same-sex marriage. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 482 (Conn. 2008). A panel of the Iowa Supreme Court did so in 2009, again under the state constitution. *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009).

Only twelve States and the District of Columbia have extended marriage to same-sex unions *legislatively*. Connecticut and Vermont in 2009; New Hampshire in 2010; New York in 2011; Washington and Maine in 2012; and Delaware, Hawai'i, Illinois, Maryland, Minnesota, and Rhode Island in 2013. *See* Conn. Gen. Stat. § 46b-20, -20a; 15 V.S.A. § 8; N.H. Rev. Stat. Ann. § 457:46; N.Y. Dom. Rel. § 10-A; Wash. Rev. Code § 26.04.010; Me. Rev. Stat. § 650-A; Del. Code tit. 13, § 129; Haw. Rev. Stat. § 572-1.8; 750 Ill. Comp. Stat. 5/201; Md. Code Ann., Fam. Law § 2-201; Minn. Stat. § 517.01-.02; R.I. Gen. Laws § 15-1-1;

D.C. Code § 46-401 (2010).[3] Meanwhile, voters and legislatures in thirty-three States have affirmed the historic, traditional definition of marriage, either by constitutional amendment or legislation. *See supra* n.1.

This is not a historical record that justifies treating same-sex marriage as a fundamental right.

B. Limiting marriage to the union of a man and a woman does not implicate a suspect class

1. Traditional marriage is not sex discrimination

The district court correctly rejected the theory that Nevada's traditional definition of marriage discriminates on the basis of sex, and therefore properly eschewed both heightened scrutiny and comparison to the anti-miscegenation law invalidated in *Loving v. Virginia*, 388 U.S. 1 (1967). *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1004-1005 (D. Nev. 2012).

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[3] Even at that, not all have stuck. In 2009, Maine voters repealed a 2009 statute enacted by its legislature that extended marriage to same-sex couples. Bureau of Corporations, Elections and Commissions, Department of the Maine Secretary of State, *November 3, 2009 General Election Tabulations*, http://www.maine.gov/sos/cec/elec/2009/referendumbycounty.html (last visited January 28, 2014).

The traditional definition of marriage existed at the very origin of the institution and predates by millennia the current political controversy over same-sex marriage. It neither targets, nor disparately impacts, either sex. Accordingly, there is no basis for inferring that sex discrimination underlies traditional marriage, and no basis for subjecting traditional marriage definitions to heightened scrutiny.

There is also no parallel to *Loving* in this circumstance. The racially discriminatory classification in *Loving* was "designed to maintain White Supremacy," to the clear favor of one racial class. *See Loving*, 388 U.S. at 11. A *Loving* analogy involving sex discrimination would, for example, ban *only* lesbians from marrying women, but not gay men from marrying other men. Traditional marriage, in contrast, draws no distinction based on gender.

Furthermore, unlike traditional marriage laws, anti-miscegenation laws *contravened* common law and marriage tradition in Western society. The entire phenomenon of banning interracial marriages originated in the American colonies: "There was no ban on miscegenation at common law or by statute in England at the time of the establishment of the American Colonies." Harvey M. Applebaum,

Miscegenation Statutes: A Constitutional and Social Problem, 53 Geo. L.J. 49, 49-50 (1964). In contrast with inter-racial marriages, same-sex relationships were never thought to be marriages—or to further the purposes of marriage—anywhere at anytime, until recently (in some jurisdictions).

As Nevada's traditional marriage definition does not draw a classification or even impose a disproportionate effect based on sex, it does not constitute sex discrimination subject to heightened Fourteenth Amendment scrutiny.

2. Traditional marriage laws do not classify based on sexual orientation or target homosexuals, so neither *SmithKline Beecham* nor *Windsor* is instructive

As the district court observed, traditional marriage laws do not classify homosexuals as such. "[T]he distinction is not by its own terms drawn according to sexual orientation. Homosexual persons may marry in Nevada, but like heterosexual persons, they may not marry members of the same sex." *Sevcik v. Sandoval*, 911 F.Supp. 2d 996, 1004 (D. Nev. 2012). While traditional marriage laws *impact* heterosexuals and homosexuals differently, that is not enough to treat them as creating classifications based on sexuality, particularly in view of the benign

history of traditional marriage laws generally. *See*, *e.g.*, *Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding that disparate impact on a suspect class is insufficient to justify strict scrutiny absent evidence of discriminatory purpose).

Yet the district court paradoxically deduced that, notwithstanding the lack of classification based on sexual orientation, "for the purposes of an equal protection challenge, the distinction is definitely sexual-orientation based." *Sevcik*, 911 F. Supp. 2d at 1005. Regarding the Nevada law's supposed "distinction"—which the district court did not precisely identify—there is (said the district court) "at most" some "intent to maintain" what it called "heterosexual superiority or 'heteronormativity.'" *Id.* But deducing any such discriminatory intent (unaccompanied by any actual statutory classification) is highly anachronistic. There is no plausible argument that the traditional definition of marriage was invented as a way to discriminate against homosexuals or to maintain the "superiority" of heterosexuals vis-à-vis homosexuals. And inferring discriminatory intent from Nevada's more recent decision to recognize civil unions but adhere to the traditional,

benign definition of marriage unfairly penalizes, and can only discourage, social experimentation.

Accordingly, the recent decision in *SmithKline Beecham Corp. v. Abbott Labs.*, Nos. 11-17357, 11-17373, 2014 WL 211807 (9th Cir. Jan. 21, 2014), that intentional targeting of homosexual status in jury selection constitutes invidious discrimination subject to heightened scrutiny has no bearing here. That decision turned on *United States v. Windsor*, 133 S. Ct. 2675 (2013), where the Court deemed DOMA Section 3 an "unusual deviation from the usual tradition of *recognizing and accepting state definitions of marriage*," and therefore searched for improper animus. *Windsor,* 133 S. Ct. at 2693 (emphasis added). *SmithKline Beecham* held that a searching inquiry is also justified where state action specifically targets sexual orientation. *SmithKline Beecham*, 2014 WL 211807 at *10-12. But there is nothing about Nevada's adherence to the traditional definition of marriage—which has prevailed since before statehood—that either targets sexual orientation or constitutes an "unusual deviation from tradition."

Hence, even by the terms of *SmithKline Beecham* and *Windsor*, there is no call to search for illicit motives. More fundamentally, these

technical, doctrinal inquiries only confirm what common sense tells us: traditional marriage arises from concern for opposite-sex couples, not same-sex couples.

II. The Concept of Traditional Marriage Embodied in the Laws of Thirty-Three States Satisfies Rational Basis Review

Because Nevada's traditional definition of marriage does not involve a fundamental right or a suspect class, it benefits from a "strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319 (1993). It must be upheld "if there is any reasonably conceivable set of facts that could provide a rational basis for the classification." *Id.* at 320 (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)). "[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.'" *Id.* (quoting *Beach Commc'ns*, 508 U.S. at 315). The district court correctly stated that it cannot "judge the perceived wisdom or fairness of [the] law, nor [can] it examine the actual rationale for the law when adopted." *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1014 (D. Nev. 2012).

A. The definition of marriage is too deeply imbedded in our laws, history and traditions for a court to hold that adherence to that definition is illegitimate

As an institution, marriage has served so many interlocking and mutually reinforcing public purposes that it always and everywhere in our civilization has enjoyed the protection of the law. Yet until recently, "it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sexes." *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006). Consequently, it is utterly implausible to suggest, as the legal argument for same-sex marriage necessarily implies, that States long-ago invented marriage as a tool of invidious discrimination based on sex or same-sex love interest.

In Nevada, the traditional definition of marriage was established by state statute in 1861—even before statehood—and reaffirmed through a constitutional amendment, ratified by the voters, in 2002. Until the past decade, every State in the Union adhered to this same traditional definition of marriage. A political (as opposed to judicial) re-definition of marriage did not occur until 2009. See Conn. Gen. Stat. § 46b-20 and 15 V.S.A. § 8. Even today, the people of thirty-eight States,

directly or through their representatives, have defined marriage in the traditional manner. In a few of these States, to be sure, courts have invalidated the traditional definition of marriage,[4] but for present purposes it is important to bear in mind that, politically speaking, the people of the vast majority of States have not themselves been moved to redefine marriage.

Against this backdrop, the district court properly concluded that "[t]he protection of the traditional institution of marriage, which is a conceivable basis for the distinction drawn in this case, is a legitimate state interest." *Sevcik v. Sandoval,* 911 F. Supp. 2d 996, 1014 (D. Nev. 2012). It is rational to limit the title of "marriage" to opposite-sex couples because "it is conceivable that a meaningful percentage of heterosexual couples would cease to value the civil institution as highly as they previously had and hence enter into it less frequently. . . ." *Id.* at 1016. The consequences of altering the traditional definition of

[4] *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010); *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health,* 957 A.2d 407, 481-82 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 906-07 (Iowa 2009); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 968-70 (Mass. 2003); *Garden State Equality v. Dow*, 79 A.3d 1036, 1045 (N.J. 2013); *Griego v. Oliver*, No. 34,306, 2013 WL 6670704, at *22-23 (N.M. Dec. 19, 2013); *Baker v. State*, 744 A.2d 864, 911-12 (Vt. 1999).

marriage could be so severe as to lead to "an increased percentage of out-of-wedlock children, single-parent families, [and] difficulties in property disputes after the dissolution. . . ." *Id.*

In the same vein, the Supreme Court has observed the longstanding importance of traditional marriage in its substantive due process jurisprudence, recognizing marriage as "the most important relation in life," and as "the foundation of the family and of society, without which there would be neither civilization nor progress." *Maynard v. Hill,* 125 U.S. 190, 205, 211 (1888). The Court recognized the right "to marry, establish a home and bring up children" as a central component of liberty protected by the Due Process Clause, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and in *Skinner v. Oklahoma*, marriage was described as "fundamental to the very existence and survival of the race." 316 U.S. 535, 541 (1942). All of these pronouncements, recognizing the procreative function of marriage and family, implicitly contemplate and confirm the validity of the historic definition of marriage.

B. States recognize marriages between members of the opposite sex in order to encourage responsible procreation, and this rationale does not apply to same-sex couples

Civil marriage recognition arises from the need to protect the only procreative relationship that exists, and in particular to make it more likely unintended children, among the weakest members of society, will be cared for. Rejecting this fundamental rationale for marriage undermines the existence of *any* legitimate state interest in recognizing marriages.

1. Marriage serves interests inextricably linked to the procreative nature of opposite-sex relationships

Civil recognition of marriage historically has not been based on state interest in adult relationships in the abstract. Marriage was not born of animus against homosexuals but is predicated instead on the positive, important and concrete societal interests in the procreative nature of opposite-sex relationships. Only opposite-sex couples can naturally procreate, and the responsible begetting and rearing of new generations is of fundamental importance to civil society. It is no exaggeration to say that "[m]arriage and procreation are fundamental

to the very existence and survival of the race." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

In short, traditional marriage protects civil society by encouraging couples to remain together to rear the children they conceive. It creates a norm where sexual activity that *can* beget children should occur in a long-term, cohabitative relationship. *See, e.g., Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) ("The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father."); *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 677 (Tex. App. 2010) ("The state has a legitimate interest in promoting the raising of children in the optimal familial setting. It is reasonable for the state to conclude that the optimal familial setting for the raising of children is the household headed by an opposite-sex couple.").

States have a strong interest in supporting and encouraging this norm. Social science research shows that children raised by both biological parents in low-conflict intact marriages are at significantly less risk for a variety of negative problems and behaviors than children raised in other family settings. "[C]hildren living with single mothers are five times more likely to be poor than children in two-parent

households." Barack Obama, The Audacity of Hope: Thoughts on Reclaiming the American Dream 333 (New York: Crown Publishers 2006). Children who grow up outside of intact marriages also have higher rates of juvenile delinquency and crime, child abuse, emotional and psychological problems, suicide, and poor academic performance and behavioral problems at school. *See, e.g.*, Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 La. L. Rev. 773, 783-87 (2002); Lynn D. Wardle, *The Fall of Marital Family Stability & The Rise of Juvenile Delinquency*, 10 J. L. & Fam. Stud. 83, 89-100 (2007).

Traditional marriage provides the opportunity for children born within it to have a biological relationship to those having original *legal* responsibility for their well-being, and accordingly is the institution that provides the greatest likelihood that both biological parents will nurture and raise the children they beget, which is optimal for children and society at large. By encouraging the biological to join with the legal, traditional marriage "increas[es] the relational commitment, complementarity, and stability needed for the long term responsibilities that result from procreation." Lynn D. Wardle, *"Multiply and*

Replenish": Considering Same-Sex Marriage in Light of State Interest in Marital Procreation, 24 Harv. J.L. & Pub. Pol'y 771, 792 (2001). Through civil recognition of marriage, society channels sexual desires capable of producing children into stable unions that will raise those children in the circumstances that have proven optimal. Gallagher, *supra*, at 781-82.

The fact that opposite-sex couples may marry even if they do not plan to or are unable to have children does not undermine this norm or invalidate state interests in traditional marriage. *See Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974) (confirming marriage "as a protected legal institution primarily because of societal values associated with the propagation of the human race. . .even though married couples are not required to become parents and even though some couples are incapable of becoming parents and even though not all couples who produce children are married"). Even childless opposite-sex couples reinforce and exist in accord with the traditional marriage norm. Besides, it would obviously be a tremendous intrusion on individual privacy to inquire of every couple wishing to marry whether they intended to or could procreate. States are not required to go to

such extremes simply to prove that the purpose behind civil recognition of marriage is to promote procreation and child rearing in the traditional family context.

Nor does the ideal of combining the biological with the legal disparage the suitability of alternative arrangements where non-biological parents have legal responsibility for children. "Alternate arrangements, such as adoption, arise not primarily in deference to the emotional needs or sexual choices of adults, but to meet the needs of children whose biological parents fail in their parenting role." Gallagher, *supra*, at 788. The State may rationally conclude that, all things being equal, it is better for the natural parents to also be the legal parents, and establish civil marriage to encourage that result. *See Hernandez*, 855 N.E.2d at 7.

Moreover, the sexual activity of same-sex couples implies no consequences similar to that of opposite-sex couples, *i.e.,* same-sex couples can never become parents unintentionally through sexual activity. Whether through surrogacy or reproductive technology, same-sex couples can become biological parents only by deliberately choosing to do so, requiring a serious investment of time, attention, and

resources. *Morrison v. Sadler*, 821 N.E.2d 15, 24 (Ind. Ct. App. 2005) (lead opinion). Consequently, same-sex couples do not present the same potential for unintended children, and the state does not necessarily have the same need to provide such parents with the incentives of marriage. *Id.* at 25; *see also In re Marriage of J.B. & H.B.*, 326 S.W.3d at 677 ("Because only relationships between opposite-sex couples can naturally produce children, it is reasonable for the state to afford unique legal recognition to that particular social unit in the form of opposite-sex marriage.").

In brief, the mere existence of children in households headed by same-sex couples does not put such couples on the same footing vis-à-vis the State as opposite-sex couples, whose general ability to procreate, even unintentionally, legitimately gives rise to state policies encouraging the legal union of such sexual partners. The State may rationally reserve marriage to one man and one woman to enable the married persons—in the ideal—to beget children who have a natural and legal relationship to each parent and serve as role models of both sexes for their children.

2. Courts have long recognized the responsible procreation purpose of marriage

From the very first legal challenges to traditional marriage, courts have refused to equate same-sex relationships with opposite-sex relationships. In *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974), the court observed that limiting marriage to opposite-sex couples "is based upon the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children." Not every marriage produces children, but "[t]he fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race." *Id.*

"[A]t least one of the reasons the government [grants benefits to marital partners] is to encourage responsible procreation by opposite-sex couples." *Morrison v. Sadler*, 821 N.E.2d 15, 29 (Ind. Ct. App. 2005) (lead opinion). This analysis remains dominant in our legal system. *See Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006); *Lofton v. Sec'y of the Dep't of Children and Family Servs.*, 358 F.3d 804, 818-19 (11th Cir. 2004); *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 880 (C.D. Cal. 2005); *Wilson v. Ake*, 354 F. Supp. 2d 1298,

1309 (M.D. Fla. 2005); *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff'd* 673 F.2d 1036 (9th Cir. 1982); *In re Kandu*, 315 B.R. 123, 147-48 (Bankr. W.D. Wash. 2004); *Standhardt v. Superior Court*, 77 P.3d 451, 463-65 (Ariz. Ct. App. 2003); *Dean v. District of Columbia*, 653 A.2d 307, 337 (D.C. 1995); *Conaway v. Deane*, 932 A.2d 571, 619-21, 630-31 (Md. 2007); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971); *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006); *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 677-78 (Tex. App. 2010); *Andersen v. King County,* 138 P.3d 963, 982-83 (Wash. 2006).

Accordingly, state and federal courts have also rejected the theory that restricting marriage to opposite-sex couples evinces unconstitutional animus toward homosexuals as a group. *Standhardt*, 77 P.3d at 465 ("Arizona's prohibition of same-sex marriages furthers a proper legislative end and was not enacted simply to make same-sex couples unequal to everyone else."); *In re Marriage of J.B. & H.B.*, 326 S.W.3d at 680 (rejecting argument that Texas laws limiting marriage and divorce to opposite-sex couples "are explicable only by class-based animus"). The plurality in *Hernandez*, 855 N.E.2d at 8, articulated the point most directly, observing that "the traditional definition of

marriage is not merely a by-product of historical injustice. Its history is of a different kind." As those judges explained, "[t]he idea that same-sex marriage is even possible is a relatively new one. Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex. A court should not lightly conclude that everyone who held this belief was irrational, ignorant or bigoted." *Id.*

In contrast to the widespread judicial acceptance of this theory, the only lead appellate opinion to say that a State's refusal to recognize same-sex marriage constitutes *irrational* discrimination came in *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 961 (Mass. 2003) (opinion of Marshall, C.J., joined by Ireland and Cowin, JJ.).[5]

[5] The Ninth Circuit held in *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), that California voters irrationally discriminated against same-sex couples in passing Proposition 8. The court reasoned that the voters unconstitutionally "withdrew" the label of marriage from same-sex couples after it—along with the benefits of marriage in the form of civil unions—had already been granted. *Id.* at 1086-95. The court explicitly avoided discussion of the constitutionality of marriage definitions in the first instance. *Id.* at 1064. In any case, this decision was vacated by *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013), as the appellants lacked standing to appeal.

That opinion rejected the responsible procreation theory as overbroad (for including the childless) and underinclusive (for excluding same-sex parents).[6] *Id.* at 961-62. This, of course, is irrelevant to the rational basis analysis as it is ordinarily applied. And *Goodridge* never identified an alternative plausible, coherent state justification for marriage of any type. It merely declared same-sex couples equal to opposite-sex couples because "it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage." *Id.* at 961. Having identified mutual dedication as one of the central *incidents* of marriage, however, the opinion did not explain why the State should

[6] The essential fourth vote to invalidate the Massachusetts law came from Justice Greaney, who wrote a concurring opinion applying strict scrutiny. *Goodridge*, 798 N.E.2d at 970-74. Meanwhile, the Supreme Courts of California, Connecticut, Iowa, New Mexico, and Vermont invalidated their states' statutes limiting marriage to the traditional definition, but only after applying strict or heightened scrutiny. *In re Marriage Cases*, 183 P.3d 384, 432 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health,* 957 A.2d 407, 476-81 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 896,904 (Iowa 2009); *Griego v. Oliver*, No. 34,306, 2013 WL 6670704, at *12-18 (N.M. Dec. 19, 2013); *Baker v. State*, 744 A.2d 864, 880-86 (Vt. 1999). The New Jersey Supreme Court held in *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006), and reaffirmed in *Garden State Equality v. Dow*, 79 A.3d 1036 (N.J. 2013) that same-sex couples were entitled to all the same benefits as married couples, but those courts were never asked to consider the validity of the responsible procreation theory as a justification for traditional marriage.

care about that commitment in a sexual context any more than it cares about other voluntary relationships.

III. Plaintiffs Fail to Address the Proper Rational Basis Question, Much Less Offer an Alternative Definition of Marriage Or Any Principle Limiting What Relationships Can Make Claims on the State

Plaintiffs' arguments against Nevada's traditional marriage definition suffer from at least two incurable vulnerabilities. First, Plaintiffs insist that Nevada explain how *excluding* same-sex couples from marriage advances legitimate state interests. *See, e.g.*, Plaintiff-Appellants' Opening Brief at 73 (critiquing defendants for not explaining how the inability of same-sex couples to marry affects opposite-sex couples); *id.* at 83 ("[t]he exclusion of same-sex couples from marriage [ ] has absolutely no effect on the . . . the manner in which children are raised in Nevada."). This formulation of the issue, however, presupposes a right to marriage recognition and does not articulate the proper rational-basis inquiry. With no fundamental right as the starting point, there is no fundamental "exclusion" that requires explaining.

Second, Plaintiffs reject the traditional definition of marriage, but propose no clear alternative. They merely state that "[t]he 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." *Id.* at 33. Plaintiffs' rationale for civil marriage thus derives from nothing more than an assumption that government should recognize voluntary adult relationships. But if so, no relationship can be excluded *a priori* from making claims upon the government for recognition. Plaintiffs, in other words, never explain why secular civil society has any interest in recognizing or regulating marriage as a special status.

A. By casting the issue as a matter of government's *exclusion* of same-sex couples rather than government's unique interest in opposite-sex couples, plaintiffs defy the rational-basis standard

Because no fundamental right to same-sex marriage exists (*see supra* Part I.A), neither the due process nor the equal protection inquiries can be framed in a way that presupposes a right to marriage recognition. But that is exactly what Plaintiffs do when criticizing the lack of reasons to "exclude" same-sex couples from the definition of marriage. *Id.* at 77 ("[T]he exclusion does nothing to help different-sex couples' children. . . .").

Properly understood, the traditional definition of marriage is not an exclusionary concept, except in the broadest, most meaningless sense. It is an offer of recognition to opposite-sex couples based on their particular characteristics. Not making the same offer to other groups is not "exclusion" that demands explanation. Accordingly, the due process question is no more rigorous than asking whether a State has a legitimate interest in eschewing recognition of *any* group, including carpools, garden clubs, bike-to-work groups, or any other associations whose existence might incidentally benefit the State. And for purposes of equal protection, the only question is whether there is a legitimate basis for the State's *classification* of opposite-sex couples for purposes of civil recognition. It is sufficient that the rationale for that classification has to do with attributes of opposite-sex couples (namely, the capacity and tendency of sexual intercourse to produce children, even unintentionally), rather than same-sex couples.

In other words, the lack of a fundamental right (or suspect class) requires a court to address whether there is a legitimate reason for treating two classes (same-sex couples and opposite-sex couples) differently, not whether "exclusion" advances any particular cause.

Accordingly, it is critical to understand, in the first instance, *why* a State grants marriage recognition to opposite-sex couples *before* evaluating the comparative legitimacy of doing so without also granting the same recognition and benefits to anyone else, including same-sex couples. And when the core reason for recognizing traditional marriage (*i.e.*, ameliorating the frequent consequences of heterosexual intercourse, namely the unintended issuance of children) has no application to same-sex couples, there is a legitimate reason for government to recognize and regulate opposite-sex relationships but not same-sex relationships.

The rational-basis test requires (among other things) that courts examine the issue from the State's perspective, not the challenger's perspective. *Cf. Johnson v. Robinson*, 415 U.S. 361, 383 (1974) ("When . . . the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and non-beneficiaries is invidiously discriminatory."). In contrast, Plaintiffs demand an explanation why withholding recognition from same-sex couples advances state interests. But this inquiry asks why the State may

deprive a citizen of an *a priori* entitlement, and it accordingly amounts to a *rejection* of rational-basis review, not an application of it.

B. Plaintiffs offer no definition of, or principled limitation on, civil marriage

Plaintiffs' failure to offer a redefinition of marriage has real-world implications. Nothing in Plaintiffs' argument for same-sex marriage requires a sexual, much less procreative, component to the relationship. By their lights, marriage could encompass a variety of platonic relationships—even those that if sexual in nature States could plainly prohibit, such as incestuous or kinship relationship. A brother and sister, a father and daughter, an aunt and nephew, two business partners, or simply two friends could decide to live with each other and form a household and economic partnership together based on their "bond" towards each other, even if not sexual in nature—indeed *especially* if not sexual in nature. States would apparently be required as a matter of federal constitutional law to recognize all such relationships as "marriages" if the parties desired that status.

The mere objective of self-validation is incoherent because it lacks limits. If public affirmation of anyone and everyone's personal love and commitment is the single purpose of marriage, a limitless number of

rights claims could be set up that evacuate the term marriage of any meaning. Once the link between marriage and responsible procreation is severed—not simply stretched, but severed—and the commonsense idea that children are optimally raised in traditional intact families rejected, there is no fundamental reason for government to prefer couples to groups of three or more.

The theory of traditional marriage, by contrast, focuses on the unique qualities of the male-female couple, particularly for purposes of procreating and rearing children under optimal circumstances. As such, it not only reflects and maintains the deep-rooted traditions of our Nation, but also furthers public policy objectives that inherently limit the types of relationships warranting civil recognition.

It is no response to say that the State *also* has an interest in encouraging those who acquire parental rights without procreating (together) to maintain long-term, committed relationships for the sake of their children. Such an interest is not the same as the interest that justifies marriage as a special status for sexual partners *as such*. Responsible *parenting* is not a theory supporting marriage for same-sex

couples because it cannot answer two critical questions: Why two people? Why a sexual relationship?

Marriage is not a device that governments generally use to acknowledge acceptable sexuality, living arrangements, or *de facto* parenting structures. It is a means to encourage and preserve something far more compelling and precise: the relationship between a man and a woman in their natural capacity to have children. It attracts and then regulates couples whose sexual conduct may potentially create children, which ameliorates the burdens society ultimately bears when unintended children are not properly cared for. Neither same-sex couples nor any other social grouping presents the same need for government involvement, so there is no similar rationale for recognizing such relationships.

CONCLUSION

The Court should affirm the judgment of the district court.

Dated: January 28, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)because this brief contains 6,978 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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January 28, 2014

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 28, 2014.

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