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' REPLY BRIEF

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INTRODUCTION

Same-sex couples who wish to marry seek access to the same institution of marriage as all other individuals. Beverly Sevcik and Mary Baranovich, and the seven other Plaintiff Couples, seek to express their love and make a commitment through marriage to the person they cherish most for the rest of their lives. They want to make this commitment to each other publicly before family and friends, and dance together and with their new in-laws at their wedding. As a legally-married couple, they wish to jointly experience all of life's joys and sorrows, burst with pride over the children and grandchildren that many of them will have (or already have), care for each other in sickness and in health, grow old together, and take comfort in a lifetime of shared memories after death inevitably separates them. They want to support and love each other in good times and bad, for better or for worse, for richer and for poorer. They seek to do all of this with their heads held high, with equal status and dignity in the community.

Nevada's marriage ban harms and humiliates same-sex couples and their children. That harm and humiliation is so significant that all Nevada government officials who originally defended the ban now believe it cannot be countenanced under controlling law, and therefore have withdrawn their opposition to Plaintiffs' claims. Intervenor — the only party left defending Nevada's marriage ban — argues that this discrimination is justified. In its view, same-sex couples and their

children are simply expendable: the injury to their dignity and sense of self-worth is outweighed by imagined benefits supposedly flowing to the rest of society from their exclusion, such as so-called "responsible" procreation. According to Intervenor, the reason why marriage has survived and flourished hinges upon the government's ability to keep lesbians and gay men out of the institution. Without this lynchpin, the Court is told, heterosexual couples will marry less often, having somehow intuited a government message that they need not do so. Intervenor assures the Court that this goal of shoring up heterosexual relationships was "sensed" by Nevada voters when they built a state constitutional wall to fence out lesbians and gay men from marriage.

As demonstrated below, controlling case law — including recent Ninth Circuit precedent — requires rejection of this revisionist, deeply flawed defense of Nevada's marriage ban. Not only was this not the actual purpose of the ban, but even if it were, Intervenor's defense cannot justify inequality in access to one of our society's most fundamental institutions nor the messages of stigma and second-class status the ban reinforces. Intervenor urges this Court to abandon its post as constitutional guardian and abdicate responsibility for righting constitutional wrongs to the very majorities that imposed those wrongs in the first place. Our constitutional democracy functions because of, not in spite of, the promises of

liberty and equality, and it demands a judiciary that will enforce these promises for all.

ADDENDUM OF PERTINENT AUTHORITIES

Pursuant to Ninth Circuit Rule 28-2.7, all applicable constitutional and statutory provisions are contained in the Addendum to Plaintiffs-Appellants' opening brief.

ARGUMENT

I. NEVADA'S MARRIAGE BAN INFLICTS THE SAME HARMS ON SAME-SEX COUPLES THAT THIS COURT RECENTLY CONDEMNED.

Plaintiffs-Appellants ("Plaintiffs" or "Plaintiff Couples") detailed in their opening brief the sweeping breadth of harms — both tangible and dignitary, profound and mundane — that the marriage ban imposes upon their families. ECF No. 20-3 at 17-29.[1] Defendants-Appellees ("Defendant Officials," and collectively

[1] These harms remain in urgent need of resolution, and Plaintiffs agree with Intervenor that an Article III "case or controversy" remains, notwithstanding Governor Sandoval and Carson City Clerk-Recorder Glover's decision no longer to oppose Plaintiffs' claims. U.S. Const. art. III, § 2; ECF Nos. 142, 171. As the non-prevailing parties below, Plaintiffs had standing to appeal their loss to this Court, and they remain aggrieved because all Defendants-Appellees continue to enforce Nevada's exclusion of them from marriage. *See United States v. Windsor*, 133 S. Ct. 2675, 2685 (2013) (holding that plaintiff suffered "redressable injury" when Section 3 of federal Defense of Marriage Act, which she alleged to be unconstitutional, was enforced against her).

While Plaintiffs do not contest Intervenor's ability to participate in the appeal at this specific stage of the proceedings, they vigorously dispute that Intervenor has standing to seek further review in the case without participation of a defendant government official. ECF No. 175-2 at 14-15. Standing alone, Intervenor is

with Intervenor, referred to as "Defendants") do not dispute these harms, nor could they in light of *Windsor* and this Court's decision in *SmithKline* holding that sexual orientation classifications must survive heightened scrutiny. *See United States v. Windsor*, 133 S. Ct. 2675 (2013) (finding unconstitutional Section 3 of the federal Defense of Marriage Act ("DOMA")); *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014).

Windsor and *SmithKline* leave no question that imposing "a second-class status on gays and lesbians" is incompatible with "our constitutional tradition in forbidding state action from 'denoting the inferiority' of a class of people." *SmithKline*, 740 F.3d at 482 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954), and noting *Windsor*'s deep concern with the stigmatizing message DOMA sent "about the status occupied by gays and lesbians in our society"). As *SmithKline* held, laws allowing a "separate and lesser status" for lesbians and gay men — such as Nevada's marriage ban — are "'practically a brand'" upon same-sex couples — "'an assertion of their inferiority.'" *Id.* (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879)).

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absolutely precluded from seeking further review pursuant to *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013) (holding that ballot initiative proponent of California's marriage ban lacked standing to appeal on its own a ruling overturning the ban).

Intervenor attempts to deflect by arguing that the magnitude of the harm is irrelevant. ECF No. 110-3 at 79-83. But injury to same-sex couples was at the heart of both *Windsor* and *SmithKline*. As this Court observed, *Windsor* spoke about the "harm" and "injury" imposed by DOMA, referenced DOMA"s "effect" on eight separate occasions, and emphasized the indignity and disadvantage DOMA inflicted on same-sex couples. *SmithKline*, 740 F.3d at 482. Several district courts have similarly addressed the magnitude of the harm imposed by marriage bans. *See, e.g.*, *Obergefell v. Wymyslo*, No. 1:13-cv-501, 2013 U.S. Dist. LEXIS 179550, at *23 (S.D. Ohio Dec. 23, 2013) (in a case involving Ohio's refusal to allow same-sex couples validly married elsewhere to obtain death certificates reflecting their marriage, holding that the state's actions mark these couples "as a disfavored and disadvantaged subset of people," with "a destabilizing and stigmatizing impact on them"); *Bostic v. Rainey*, No. 2:13-cv-395, 2014 U.S. Dist. LEXIS 19080, at *49, 71-72 (E.D. Va. Feb. 14, 2014) (finding unconstitutional Virginia's marriage ban after noting the "gravity of the ongoing significant harm being inflicted upon Virginia's gay and lesbian citizens" and the "stigma, humiliation and prejudice . . . visited upon these citizens' children" by it).

Intervenor also attempts to diminish the marriage ban's harms by blaming the federal government. ECF No. 110-3 at 84-85. As Plaintiffs explained in their opening brief, more than 1,000 federal statutes refer to marriage, and by barring

same-sex couples from marriage, Defendant Officials deprive them of virtually all those rights and responsibilities. ECF No. 20-3 at 17-22; *see also* ECF Nos. 29, 76 (amicus curiae brief of Gay & Lesbian Advocates & Defenders, cataloguing these federal harms). Intervenor claims that the federal government must be culpable because it refuses to invent an alternative pathway to federal rights for same-sex couples. ECF No. 110-3 at 84. The Fourteenth Amendment, however, does not countenance such blame-shifting. Defendant Officials are not relieved of the duty to provide equal treatment based on the argument that another government entity should devise a work-around. The Supreme Court definitively rejected this argument in *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938): equal treatment "is an obligation the burden of which cannot be cast by one [government entity] upon another." *Id.* at 350 (Missouri could not justify segregating a law school by arranging for black students' education in an adjacent state); *id.* ("We find it impossible to conclude that what otherwise would be an unconstitutional discrimination . . . can be justified by requiring resort to opportunities elsewhere."); *see also Garden State Equal. v. Dow*, 434 N.J. Super. 163, 212-18 (Law Div. 2013) (rejecting similar effort "to foist all constitutional responsibility for the ineligibility of [unmarried] couples for some federal benefits on the federal

government"). Nevada cannot avoid its responsibility here by heaping blame elsewhere. *Id.*[2]

Ultimately, *Windsor* "refuses to tolerate the imposition of a second-class status on gays and lesbians." *SmithKline*, 740 F.3d at 482. Nevada's marriage ban, which identifies same-sex couples "for a separate and lesser public status," is no more tolerable than was DOMA. *Id.*[3]

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[2] Contrary to Intervenor's suggestion, ECF No. 110-3 at 85, Plaintiff Couples need not demonstrate that Nevada voters had any specific *mens rea* to deprive same-sex couples of federal benefits and obligations. No party disputes that the marriage ban's differential treatment of same-sex couples is intentional, which is the only necessary inquiry. The fact that the marriage ban's harm has become magnified as other government entities have cast aside their own discriminatory distinctions supports Plaintiffs' arguments, not Intervenor's.

[3] It is not true, as some of Intervenor's amici curiae suggest, that eliminating the invidious exclusion of same-sex couples from marriage will end the ability of Nevada to maintain other marriage-eligibility criteria. Whether a constitutionally adequate justification exists for other restrictions will not be determined by a holding that no such justification exists for exclusions based on sexual orientation or sex, just as legalized polygamy has not flowed from the overturning of anti-miscegenation laws. *See also Zablocki v. Redhail*, 434 U.S. 374, 375 (1978) (overturning the restriction on marriage for child-support debtors did not eliminate "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship"); ECF No. 24 at 28-31 (amicus curiae brief of 14 states and the District of Columbia further addressing the fallacy of this argument).

II. SAME-SEX COUPLES SHARE THE SAME FUNDAMENTAL LIBERTY INTERESTS SURROUNDING MARRIAGE, FAMILY INTEGRITY, AND EQUAL DIGNITY AS DIFFERENT-SEX COUPLES.

Plaintiff Couples demonstrated in their opening brief that the marriage ban violates their due process rights under the United States Constitution.[4] The freedom to marry grants legal recognition and protection to "the most important relation in life." *Maynard v. Hill*, 125 U.S. 190, 205 (1888). As society has acknowledged that same-sex couples stand on an equal footing and share a common value with different-sex couples, courts have come to recognize the "constitutional urgency of ensuring that individuals are not excluded from our most fundamental institutions because of their sexual orientation." *SmithKline*, 740 F.3d at 485; *Kitchen v. Herbert*, No. 2:13-cv-217, 2013 U.S. Dist. LEXIS 179331, at *49 (D. Utah Dec. 20, 2013) ("If, as is clear from the Supreme Court cases discussing the right to marry, a heterosexual person's choices . . . are protected from unreasonable government interference in the marital context, then a gay or lesbian person also enjoys these same protections."); *Edwards v. Orr*, No. 1:13-cv-08719, 2014 U.S. Dist. LEXIS 21620, at *4 (N.D. Ill. Feb. 21, 2014) ("This Court

[4] Although Plaintiff Couples did not plead a due process claim in the district court, that court decided such a claim adversely to them. ER 29. Plaintiffs challenged the district court's due process decision in their opening brief. Intervenor and Defendant Officials Sandoval and Glover — the only three parties to have provided a defense of the marriage ban below or on appeal — all have waived any opposition to the raising of this claim on appeal and, indeed, all have agreed that the Court should reach this claim. ECF No. 110-3 at 10 n.10; ECF No. 112 at 31; ECF No. 113 at 2 n.2, 6.

has no trepidation that marriage is a fundamental right to be equally enjoyed by all individuals of consenting age regardless of their race, religion, or sexual orientation . . . .”). Denial of equal participation in the rights and responsibilities of marriage cannot be predicated on a “deplorable tradition of treating gays and lesbians as undeserving of participation in our nation’s most cherished rites and rituals.” *SmithKline*, 740 F.3d at 485. The constitutional urgency is particularly acute here, where lesbians and gay men have been targeted for exclusion from “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); *see also Bostic*, 2014 U.S. Dist. LEXIS 19080, at *36-37 (laws that limit the fundamental right to marry only to different-sex couples “interject profound government interference into one of the most personal choices a person makes.”).

A. The Fundamental Right to Marry Is Supported by Liberty Interests in Privacy, Intimate Association, and Equal Dignity.

In support of their due process argument, the Plaintiff Couples articulate a simple and clear fundamental right: the right to marry the person of one’s choice. ECF No. 20-3 at 30-38. As Intervenor notes, ECF No. 110-3 at 87-88, Plaintiff Couples explained in their opening brief that the right to marry the person of one’s choice has its underpinnings in general liberties that have been guaranteed since the founding and the ratification of the Fourteenth Amendment, including privacy, intimate association, and equal dignity. ECF No. 20-3 at 31-48; *see also Kitchen*,

2013 U.S. Dist. LEXIS 179331, at *30 ("[T]he right to marry implicates additional rights that are protected by the Fourteenth Amendment.").

The Supreme Court long has recognized that the freedom to marry is rooted in the related due process guarantees of privacy and intimate association. *Kitchen*, 2013 U.S. Dist. LEXIS 179331, at *30-31 (citing *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965), establishing that the right to marry is intertwined with rights of privacy that protect spouses' decisions not to procreate by using contraception); *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (finding that marriage is "among associational rights this Court has ranked of basic importance to our society" (internal quotation marks omitted)); *see also Bostic*, 2014 U.S. Dist. LEXIS 19080, at *34 (the "right to marry is inseparable from our rights to privacy and intimate association"). Describing marriage's rightful place among the family-life decisions protected as fundamental, *Zablocki v. Redhail* observed that "it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society." 434 U.S. 374, 386 (1978).

The "equal dignity" that Justice Kennedy described in *Windsor*, 133 S. Ct. at 2693, which is also an elemental component of the liberty interest in decisions about marriage and family life, demonstrates that the fundamental right to marry must include the right to marry the person of one's choice (and not just a person of

a different sex). *See Kitchen*, 2013 U.S. Dist. LEXIS 179331, at *19, *37-38 (noting that "an individual's choices related to marriage are protected because they are integral to a person's dignity and autonomy"); *Obergefell*, 2013 U.S. Dist. LEXIS 179550, at *29 (finding that Ohio's refusal to recognize valid marriages of same-sex couples from other jurisdictions on death certificates denies them the "immensely important dignity, status, recognition, and protection of lawful marriage"). Indeed, "choices central to personal dignity and autonomy . . . are central to the liberty protected by the Fourteenth Amendment." *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quotation marks omitted). Plaintiffs' opening brief traced the many contexts in which the Supreme Court has recognized the protection of dignity as inherent in our nation's very constitutional structure. ECF No. 20-3 at 38-45; *see also Kitchen*, 2013 U.S. Dist. LEXIS 179331, at *84 (laws such as Nevada's marriage ban "deprive a targeted minority of the full measure of human dignity and liberty by denying them the freedom to marry the partner of their choice"). Intervenor objects that a right to equal dignity has no inherent limitations, but the answer is contained in the description of the right: Plaintiff Couples seek only the same venerated status the government already has conferred on others — a right to dignity that is *equal*, not limitless.[5]

[5] As amicus curiae Columbia Law School Sexuality and Gender Law Clinic explains, the Fourteenth Amendment's equality guarantees offer additional protection when the government selectively deprives a vulnerable minority of

Distilled to their essence, liberty interests in privacy, association, and dignity collectively safeguard one's "freedom of choice" in selecting the irreplaceable person one wishes to marry, and infuse that right with its cherished meaning. *Loving*, 388 U.S. at 12; *see also Bostic*, 2014 U.S. Dist. LEXIS 19080, at *38 (same-sex couples' "relationships are created through the exercise of sacred, personal choices — choices, like the choices made by every other citizen, that must be free from unwarranted government interference"). As all Defendant Officials now have conceded, no state interest can be articulated to justify depriving this full measure of humanity to same-sex couples. ECF No. 142 at 6 ("Nevada must yield to federal supremacy."); ECF No. 171 at 5-6 (arguments in the State's now-withdrawn answering brief "cannot withstand legal scrutiny" and "are no longer sustainable").[6]

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access to a fundamental right. *See* ECF No. 27; *see also* ECF No. 20-3 at 92-95 (Plaintiffs' opening brief).

[6] Attempting to sidestep the implications of this jurisprudence, Intervenor instead resurrects a dangerous argument that would shield federal court review of state decisions regarding marriage. Intervenor contends the "heightened dignity or social standing" conferred by marriage is a right to be doled out at will by the states, rather than one founded in federal due process guarantees. ECF No. 110-3 at 77. The Supreme Court had little trouble dismissing the suggestion that the state's "powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment" when it decided *Loving*. 388 U.S. at 7; *see also Bostic*, 2014 U.S. Dist. LEXIS 19080, at *47 (noting that "federal courts have intervened, properly, when state regulations have infringed upon the right to marry" and that *Windsor* endorsed such intervention "by citing *Loving*'s holding

B. Plaintiff Couples Seek the Same Fundamental Right to Marry Shared by All Others.

In attempting to limit the confines of the fundamental right at issue, Intervenor urges upon this Court a profound error in the due process analysis. Intervenor claims that the right to marry is somehow transformed when a group historically excluded from its exercise invokes the same principles "in their own search for greater freedom." *Lawrence*, 539 U.S. at 579. But Plaintiff Couples seek only the fundamental right to marry, not a different right of "same-sex marriage" — and certainly not a right of "genderless marriage." *See Bostic*, 2014 U.S. Dist. LEXIS 19080, at *35 (finding that the "insistence that Plaintiffs have embarked upon a quest to create and exercise a new (and some suggest threatening) right must be . . . put aside," for plaintiffs seek "nothing more than to exercise a right that is enjoyed by the vast majority of Virginia's adult citizens"); *Kitchen*, 2013 U.S. Dist. LEXIS 179331, at *46 ("Plaintiffs here do not seek a new right to same-sex marriage, but instead . . . the same right that is currently enjoyed by heterosexual individuals . . . .").

Unsurprisingly, Intervenor cites no authority for its novel proposition that a constitutional right that belongs to all can be narrowed to define an excluded group out of the right. This was in fact the foundational mistake that *Lawrence* corrected

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that recognized that 'of course,' such laws 'must respect the constitutional rights of persons'") (citation omitted).

in *Bowers v. Hardwick*, 478 U.S. 186 (1986). It was *Bowers*' labeling of the right by the group excluded — the right of "homosexuals to engage in sodomy" — that revealed "the Court's own failure to appreciate the extent of the liberty at stake." *Lawrence*, 539 U.S. at 566-67 (internal quotation marks omitted). This Court should decline Intervenor's invitation to make precisely the same misstep here.

Washington v. Glucksberg does not change this analysis. 521 U.S. 702 (1997). *Glucksberg* and its progeny instruct that courts must define newly identified rights carefully when considering whether they are fundamental, not that courts may impose strictures on an already-recognized bedrock right to prevent its exercise by a disfavored minority. *Id.* at 720-21. A liberty interest, once deemed fundamental, belongs to all citizens. *See, e.g.*, *Zablocki*, 434 U.S. at 384 ("[T]he right to marry is of fundamental importance for *all* individuals.") (emphasis added); *Kitchen*, 2013 U.S. Dist. LEXIS 179331, at *38 ("Like all fundamental rights, the right to marry vests in every American citizen."); *Obergefell*, 2013 U.S. Dist. LEXIS 179550, at *30-34 n.10 (reviewing Supreme Court cases establishing that "a fundamental right, once recognized, properly belongs to everyone"). In fact, it is because fundamental rights help define the "attributes of personhood" that they belong to all people. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S.

833, 851 (1992).[7] Lesbians and gay men share these attributes no less than their heterosexual neighbors, colleagues, and family members. Because "the right to marry has already been established as a fundamental right" and Plaintiffs seek nothing more than that, *Glucksberg* is simply "inapplicable here." *Kitchen*, 2013 U.S. Dist. LEXIS 179331, at *48.

Intervenor claims that the right to marry "always has been the right of a man and a woman to marry." ECF No. 110-3 at 88. By recognizing the equal worth and dignity of same-sex spouses, however, *Windsor* confirms that marriage is not inherently defined by the sex or sexual orientation of the couples. 133 S. Ct. at 2692-93 (recognizing that marriages of same-sex couples must be afforded equal treatment by the federal government). "[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." *Lawrence*, 539 U.S. at 572 (internal quotation marks and citation omitted).

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[7] Intervenor claims that *Glucksberg* limits a number of the key authorities on which Plaintiff Couples rely, including *Casey*'s recognition that personal choices central to dignity and autonomy are protected by the Fourteenth Amendment. 505 U.S. at 851; ECF No. 110-3 at 90-91. While *Glucksberg* noted that not *every* important decision in life is protected as fundamental, 521 U.S. at 727-28, Plaintiff Couples do not seek protection for an amorphous set of choices. They seek the freedom to marry, nothing more and nothing less. It also bears emphasis that *Lawrence* cited *Casey*, and did not even bother to reference *Glucksberg* — notwithstanding the arguments raised in dissent in *Lawrence* about *Glucksberg* and its test, 539 U.S. at 568, 588, 593 n.3, 598 (Scalia, J., dissenting) — because the *Lawrence* majority soundly rejected the notion that the constitutional rights at issue could be defined by who seeks to exercise them. *Id.* at 567, 573-74.

Lawrence, for instance, recounted the long history of the *criminalization* of homosexual and heterosexual sodomy before finding a protected liberty interest. *Id.* at 568-71. And both Virginia and North Carolina as amicus curiae described extensive historical arguments against a right to marry a person of another race in *Loving*, all readily dismissed by the Court. 388 U.S. at 8-9; Brief of Appellee, Loving v. Virginia, 388 U.S. 1 (1967) (No. 395), 1967 WL 113931, at *31-38; Brief for the State of North Carolina as Amicus Curiae Supporting Appellee, Loving v. Virginia, 388 U.S. 1 (1967) (No. 395), 1967 WL 93614, at *4-5. The Supreme Court accordingly has never used a tradition of discrimination to continue withholding the right to marry from those who have been excluded. *See* ECF No. 30 at 20-22 (brief of amicus curiae NAACP Legal Defense & Educational Fund, Inc. describing historical tradition of excluding African-Americans from marriage before *Loving* was decided); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 992 (N.D. Cal. 2010) ("[T]he [Supreme] Court recognized that race restrictions, despite their historical prevalence, stood in stark contrast to the concepts of liberty and choice inherent in the right to marry.").

C. The Fundamental Right to Marry Is Not Defined by the Ability to Accidentally Procreate.

Intervenor and its amici curiae also assert that Supreme Court jurisprudence inextricably links marriage and procreation. But the constitutional rights to marry and procreate are distinct and independent. To the extent Intervenor and its amici

curiae argue that the freedom to marry can be restricted to reinforce a norm of tying marriage to procreation, the Supreme Court repeatedly has shielded individual liberties from such coercive prescriptions. *See Casey*, 505 U.S. at 849 ("It is settled now . . . that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood . . . ." (internal citations omitted)). The government thus lacks the power to coerce ties between marriage and procreation by prohibiting married couples from using birth control, *Griswold*, 381 U.S. 479; by prohibiting unmarried people from using birth control, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); by prohibiting women from the choice to terminate an early-term, unwanted pregnancy, *Roe v. Wade*, 410 U.S. 113 (1973); by preventing prisoners from marrying even where they cannot procreate, *Turner v. Safley*, 482 U.S. 78 (1987); or by preventing adults from engaging in private, consensual, non-procreative intimacy, *Lawrence*, 539 U.S. 558.

Turner offers particularly clear affirmation that even individuals unable to procreate share the fundamental right to marry. 482 U.S. 78 (overturning regulation restricting marriage for prisoners). The Missouri regulation challenged in *Turner* allowed prisoners to marry in the event of pregnancy, or to legitimate a child. *Id.* at 82. At issue was the freedom to marry for other prisoners subject to the typical "substantial restrictions [imposed] as a result of incarceration," such as the inability to have intimate relationships with others (and thus, to procreate). *Id.*

at 95. The Court found the fundamental right to marry no less protected in that context, because "[m]any important attributes of marriage remain," including expressions of emotional support and public commitment, spiritual significance, the possibility that the marriage might someday be consummated, and receipt of government benefits. *Id.* at 95-96.

Same-sex couples share all of these, and many more, facets of marriage. *See* ECF No. 20-3 at 17-29 (describing Plaintiff Couples' desire to secure their family bonds through marriage to better protect their children, and to secure tangible benefits and inestimable societal standing currently denied them and their families). Moreover, because the prison in *Turner* already was facilitating marriages for couples who had children together, the marriages sought by the plaintiffs did not advance that interest. But the Supreme Court found that they too share the fundamental right to marry, powerfully affirming that due process shelters that right regardless of a couple's procreative intent or ability. The Supreme Court has similarly held that even a child support debtor — a notable example of *irresponsible* procreation — could not have his right to marry restricted merely because he failed to support his children from a prior relationship. *Zablocki*, 434 U.S. at 390-91; *cf. Lawrence*, 539 U.S. at 578 ("[D]ecisions by married persons, concerning the intimacies of their physical relationship, even

when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment.") (internal quotation omitted).

III. PLAINTIFF COUPLES' EQUAL PROTECTION CLAIMS REQUIRE HEIGHTENED CONSTITUTIONAL SCRUTINY.

A. As This Court Recently Affirmed, Classifications Based on Sexual Orientation Must Be Reviewed Under Heightened Scrutiny.

1. Heightened Scrutiny Applies Under *Windsor* and *SmithKline*.

Heightened scrutiny is the law of the Circuit for sexual orientation classifications under *SmithKline*. 740 F.3d at 481 ("*Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation.").[8] Under this standard, a discriminatory classification finds no safe

[8] Intervenor attempts to discount *SmithKline*'s precedential effect by claiming that it may still be reviewed en banc or by the Supreme Court. ECF No. 136 ¶ 3; ECF No. 175-2 at 1 n.2. But no party yet has petitioned for either form of review, and *SmithKline* is the law of the Circuit. *See United States v. Johnson*, 256 F.3d 895, 915-16 (9th Cir. 2001). Intervenor claims that only the Supreme Court can decide that a particular classification receives heightened review, ECF No. 136 at ¶ 5, but even assuming *arguendo* that were true, as this Court explained in *SmithKline*, that is precisely what the Supreme Court did in *Windsor*. *SmithKline*, 740 F.3d at 483-84.

In addition, since Plaintiff Couples filed their opening brief, another federal court has found that heightened scrutiny applies to sexual orientation classifications based on the traditional hallmarks of heightened review, including a history of discrimination due to a trait unrelated to the ability to contribute to society. *See Obergefell*, 2013 U.S. Dist. LEXIS 179550, at *43-59. While *SmithKline* found that, prior to *Windsor*, such arguments were foreclosed by *Witt v. Dep't of the Air Force*, Plaintiffs preserve their position that, even independent of *Windsor*, heightened scrutiny is the correct test to be applied to government action that discriminates based on sexual orientation, to the extent it becomes relevant at a

harbor in the presumption of constitutionality that rational basis review often affords. *Id.* at 482-83. Instead, the command of equal protection regardless of sexual orientation "requires not that we conceive of hypothetical purposes, but that we scrutinize [the government's] actual purposes." *Id.* at 482. *SmithKline* emphasized that the courts are deeply concerned where a classification demeans a minority group by branding them as second-class, and in such circumstances, the justification must be sufficiently substantial to overcome that grave constitutional harm: "*Windsor* requires that classifications based on sexual orientation that impose inequality on gays and lesbians and send a message of second-class status be justified by some legitimate purpose." 740 F.3d at 482-83; *see also id.* at 482 (explaining that the classification must be supported by a legitimate purpose to "*justify* disparate treatment of the group" and "overcome the disability on a class of individuals") (internal quotation marks and brackets omitted; emphasis in original). Accordingly, the Court "must examine [the classification's] actual purposes and carefully consider the resulting inequality to ensure that our most fundamental institutions neither send nor reinforce messages of stigma or second-class status." *Id.* at 483. Nevada's marriage ban reifies precisely those caste-based messages of

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future stage of review. *See SmithKline*, 740 F.3d at 480 (citing *Witt v. Dep't of the Air Force*, 527 F.3d 806 (9th Cir. 2008)).

inferiority and cannot survive any level of review, let alone the heightened scrutiny that *Windsor* and *SmithKline* require.

In light of *SmithKline*'s guidance, particular care is required when examining a post-hoc rationalization, such as Intervenor's parenting arguments, to ensure that the challenged classification is not the product of unfounded stereotypes. Where a group has long been targeted for discrimination and thus is little understood, stereotypes are especially likely to animate the classification of that group for inferior treatment. *SmithKline*, 740 F.3d at 484-86, (reviewing the extensive history of discrimination against gay people, which has been fueled by a "pervasiveness of stereotypes about the group"). This circumstance counsels an abiding caution in reviewing the classification because "[t]hese stereotypes and their pernicious effects are not always known to us." *Id.* at 486; *see also Lawrence v. Texas*, 539 U.S. 558, 579 (2003) ("times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress"). The classification then risks "reinforc[ing] and perpetuat[ing] these stereotypes," rather than being justified by them. *SmithKline*, 740 F.3d at 486 (noting that condoning peremptory strikes against lesbians and gay men sends a "false message" that they "could not be trusted" to fulfill jury service). This instruction applies with particular force here, where the marriage ban — and the justifications offered in its defense — send a false and hurtful message that same-

sex couples cannot be trusted to love and nurture their children. *See* ECF No. 30 at 3 (brief of amicus curiae NAACP Legal Defense & Educational Fund, Inc. noting that the defendants in *Loving* also "relied on purportedly scientific studies to argue that the state law was necessary to prevent harm to any children who would be raised in the unions they sought to prohibit"); *see also id.* at 16-20.[9]

2. When It Said "Heightened Scrutiny," This Court Meant "Heightened Scrutiny."

In its Supplemental Answering Brief, Intervenor oddly argues that the "heightened scrutiny" applicable to classifications based on sexual orientation under *SmithKline* does not mean "heightened scrutiny" as that phrase has

[9] Such stereotypes pervade Intervenor's arguments, including the repeated suggestion that same-sex couples seek marriage for selfish reasons, while different-sex couples are purportedly more focused on their children. *See, e.g.*, ECF No. 110-3 at 1 (claiming that when different-sex couples marry, the institution is directed toward "great social tasks" involving the raising of children; and when same-sex couples marry, the institution is "transformed" into a "government-endorsed celebration of the private desires of two adults"); 8 (when same-sex couples seek to marry it is "very much *about* homosexuality" and "very little *about* marriage"); 35 (same-sex couples seek to marry only for the "gratification" of their "emotional needs" and "adult desires" rather than having any concern for the children they may have). These are precisely the sorts of "preconceived notions of the identities, preferences, and biases of gays and lesbians [that] reinforce and perpetuate these stereotypes." *SmithKline*, 740 F.3d at 486; *see also Bostic*, 2014 U.S. Dist. LEXIS 19080, at *55; *Kitchen*, 2013 U.S. Dist. LEXIS 179331, at *44. Ultimately, "[t]he Constitution cannot countenance 'state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.'" *SmithKline*, 740 F.3d at 486 (quoting *J.E.B.*, 511 U.S. at 128)).

previously been used by this Court and the Supreme Court. [10] Of course, this Court did not say in *SmithKline* that its use of the term "heightened scrutiny" was meant to express something brand new, and both the Supreme Court and this Court previously have used the term "heightened scrutiny" in the equal protection context to be equivalent to at least intermediate scrutiny. *See, e.g.*, *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 135 (1994) (referring to "the heightened equal protection scrutiny afforded gender-based classifications"); *Ahlmeyer v. Nev. Sys. of Higher Educ.*, 555 F.3d 1051, 1059 n.8 (9th Cir. 2009); *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001).

Moreover, the test that *SmithKline* determined is required by *Windsor* closely resembles preexisting descriptions of at least intermediate scrutiny:

[10] *See* ECF No. 175-2, at 2-3 (objecting that *SmithKline* never expressly uses the words "intermediate scrutiny" or "strict scrutiny," which Intervenor apparently considers talismanic), 4 (asserting that "[t]he *SmithKline* panel . . . contemplated a new form of 'heightened scrutiny' for classifications based on sexual orientation — one neither intermediate scrutiny nor strict scrutiny"), 5 ("The 'heightened scrutiny' announced in *SmithKline* is a new constitutional standard, one not articulated in any Fourteenth Amendment decision of the Supreme Court.").

Test *SmithKline* Holds Is Required by *Windsor*	**Test for Intermediate Scrutiny**
Windsor requires that the strong presumption of constitutionality and the extremely deferential posture toward government action often applicable to rational basis review does not apply to discrimination based on sexual orientation. *SmithKline*, 740 F.3d at 483.	The presumption of constitutionality applicable to the rational basis test does not apply on intermediate scrutiny. *Hibbs v. HDM Dep't of Human Res.*, 273 F.3d 844, 855 (9th Cir. 2001), *aff'd*, 538 U.S. 721 (2003). Deference to political branches is required under rational basis review but not intermediate scrutiny. *Ruiz-Diaz v. United States*, 697 F.3d 1119, 1123 (9th Cir. 2012).
Heightened scrutiny applicable to sexual orientation discrimination requires careful examination of actual purposes of government action, rather than any conceivable, hypothetical justification. *SmithKline*, 740 F.3d at 480-82, 483.	Alleged justification for sex discrimination fails under intermediate scrutiny because it is not "the actual purpose underlying the discriminatory classification." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 730 (1992).
Heightened scrutiny applicable to sexual orientation discrimination involves a "balancing" test that requires that the harm imposed by the disparate treatment be justified and overcome by a sufficiently strong government interest. *SmithKline*, 740 F.3d at 482-83.	Under intermediate scrutiny, courts must carefully examine the strength of the government's justification for disparate treatment. *United States v. Virginia*, 518 U.S. 515, 532-33 (1996); *Peruta v. Cnty. of San Diego*, No. 10-56971, 2014 U.S. App. LEXIS 2786, at *66 (9th Cir. Feb. 12, 2014) (referring to the "balancing test" used under intermediate or strict scrutiny).
Windsor requires that disparate treatment based on sexual orientation not send messages of stigma or second class status. *SmithKline*, 740 F.3d at 482, 483.	Government's disparate treatment of women, subject to intermediate scrutiny, must not reinforce misconceptions about women's role in the world or their capabilities. *J.E.B.*, 511 U.S. at 135.

Ultimately, however, Intervenor's complaints are irrelevant. Whether *Windsor* applied traditionally-understood heightened scrutiny or some new form of it, the test required in *Windsor* — as explicated in *SmithKline* — is the test that must be applied in this case, *see United States v. Johnson*, 256 F.3d 895, 918 (9th Cir. 2001) ("Where . . . it is clear that a majority of the panel has focused on the legal issue presented by the case before it and made a deliberate decision to resolve the issue, that ruling becomes the law of the circuit and can only be overturned by an en banc court or by the Supreme Court."). It is a test Nevada's marriage ban cannot meet.

3. Intervenor's Animus Arguments Do Not Alter the Application of Heightened Scrutiny.

Intervenor also attempts to cabin *SmithKline* by arguing that heightened scrutiny attaches only to classifications motivated by animus, vociferously protesting the idea that the marriage ban may have been so motivated. ECF No. 175-2 at 6; ECF No. 110-3 at 5, 17, 99-101. Intervenor is wrong on two accounts. First, heightened scrutiny has never been limited only to cases of an impure heart, *see, e.g.*, *J.E.B.*, 511 U.S. at 133 (even classifications designed to place women on a "pedestal" are subject to heightened scrutiny) (internal quotation omitted), and *SmithKline* did not announce such a rule. In fact, *SmithKline* used the word "animus" just once — to point out that a hostile motivation is *not* required. *SmithKline*, 740 F.3d at 486. The level of scrutiny attaches not to the

government's motivation, but instead to the government's use of a personal trait — irrelevant to any valid governmental concern — to mete out differential treatment. *See Adarand Constructors v. Pena*, 515 U.S. 200, 226-27 (1995) (all governmental classifications based on race must be strictly scrutinized, no matter how "benign" the justification offered for them).

Importantly, Intervenor goes on to concede the proper analysis, noting that *SmithKline* found heightened review warranted because the differential treatment of the gay juror in that case was intentional, targeted based on sexual orientation, and unsupported by any credible reason. ECF No. 175-2 at 6. The same is true here. Under the marriage ban, same-sex couples are intentionally separated out for differential treatment, based on their sexual orientation, without credible justification.

Second, Intervenor gravely misconstrues the courts' understanding of animus, which does not require showings of bigotry or malice. Rather, courts have recognized that animus often arises not from hatred but simply from a "view that those in the burdened class are not as worthy or deserving as others." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). As Justice Kennedy has explained, this is because "[p]rejudice . . . rises not from malice or hostile animus alone," but "may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against

people who appear to be different in some respects from ourselves." *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring), cited with approval by this Court in *SmithKline*, 740 F.3d at 486.

While animus is not necessary to demonstrate either an equal protection violation, or that heightened scrutiny applies, animus certainly is present here: the ban on marriage for same-sex couples reflects, at a minimum, a view that same-sex couples are less "deserving" of that cherished right than others. *See Cleburne*, 473 U.S. at 440.[11]

[11] Moreover, even if animus were limited to "ill will and a mean spirit," ECF No. 110-3 at 5, which it is not, such sentiments are openly displayed through the word choices pervading the brief filed by Intervenor — the proponent of the marriage ban — which describes same-sex couples' pursuit of the freedom to marry as an ominous, selfish, elitist, and violent enterprise, and which repeatedly belittles the relationships of same-sex couples as well as their relationships with their children. *See, e.g.*, ECF No. 110-3 at 1 (falsely describing plaintiffs' suit as one that seeks to have marriage "torn away" from its ancient social purposes and transformed into a celebration of "the private desires of two adults . . . for as long as those personal desires last"); 2 (accusing those seeking marriage equality of disparaging biological, married families, and of bringing a "dark cloud" on the horizon); 3 (describing this as a "great constitution-altering project, supported by many of the Nation's elites" and referring to the children of same-sex couples as "children who may happen to be connected to the relationship"); 6-7 (comparing advocates of allowing same-sex couples to marry to white supremacists); 17, 33, and 101 (falsely accusing plaintiffs of "slander" and of claiming that those who disagree with them are "bigots"); 45 and 65 (accusing Plaintiffs' position to be that of "radical" and "extreme" "social constructivists"); 66 (suggesting that a ruling in plaintiffs' favor would be akin to the ruling in *Dred Scott* upholding slavery); and 93 (calling Plaintiffs' position an "extremely radical" one that will be the "likely destroyer" of "man-woman marriage").

B. The Marriage Ban Also Receives Heightened Scrutiny as Sex Discrimination.

Intervenor primarily opposes Plaintiff Couples' sex discrimination claim by arguing the marriage ban treats men as a class and women as a class equally.[12] ECF No. 110-3 at 98. But as the Supreme Court repeatedly has confirmed, "[i]t is the individual . . . who is entitled to the equal protection of the laws — not merely a group of individuals, or a body of persons according to their numbers." *Mitchell v. United States*, 313 U.S. 80, 97 (1941); *see also Adarand Constructors*, 515 U.S. at 227 ("the Fifth and Fourteenth Amendments to the Constitution protect *persons*,

[12] Intervenor's cavalier claim that courts have "nearly unanimously rejected" the argument that marriage bans discriminate on the basis of sex totally ignores the more recent trend of cases accepting that such bans do discriminate based on sex. None of the cases cited by Intervenor on this point was decided within the last six years, and one is from thirty-nine years ago. More recently, numerous courts, including a number within this Circuit, 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 In re Fonberg*, 736 F.3d 901, 903 (9th Cir. Jud. Council 2013) (denial of health benefits to same-sex domestic partner of former U.S. District of Oregon law clerk "amounts to discrimination on the basis of sex" in violation of District's EDR plan); *Perry*, 704 F. Supp. 2d at 996; *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 982 n.4 (N.D. Cal. 2012), *hearing en banc denied*, 680 F.3d 1104 (9th Cir. 2012), *appeal dismissed*, 724 F.3d 1048 (9th Cir. 2013); *In re Balas*, 449 B.R. 567, 577-78 (Bankr. C.D. Cal. 2011); *In re Levenson*, 560 F.3d 1145, 1147 (9th Cir. EDR Op. 2009); *Baehr v. Lewin*, 852 P.2d 44, 67-68 (Haw. 1993); *cf. Veretto v. Donahoe*, EEOC Dec. No. 0120110873 (2011) (a gay man harassed at work after announcing his marriage to a man in the society pages of the local newspaper stated a Title VII claim by alleging that his harassing co-worker "was motivated by the sexual stereotype that marrying a woman is an essential part of being a man"); *Castello v. Donahoe*, EEOC Dec. No. 0520110649 (2011) (female employee stated Title VII claim by alleging that harassing manager "was motivated by the sexual stereotype that having relationships with men is an essential part of being a woman").

not *groups*") (emphasis in original); U.S. Const. amend. XIV, § 1 ("No State shall . . . deny to any *person* within its jurisdiction the equal protection of the laws.") (emphasis added). As Justice Kennedy observed in *J.E.B.*, the "neutral phrasing of the Equal Protection Clause, extending its guarantee to 'any person,' reveals its concern with rights of individuals, not groups (though group disabilities are sometimes the mechanism by which the State violates the individual right in question)." 511 U.S. at 152 (Kennedy, J., concurring).

The question thus is not whether an entire group is being treated unequally based on a shared characteristic as compared to another group, but whether an individual is being discriminated against based on that characteristic. This is plainly what is happening when Plaintiff Beverly Sevcik is told that she cannot marry her partner Mary Baranovich because Beverly is female, but would be allowed to do so if Beverly were male. *See also Kitchen*, 2013 U.S. Dist. LEXIS 179331, at *57-58 (noting that *Loving* rejected similar arguments that the "equal application" of anti-miscegenation laws to restrict different racial groups from marrying each other somehow immunized the law).

Intervenor mischaracterizes Plaintiffs' sex stereotyping theory, which is not that having women marry men is an "impermissible sex-role allocation." ECF No. 110-3 at 98. Rather, it is that the refusal to let a woman marry a woman, or a man marry a man, rests on impermissible stereotypes. Plaintiffs' claim does not

question "the statuses and identities of *husband* and *wife*," as Intervenor suggests, but rather the insistence that it is not proper for a woman to have a wife, or a man to have a husband. *Id.* *See* ECF No. 41 at 14-17 and ECF No. 32 at 16-22 (briefs of amici women's advocacy organizations explaining the ways in which anti-gay discrimination is founded on sex stereotypes). Plaintiffs' argument also can be understood with reference to Intervenor's reliance on the concept of "gender complementarity," which presumes that all women act in one way and all men in another (or do so "on average," *see* ECF No. 110-3 at 43, which Intervenor uses as a basis to treat all men as the "average" man and all women as the "average" woman, regardless of whether that "average" applies to them). The Supreme Court repeatedly has rejected such stereotyped generalizations. *See, e.g.*, *Virginia*, 518 U.S. 515; *Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero v. Richardson*, 411 U.S. 677 (1973). Regardless of whether any particular woman might complement any particular man (as many do), it is the notion that Beverly and Mary simply cannot complement each other — unless they were Ben and Mary — that is constitutionally impermissible.

The marriage ban accordingly must be understood as discriminating based on each Plaintiff's sex, and must be subjected to heightened scrutiny for that independent reason in addition to the other reasons advanced by Plaintiffs.

IV. NO GOVERNMENTAL INTERESTS CAN SUSTAIN THE MARRIAGE BAN.

As explained above, whether the Court resolves this case under due process or equal protection principles, heightened scrutiny is required. Under any of Plaintiffs' theories, the Court must measure Nevada's marriage ban by its actual, not hypothetical, motivation. This long has been the standard for violations of due process and sex discrimination.[13] *SmithKline* now decrees the same rule for sexual orientation discrimination: the classification must be justified by the law's "*demonstrated* purpose." 740 F.3d at 482 (internal quotation marks omitted; emphasis in original). As *SmithKline* explains, *Windsor* looked not at the hypothetical justifications offered in DOMA's defense, but instead at the "essence" of DOMA, including its "design, purpose, and effect." *Id.* at 481 (internal quotation marks omitted). DOMA's "principal purpose," *Windsor* found, was to "impose inequality." *SmithKline*, 740 F.3d at 482 (internal quotation marks omitted). As the record confirms, Nevada's marriage ban shares the same impermissible purpose.

Identical ballot arguments were presented to Nevada's voters in the 2000 and 2002 biennial elections, and they mentioned not a word about several of

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[13] *See, e.g.*, *Zablocki*, 434 U.S. at 388 (a classification that impinges on the fundamental right to marry requires a "sufficiently important," not merely hypothetical, government interest); *Hogan*, 458 U.S. at 730 (discussing requirement "to establish that the alleged objective is the actual purpose underlying the discriminatory classification" based on sex).

Intervenor's proffered justifications, including parenting and religious liberties. ER 160-63, 166-69. Defendants thus do not, and cannot, demonstrate that such reasons *actually* motivated the marriage ban. *U.S. Term Limits v. Thornton*, 514 U.S. 779, 921 (1995) ("inquiries into legislative intent are even more difficult than usual when the legislative body whose unified intent must be determined consists of 825,162 Arkansas voters"); *Kitchen*, 2013 U.S. Dist. LEXIS 179331, at *66 ("the court finds that it is impossible to determine what was in the mind of each individual voter"). To the extent that the 2000 and 2002 ballot materials are probative of voter intent, they suggest that the chief motivation for the amendment was to disrespect the marriages that same-sex couples might someday enter in other jurisdictions, since no state allowed marriage by same-sex couples at the time. ER 162 (The ballot "Arguments for Passage" from 2000 states, "Proponents argue that if same gender marriages ever become legal in another state . . . Nevada could be required to recognize such marriages entered into legally in another state."), 168 (ballot "Arguments for Passage" from 2002, stating the same). This reduces to nothing more than the same desire to impose inequality that *Windsor* rejected. Nonetheless, Plaintiff Couples address all the purported justifications Intervenor offers to provide a thorough treatment of the issues for the Court.[14]

[14] *SmithKline*, issued on the day Defendants filed their answering briefs, supersedes Intervenor's claim that the Court should defer to certain "legislative facts" allegedly ratified by the voters through their greater "collective wisdom."

A. The Marriage Ban Hurts, Rather Than Helps, Children.

Intervenor offers the same false conjecture about same-sex couples' children as did DOMA's proponents in *Windsor* — arguments so insubstantial that the Supreme Court found them unnecessary even to acknowledge.[15] In fact, the only harm *Windsor* examined was the clear injury that unequal treatment imposes on

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ECF No. 110-3 at 19; *see also* ECF No. 110-3 at 42-46 (attributing to the voters a series of beliefs about the parenting abilities of men and women). Under *SmithKline*, Intervenor's conjecture about the contents of voters' minds receives no deference. Intervenor claims the level of review makes no difference because the Court must defer to legislative facts allegedly chosen by the voters. ECF No. 110-3 at 20-24. But Intervenor's invocation of *Vance v. Bradley*, 440 U.S. 93 (1979), and *Glucksberg*, 521 U.S. 702, cannot support Intervenor's argument because both are rational basis cases. Nor is the marriage ban anything like the university admissions policy tested in *Grutter v. Bollinger*, which involved "judgments in an area that lies primarily within the expertise of the university." ECF No. 110-3 at 24-25; 539 U.S. 306, 328 (2003). Unlike the "special niche in our constitutional tradition" that universities occupy, *id.* at 329, the courts are particularly concerned with majoritarian acts that impose a deprivation on the minority to which the majority will not subject itself. *Diaz v. Brewer*, 656 F.3d 1008, 1014 (9th Cir. 2011) ("there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law" that voters "would impose upon a minority must be imposed generally") (quotation omitted). Moreover, *Windsor* surely defeats Intervenor's argument because, in that case, the Supreme Court — applying what this Court has determined to be heightened scrutiny — refused to defer to precisely the same supposed "legislative facts" expressed by members of Congress in passing DOMA as Intervenor claims motivated Nevada's voters. *See* Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307) ("BLAG *Windsor* Brief"), 2013 U.S. S. Ct. Briefs LEXIS 280, at *10-11 (referencing concerns in DOMA's legislative history about protecting "traditional marriage" and about heterosexual procreation and "optimal" parenting).

[15] *See* BLAG *Windsor* Brief, 2013 U.S. S. Ct. Briefs LEXIS 280, at *74-82.

same-sex couples' children, stating DOMA "humiliates tens of thousands of children now being raised by same-sex couples." *Windsor*, 133 S. Ct. at 2694; *see also Kitchen*, 2013 U.S. Dist. LEXIS 179331, at *82 (while Utah's marriage ban "does not offer any additional protection to children being raised by opposite-sex couples, it demeans the children of same-sex couples who are told that their families are less worthy of protection than other families").

Even if this Court considers Intervenor's arguments about parenting, however, they fail for at least three independent reasons. First, the marriage ban has no effect on the number of children being raised by parents who are same-sex couples — ensuring only that those children will be raised in families branded as second-class. Second, the overwhelming scientific consensus is that same-sex couples' children are equally well-adjusted, and claims to the contrary are demonstrably false. Third, Nevada's family law, including its public policy of treating same-sex couples equally in every respect, except by affording them the honored designation of marriage, belies any argument about a state interest in treating them differently as parents.

1. The Marriage Ban Has No Effect on Who Becomes a Parent.

Intervenor is silent on the core task that "gives substance to the Equal Protection Clause": the search for the link between the classification adopted and the object to be attained. *Romer v. Evans*, 517 U.S. 620, 632 (1996) (even under

the most deferential standard, courts "insist on knowing the relation between the classification adopted and the object to be obtained"); *Kitchen*, 2013 U.S. Dist. LEXIS 179331, at *68-69 (collecting authorities). At a minimum, Nevada's marriage ban must be justified by a "purpose to overcome the disability on a class of individuals." *SmithKline*, 740 F.3d at 482 (internal quotation marks and brackets omitted). And to "overcome" the harm to same-sex couples, Nevada's marriage ban must at least *further* that interest in some significant way. The marriage ban does nothing of the sort.

Intervenor and its amici offer two potential parenting-related rationales for the marriage ban, including facilitating "responsible procreation," and promoting "optimal parenting." The marriage ban, however, has no effect on either interest.

a. Intervenor's "Responsible Procreation" Theory Fails to Justify Nevada's Marriage Ban.

Intervenor's "responsible procreation" theory claims that heterosexual couples require a special incentive to channel their procreative capacity into marriage, which same-sex couples purportedly eradicate when they also may marry. As Plaintiffs explained in their opening brief, however, Intervenor not only lacks any evidence that the number of different-sex couples choosing to marry each other is affected in any way by same-sex spouses, it also "defies reason to conclude" as much. *Kitchen*, 2013 U.S. Dist. LEXIS 179331, at *72 (finding that marriage by same-sex couples will not diminish the example that married different-

sex spouses provide to their unmarried counterparts; in fact, both same-sex and different-sex spouses "model the formation of committed, exclusive relationships, and both establish families based on mutual love and support"); *see also* ECF No. 20-3 at 73-78 (Plaintiffs' opening brief). In other words,

> Permitting same-sex couples to receive a marriage license does not harm, erode, or somehow water-down the "procreative" origins of the marriage institution, any more than marriages of couples who cannot "naturally procreate" or do not ever wish to "naturally procreate." Marriage is incentivized for naturally procreative couples to precisely the same extent regardless of whether same-sex couples (or other non-procreative couples) are included.

Bishop v. United States ex rel. Holder, No. 04-CV-848-TCK-TLW, 2014 U.S. Dist. LEXIS 4374, at *106 (N.D. Okla. Jan. 17, 2014).[16]

[16] Intervenor's argument that allowing same-sex couples to marry will "suppress" or "supplant" what Intervenor describes as "man-woman marriage" is baseless, as a simple comparison to parenting makes clear. Allowing individuals to engage in assisted reproduction or to adopt children has not "deinstitutionalized" parenting by couples who conceived through sexual intercourse and has not "suppressed" or "supplanted" the fact that most parents are biologically related to their children. And even if there were a valid concern that allowing same-sex couples to marry might have a "deinstitutionalizing" or "suppressive" impact, which it will not, avoiding that impact cannot be the "actual purpose" of the state's marriage ban. If Nevada truly were interested in ensuring that all children have married parents who are genetically related to them, it would not permit gestational surrogacy; it would not allow individuals who are not married to engage in assisted reproduction; it would not permit a married woman, with her husband's consent, to use donated sperm that is not his; and it would not allow donors of genetic material who are not intended parents to avoid parental responsibilities (all of which it does, *see* Nev. Rev. Stat. § 126.510 *et seq*.). Nevada likewise would not permit genetic parents to place their children for adoption (as it does, *see* Nev. Rev. Stat. § 127.040), and it would not provide that children born during a Nevada domestic partnership, including one entered by a same-sex couple, are presumed to be the children of

As with so many of Intervenor's purported justifications, Nevada's marriage ban not only lacks any link to the goal of channeling procreation into marriage, but has the opposite effect. Because same-sex couples also procreate through assisted reproductive technology and surrogacy, excluding them from marriage means their procreation is necessarily channeled *outside* of marriage — and their children are denied marital security and stability — which "hinders rather than promotes that goal." *Bishop*, 2014 U.S. Dist. LEXIS 4374, at *108-09; *see also Kitchen*, 2013 U.S. Dist. LEXIS 179331, at *72 (finding that, to the extent the goal is to channel intimacy itself into marriage, the marriage ban reinforces the opposite norm by requiring all same-sex couples' intimate relationships to exist outside of marriage).

b. Intervenor's "Optimal Parenting" Theory Likewise Fails to Justify Nevada's Marriage Ban.

Intervenor's "optimal parenting" theory posits that only different-sex spouses raising children genetically related to both of them can provide the optimal

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both partners (as it does, *see* Nev. Rev. Stat. §§ 122A.200(1)(d), 126.051(1)(a)). *See Cleburne*, 473 U.S. at 449 (rejecting, even under rational basis test, the argument that a group home for people with developmental disabilities could be zoned out of a community because of concerns about evacuation during a flood, given that nursing homes, homes for convalescents or the aged, sanitariums, and hospitals were not similarly barred from the area).

Intervenor claims that adoption is a permitted exception to the supposed goal of children having married, biologically-related parents only because that is "in the best interests of the child," ECF No. 110-3 at 35, but never explains why it is not *also* in the best interests of children born to or adopted by same-sex couples for their parents to be able to marry.

environment for raising children. As discussed further below, this ignores the expert consensus in the field and is simply incorrect. But even were it true that heterosexuals are superior parents, which it is not, excluding same-sex couples from marriage does not lead to any children having parents who are different-sex couples rather than same-sex couples. *See* ECF No. 20-3 at 78-80 (further discussion in Plaintiffs' opening brief); *Bostic*, 2014 U.S. Dist. LEXIS 19080, at *52 ("the welfare of our children is a legitimate state interest," but "limiting marriage to opposite-sex couples fails to further this interest"). This is because the marriage ban neither "furthers [n]or restricts the ability of gay men and lesbians to adopt children, [or] to have children through surrogacy or artificial insemination," and therefore lacks even a "rational link" to the "goal of having more children raised in the family structure the State wishes to promote." *Kitchen*, 2013 U.S. Dist. LEXIS 179331, at *74-75; *see also Obergefell*, 2013 U.S. Dist. LEXIS 179550, at *67 ("there is simply no rational connection between the Ohio marriage recognition bans and the asserted goal" of having more children raised by different-sex parents).[17] This supposed state interest thus also fails as a matter of law.

[17] Beyond its reliance on a counterfactual premise about the lesser worth of parents who are same-sex couples, this interest is incompatible with fundamental rights surrounding procreation and childrearing, which belong equally to lesbians and gay men. It also impermissibly perpetuates the stigma and second-class status prohibited by *Windsor* and *SmithKline*. *See, e.g.*, ECF No. 110-3 at 40 (arguing

c. *Johnson v. Robison* Does Not Change the Analysis.

Intervenor's amici curiae misread *Johnson v. Robison*, 415 U.S. 361 (1974), to suggest that the demands of the Equal Protection Clause are met when the inclusion of one group promotes a government interest and the addition of others would not. *See Johnson*, 415 U.S. at 374 (examining whether veterans' educational benefits could be limited to those who had performed military service and denied to conscientious objectors). But rather than merely asking whether certain educational benefits help former servicemembers and stopping there, *Johnson* carefully analyzed whether conscientious objectors were in fact similarly situated to military veterans *with regard to those benefits*, and found they were not. 415 U.S. at 382; *see also Bishop*, 2014 U.S. Dist. LEXIS 4374, at *110 (noting that, in *Johnson*, the "carrot" of educational benefits could never actually incentivize military service for conscientious objectors because of their religious beliefs).

By contrast, same-sex couples are similarly situated to different-sex couples *with regard to the benefits of marrying* since both same-sex and different-sex couples may have children and both sets of couples — and any children they may have — benefit in precisely the same ways when those couples marry. *See Bishop*,

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that "the intact, biological married family remains the gold standard for family life in the United States" and thereby asserting that families formed by same-sex couples are inferior and of less value).

2014 U.S. Dist. LEXIS 4374, at *110 ("here, the 'carrot' of marriage is equally attractive to procreative and non-procreative couples, is extended to most non-procreative couples but is withheld just from one type of non-procreative couple"); *Dragovich v. U.S. Dep't of Treasury*, 872 F. Supp. 2d 954, 958 n.10 (N.D. Cal. 2012) (rejecting a similar attempt to rely on *Johnson* in defense of DOMA).[18]

The proper focus thus "is not on whether extending marriage benefits to heterosexual couples serves a legitimate government interest," but on "whether the State's interests in responsible procreation and optimal child-rearing are furthered by prohibiting same-sex couples from marrying." *Kitchen*, 2013 U.S. Dist. LEXIS 179331, at *69-70. As discussed above, they are not.

2. The Scientific Consensus Is That Children of Same-Sex Couples Are Equally Well-Adjusted.

Should the Court weigh Intervenor's parenting arguments on the merits, the overwhelming consensus of experts in the field inexorably leads to one conclusion: Intervenor's claims are founded in stereotypes, not science. Rather than promoting an "optimal" environment for children, the "only effect the [marriage ban has] on children's well-being is harming the children of same-sex couples who are denied

[18] Reading *Johnson* as Intervenor's amici curiae urge also would subject same-sex couples "to a 'naturally procreative' requirement to which no other [Nevada] citizens are subjected, including the infertile, the elderly, and those who simply do not wish to ever procreate." *Bishop*, 2014 U.S. Dist. LEXIS 4374, at *110-11. That well exceeds the limit of even rationality review, *id.* at *111, and certainly cannot survive the heightened review required here.

the protection and stability of having parents who are legally married." *Obergefell*, 2013 U.S. Dist. LEXIS 179550, at *67-68 (citing *Windsor*'s conclusion that differentiating same-sex couples and their families "humiliates" their children).

As Plaintiffs explained in their opening brief, the scientific consensus, based on decades of peer-reviewed research, demonstrates that the children of same-sex and different-sex couples are equally well-adjusted. ECF No. 20-3 at 80-81; *see also* ER 498-514 (testimony of preeminent expert on parenting and children's adjustment, Dr. Michael Lamb).[19] As the American Psychological Association ("APA") and other amici curiae confirm, "the parenting abilities of gay men and lesbians and the positive outcomes for their children are *not* areas where credible scientific researchers disagree." ECF No. 31 at 22; *id.* at 23-24 (cataloguing official statements of the major medical, child welfare, and mental health organizations recognizing that same-sex couples' children are equally well-adjusted); ECF No. 22 at 5-13 (amicus curiae brief of American Sociological Association ("ASA") reviewing research establishing that children of same-sex couples fare just as well across a spectrum of measures, and confirming that the research conforms to the highest standards); *see also Obergefell*, 2013 U.S. Dist.

[19] Various opponents of marriage for same-sex couples, including one of Intervenor's amici, imply that Dr. Lamb's early work and trial testimony from *Perry*, 704 F. Supp. 2d at 981, contradict his current testimony. Dr. Lamb explained why these claims are inaccurate in his testimony below. ER 57, 61-65.

LEXIS 179550, at *68-70 n.20 (describing the overwhelming scientific consensus that children of same-sex couples are equally well-adjusted as those of different-sex couples; collecting authorities). As a district court in Virginia recently observed, same-sex couples are "as capable as other couples of raising well-adjusted children," and in "the field of developmental psychology, the research supporting this conclusion is accepted beyond serious debate." *Bostic*, 2014 U.S. Dist. LEXIS 19080, at *53 (internal quotation marks omitted).

Intervenor and its amici attempt to circumvent this well-established research, arguing that children fare better when there is "gender complementarity" and when they are raised by both biological parents. These arguments are wrong on their merits and do not provide support for the marriage ban. Intervenor also misleadingly cites research about children raised by a single parent, which is not relevant here.

a. Intervenor's "Gender Complementarity" Arguments Are Baseless.

Intervenor and its amici curiae suggest that children must be raised by different-sex couples in order to flourish, incorrectly claiming that men and women have inherently different parenting styles and capacities, which must both be present to offer "gender complementarity." *See, e.g.*, ECF No. 110-3 at 34-35, 42-46. But the factors that affect the adjustment of children are well-understood, and include the quality of children's relationships with their parents, the quality of the

relationships among the significant adults in the children's life, and the availability of economic and social resources. ER 503 (expert testimony of Dr. Lamb); ECF No. 31 at 14-17 (amicus curiae brief of APA, et al.). The science also shows that these factors predict the adjustment of children regardless of parental sexual orientation or sex. ER 502; ECF No. 31 at 15-16 (amicus curiae brief of APA, et al.).

Intervenor also suggests that there are inherent sex-typed differences in men and women's parenting capacities, pointing to articles about parenting patterns among some different-sex couples who are parents. ECF No. 110-3 at 42-46.[20] As Dr. Lamb explained below, however, those differences in parenting style can vary within each gender and often reflect the parent's responsibility as a primary versus

[20] Attempting to compensate for the fact that Defendants did not qualify a single expert on child welfare or parenting, or produce any admissible evidence below, Intervenor points to materials that are, in many instances, the musings of philosophers and lawyers — including the writings of Intervenor's lead counsel — to support the innuendo that lesbians and gay men are less capable parents. As Dr. Lamb testified, however, these views have been widely discredited. *Compare*, *e.g.*, ECF No. 110-3 at 43 n.63 (claiming that work by David Popenoe in the 1990s supports the claim that children need "gender-differentiated parenting") *with* ER 507 n.1 (Dr. Lamb's testimony that this early theory was proven unfounded by subsequent empirical research). *See also* ECF No. 22 at 25, 25-26 n.6 (explaining that David Blankenhorn, cited repeatedly by Intervenor and its amici curiae, is not a social scientist and has abandoned his prior opposition to allowing same-sex couples to marry).

secondary care-giver, rather than the parent's gender. ER 506-07.[21] There is no empirical support, in either Intervenor's materials or elsewhere in the literature, for the notion that the presence of both male and female parents in the home enhances children's adjustment. ER 507. To the contrary, the research shows that nothing about a person's sex determines the capacity to be a good parent, that male and female parents can adopt a range of parenting styles, and that this range does not affect children's adjustment. ER 506-07; *see also Perry*, 704 F. Supp. 2d at 981 ("Children do not need to be raised by a male parent and a female parent to be well-adjusted, and having both a male and a female parent does not increase the likelihood that a child will be well-adjusted."). Rather, children's adjustment is affected by the range of factors described above relating to relationships among children, their parents, and family resources.

b. Intervenor's Arguments About the Importance of Genetic Ties to Parents Also Are Unfounded.

Intervenor and its amici curiae claim that the marriage ban furthers an interest in having children raised by both biological parents. As explained above, the marriage ban has no effect on how many children are raised by same-sex *or* different-sex couples, and any suggestion to the contrary simply cannot be

[21] Dr. Lamb explains, for example, that some studies have found that men's interactions with children may be more boisterous, and women's interactions soothing, but each sex can adopt either style, and when fathers are the primary caregivers their parenting style resembles that more typically ascribed to women. ER 506-07.

credited. *See Bishop*, 2014 U.S. Dist. LEXIS 4374, at *112 ("Exclusion from marriage does not make it more likely that a same-sex couple desiring children, or already raising children together, will change course and marry an opposite-sex partner," to raise children.). But on the merits, Intervenor's argument misconstrues the literature, as the expert testimony below confirmed. ER 513 (explaining that many of the relevant studies use the term "biological parents" to include both adoptive parents and biological parents).[22] A reliable body of research explores potential associations between genetic linkages and children's adjustment and development. ER 135. The research consistently shows that children may thrive psychologically whether or not they are genetically related to the parents who rear them, and a genetic link does not improve their outcomes. *Id.* *See also Obergefell*, 2013 U.S. Dist. LEXIS 179550, at *10-11 n.4 (addressing these arguments and noting that, "[a]mong [amicus curiae's] many remarkable and fundamentally baseless arguments, one of the most offensive is that adopted children are less emotionally healthy than children raised by birth parents").

[22] Intervenor recounts the findings of a "study" involving the outcomes of children conceived through assisted reproductive technology ("ART"), ECF No. 110-3 at 36-37, although the paper was issued by an advocacy organization and was not peer-reviewed or published in an academic journal. ER 135. The paper acknowledges that the vast majority of ART users are different-sex couples, making it hard to see how the paper supports excluding same-sex couples from marriage. ER 135-36. But in any event, the research on donor-conceived children published in scientific journals through the peer-review process shows that these children's adjustment is not related to a genetic tie to their parents. *Id.*

c. Intervenor's Arguments About "Fatherlessness" Are Misplaced.

Intervenor also cites literature regarding the outcomes of children raised in single-parent families, which it refers to as "fatherlessness." ECF No. 110-3 at 46-48. But research showing that children in *one*-parent families are at greater risk of maladjustment than those raised by *two* parents simply confirms the importance of the adjustment factors described above (*e.g.*, the quality of the relationships between children and their parents, and family resources). ER 512-13. Furthermore, these studies have not examined parental sex or sexual orientation, ER 512, and do not support the conclusions Intervenor attributes to them. *See* ECF No. 22 at 22-25, 28-29 (brief of amicus curiae ASA explaining the inapplicability of those studies to conclusions about parents who are same-sex couples).[23]

[23] In fact, the authors of one paper repeatedly cited by Intervenor and its amici curiae have publicly disavowed this distortion of their work. *See* Kristen Anderson Moore, et al., *Marriage from a Child's Perspective*, Child Trends Research Brief (2002) (now with an introductory note stating that "no conclusions can be drawn from this research about the well-being of children raised by same-sex parents or adoptive parents"), *available at* www.childtrends.org/wp-content/uploads/2013/03/MarriageRB602.pdf. Other authors cited by Intervenor's amici, including researchers Sara McLanahan and Gary Sandefur, submitted an amicus brief in Hawaii state court litigation clarifying that their research about parents who were never-married, divorced, or step-parents provides no basis for conclusions about parents who are a same-sex couple; instead, the literature shows that parents' sexual orientation and gender is irrelevant to parental fitness, and children whose parents are a same-sex couple would benefit if their parents could marry. *See* Brief for Andrew J Cherlin, Ph.D., Frank F. Furstenberg, Jr., Ph.D., Sara S. McLanahan, Ph.D., Gary D. Sandefur, Ph.D., and Lawrence L. Wu, Ph.D. as Amici Curiae Supporting Plaintiffs, Baehr v. Miike, No. 20371, 1999 Haw. LEXIS 391 (Haw.

d. The Flawed Articles Cited by Intervenor and Its Amici Curiae Do Not Support Intervenor's Arguments.

Finally, Intervenor and its amici attempt to cast doubt on the authoritative research showing that same-sex couples' children are equally well-adjusted. *See*, *e.g.*, ECF No. 110-3 at 40 n.55 (citing articles by Mark Regnerus and Douglas Allen). But the articles they cite do not allow for this conclusion. As Dr. Lamb testified below, and the ASA confirms in its amicus brief, use of these articles to question the research about same-sex couples has been discredited. *See* ER 59-61, 508-10 (Dr. Lamb's testimony explaining the reasons that Regnerus does not actually measure adjustment of children parented by same-sex couples, and an internal audit's conclusion that the journal should have disqualified his work from publication); *see also* Amicus Curiae Brief of the American Sociological Association, ECF No. 22 at 14-21 (discussing Regnerus); *id.* 7 n.3 (discussing Allen); *id.* 13 n.5 (discussing Loren Marks article sometimes cited by opponents of marriage for same-sex couples); ER 59-60, 136-37, 511 (Dr. Lamb's testimony about the reasons Marks' work does not support conclusions about parents who are same-sex couples, and Marks' failure to acknowledge the existence of rigorous research on both lesbian parents and gay parents, from a representative variety of

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Dec. 11, 1999), *available at* http://www.lambdalegal.org/in-court/legal-docs/baehr_hi_19961011_amici-marriage-scholars.

ethnic and economic backgrounds, that includes multiple cross-sectional and longitudinal studies).

e. Intervenor's Arguments Rest on Impermissible Stereotypes and Fail to Justify the Marriage Ban.

At bottom, Intervenor's arguments — including claims about men's and women's "differences in genes and hormones," ECF No. 110-3 at 43 n.60 — are premised on stereotyped notions of the capacities of men and women as parents, which the Supreme Court long ago renounced as a basis for differential treatment. *See, e.g.*, *Caban v. Mohammed*, 441 U.S. 380, 389 (1979) (rejecting the notion of "any universal difference between maternal and paternal relations at every phase of a child's development"); *Stanley v. Illinois*, 405 U.S. 645, 654 (1972) (even were it true that "most unmarried fathers are unsuitable and neglectful parents," this stereotyped notion could not justify differential treatment of parents based on sex). Preconceived notions about the parenting abilities of men and women have no place in our constitutional tradition, and they certainly cannot be resuscitated solely to disadvantage lesbians and gay men and their families.

In addition, Intervenor's claims about the "optimal" environment for raising children must fail not only because they are demonstrably inaccurate, but also because the marriage ban undermines rather than advances that goal. As explained in Plaintiffs' opening brief, the marriage ban does not help the children of different-sex couples in any way, but it hurts same-sex couples' children

immeasurably. ECF No. 20-3 at 79, 83-84; *see also Kitchen*, 2013 U.S. Dist. LEXIS 179331, at *75 (holding that same-sex couples' "children are also worthy of the State's protection, yet [Utah's marriage ban] harms them for the same reasons that the Supreme Court found that DOMA harmed the children of same-sex couples"). "Indeed, Justice Kennedy explained [in *Windsor*] that it was the government's failure to recognize same-sex marriages that harmed children, not having married parents who happened to be of the same sex." *Bourke v. Beshear*, No. 3:13-CV-750-H, 2014 U.S. Dist. LEXIS 17457, at *31 (W.D. Ky. Feb. 12, 2014); *see also Bostic*, 2014 U.S. Dist. LEXIS 19080, at *52-53 (Virginia's marriage ban has the effect of "needlessly stigmatizing and humiliating children who are being raised" by same-sex couples, which "betrays" rather than serves an interest in child welfare). Moreover, the marriage ban injures the lesbian and gay children (whether their parents are different-sex or same-sex couples) "who will grow up with the knowledge that the State does not believe they are as capable of creating a family as their heterosexual friends." *Kitchen*, 2013 U.S. Dist. LEXIS 179331, at *76.

f. Nevada Recognizes That Same-Sex Couples Are Worthy of the Same Parenting Rights and Responsibilities as Different-Sex Couples.

Particularly in light of *SmithKline*'s requirement to heed the "*demonstrated* purpose" of a law, Nevada's public policy shows the State has rejected the idea

that it has any interest in setting apart, and treating more poorly, parents who are same-sex couples. As amici curiae family law professors cogently explain, Intervenor's emphasis on biological relationships between parents and children, and the need for parents of different sexes, bears no resemblance to Nevada's robust public policy of affording same-sex couples equal treatment as parents. ECF No. 28 (amicus curiae brief of family law professors); *see also* ECF No. 20-3 at 81-83 (Plaintiffs' opening brief). In every respect — from the laws for registered domestic partners to the recent pronouncements of Nevada's Supreme Court about parenting by same-sex couples, ECF No. 20-3 at 83 n.44 — the State acknowledges that the parental bonds of same-sex couples and their children deserve the same protection as all others. This, too, provides an independent basis to reject Intervenor's arguments that Nevada's marriage ban is justified by a desire to privilege different-sex couples and their children.

Intervenor also argues that, because Nevada's domestic partnership laws are statutory, they are subservient to the State's constitutional amendment prohibiting marriage for same-sex couples. ECF No. 110-3 at 102-03. But Plaintiff Couples do not ask the Court to read the statutes as providing a right to marriage in direct contravention of the constitutional amendment. Instead, the statutes demonstrate that the State has "abandoned" a purported interest in discrimination by acting

contrary to the claimed interest, *Eisenstadt*, 405 U.S. at 448; namely, by conferring equal parental rights on same-sex couples under State law.

B. Intervenor's Religious Liberties Arguments Are Untenable.

Intervenor advances a vague and speculative argument that allowing same-sex couples to marry could result in a parade of horribles for religious liberty, from religious institutions' loss of tax-exempt status to a requirement that public accommodations be available without discrimination based on sex or sexual orientation. Distilled, Intervenor's position seeks to deprive Plaintiff Couples of the right to marry as a prophylactic means of preventing those opposed to marriage for same-sex couples from having to treat same-sex couples equally when offering services to the general public, running a business, or spending public funds. Federal constitutional guarantees, however, were designed not only "to protect religious beliefs," but also to "prevent unlawful government discrimination based upon them." *Bourke*, 2014 U.S. Dist. LEXIS 17457, at *3.

Three key points answer Intervenor's contentions. First, as with Intervenor's contentions regarding parenting, these religious concerns were not the "actual" reason for Nevada's adoption of the marriage ban and must therefore be rejected under the heightened scrutiny mandated by *SmithKline*. *See* discussion at pp. 31-32, 32-33 n.14, *supra*.

Second, as more and more courts have recognized, access to civil marriage for same-sex couples "does not mandate any change for religious institutions, which may continue to express their own moral viewpoints and define their own traditions about marriage." *Kitchen*, 2013 U.S. Dist. LEXIS 179331, at *79. Because churches' decisions about whether to marry certain couples are protected by the First Amendment, no church has ever lost its tax-exempt status for refusing to perform a marriage. Indeed, affording same-sex couples the same right to marry that different-sex couples enjoy threatens religious liberty "no more than lawful interfaith marriages can threaten the religious liberty of synagogues and rabbis, or of mosques and imams, that interpret their scripture and tradition to prohibit such unions." Eric Alan Isaacson, *Are Same-Sex Marriages Really a Threat to Religious Liberty?*, 8 Stan. J. C.R. & C.L. 123, 124, 136 n.65 (2012) (citing, *e.g.*, *In re Marriage Cases*, 183 P.3d 384, 451-52 (Cal. 2008); *Varnum v. Brien*, 763 N.W. 2d 862, 906 (Iowa 2009)).

Third, the marriage ban has no effect on the antidiscrimination requirements in Nevada, which already prohibit discrimination in public accommodations on the basis of sex and sexual orientation. *See* Nev. Rev. Stat. §§ 651.050(3), 651.070. Places of public accommodation have no greater permission to discriminate on protected grounds with or without the marriage ban. Churches do not face liability as places of worship, as Intervenor inaccurately suggests; rather, only entities and

individuals participating in the marketplace as places of public accommodations are subject to regulation by public accommodation laws.

Even more fundamentally, Intervenor does not explain how avoiding enforcement of antidiscrimination laws is even a legitimate government interest — particularly given that public accommodation laws "serve compelling state interests of the highest order." *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (internal quotation marks omitted); *see also Romer*, 517 U.S. at 635 (rejecting respect for "religious objections to homosexuality" as a justification for barring government from banning sexual orientation discrimination by public accommodations); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984) ("[A]cts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent . . . ."). That is also why there is no protected right, for example, to receive government contracts while ignoring non-discrimination conditions attached to them. ECF No. 110-3 at 52; *cf. Bob Jones Univ. v. Simon*, 416 U.S. 725, 736-37 (1974) (rejecting the argument that the free exercise of religion could justify violating antidiscrimination requirements attached to a tax-exempt status).

Ultimately, the "beauty of our Constitution is that it accommodates our individual faith's definition of marriage while preventing the government from

unlawfully treating us differently," a result that is "hardly surprising since it was written by people who came to America to find both freedom of religion and freedom from it." *Bourke*, 2014 U.S. Dist. LEXIS 17457, at *36.

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For all the reasons above, any supposed government interest in Nevada's marriage ban cannot survive even the most deferential review, let alone the heightened scrutiny required for both Plaintiff Couples' due process and equal protection claims. *Cf. Obergefell*, 2013 U.S. Dist. LEXIS 179550, at *26 (concluding that interests in tradition, caution, and religious liberties are "vague, speculative, and unsubstantiated" and "do not rise anywhere near the level necessary to counterbalance the specific, quantifiable, and particularized injuries . . . suffered by same-sex couples" under heightened review).[24]

[24] Arguments surrounding tradition and caution, previously raised by Governor Sandoval Clerk-Recorder Glover — but now withdrawn — have been further discredited by federal courts since Plaintiffs filed their opening brief. *See Bostic*, 2014 U.S. Dist. LEXIS 19080, at *40-45; *Kitchen*, 2013 U.S. Dist. LEXIS 179331, at *48-49, 79-80; *Obergefell*, 2013 U.S. Dist. LEXIS 179550, at *26-27; *Bishop*, 2014 U.S. Dist. LEXIS 4374, at *104-05. *See also* ECF No. 24 at 22-28 (amicus curiae brief of 14 states permitting marriage for same-sex couples and the District of Columbia affirming that speculation about the erosion of marriage is unfounded). Intervenor compares marriage to a "massive ocean-going ship" that takes decades to "turn." ECF No. 110-3 at 33 n.37. But Plaintiffs-Couples' "desire to publicly declare their vows of commitment and support to each other is a testament to the strength of marriage in society, not a sign that, by opening its doors to all individuals, it is in danger of collapse." *Kitchen*, 2013 U.S. Dist. LEXIS 179331, at *85.

V. *BAKER V. NELSON* IS NO LONGER CONTROLLING.

Intervenor also tries to dissuade the Court from deciding the core issues in this case by resuscitating the Supreme Court's 42-year-old summary dismissal in *Baker v. Nelson*, 409 U.S. 810 (1972) (mem.). ECF No. 110-3 at 67-68. That summary decision is now obsolete. Other courts have had no trouble disposing of *Baker* as a relic of a bygone era when the law still condemned same-sex couples' intimate relationships as criminal and placed no limits on discrimination against them.

The Supreme Court has explained that summary decisions are binding only unless and until subsequent "doctrinal developments indicate otherwise." *Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975).[25] Noting the several momentous Supreme Court decisions issued about lesbians and gay men since *Baker*, several federal judges have recently concluded that it no longer governs. *Kitchen*, 2013 U.S. Dist. LEXIS 179331, at *22-26 (describing major shifts in Supreme Court jurisprudence since *Baker* and concluding that it no longer is controlling); *Bostic*, 2014 U.S. Dist. LEXIS 19080, at *28-29 ("doctrinal developments since 1971 compel the

[25] Intervenor claims that only the Supreme Court may conclude that a summary dismissal is vitiated, *see, e.g.*, ECF No. 110-3 at 67-68, but the Supreme Court has never said that. Intervenor's reliance on *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012), also is inapposite. Ruling on the constitutionality of DOMA, and not a state marriage ban, *Massachusetts* suggested in passing that *Baker* may preclude claims for access to marriage. 682 F.3d at 8. This statement, which runs counter to the great weight of recent decisions, is dicta and not controlling in the First Circuit, let alone here.

conclusion that *Baker* is no longer binding"); *Bishop*, 2014 U.S. Dist. LEXIS 4374, at *120 ("There is no precise legal label for what has occurred in Supreme Court jurisprudence beginning with *Romer* in 1996 and culminating in *Windsor* in 2013, but this Court knows a rhetorical shift when it sees one."); *McGee v. Cole*, No. 3:13-24068, 2014 U.S. Dist. LEXIS 10864, at *29-30 (S.D. W. Va. Jan. 29, 2014).

As Defendant Officials Sandoval and Glover have now conceded, *SmithKline* answers this question definitively, making clear this Court's view that *Windsor* reflects a "change in the law by the Supreme Court" on "the relationship between equal protection and classifications based on sexual orientation." 740 F.3d at 480; ECF Nos. 142 at 5-6 ("*SmithKline* strongly implies that the Court views . . . *Windsor* to be a game changing significant doctrinal development" displacing whatever precedential authority *Baker* had.), 171 at 5-7 ("The legal evolution referenced by *SmithKline* is undeniably a 'doctrinal development' that vitiates the State's [former] position" that *Baker* was controlling.). In other words, the Ninth Circuit recognizes that the Supreme Court itself has changed the law regarding the equal protection test that was applicable when *Baker* was decided. Moreover, it is impossible to reconcile *SmithKline*'s recognition that it is no longer acceptable "to continue [the] deplorable tradition of treating gays and lesbians as undeserving of participation in our nation's most cherished rites and rituals" with *Baker*'s conclusion that no substantial federal question existed about laws that treat

lesbians and gay men as underserving of participation in the "cherished rites and rituals" of marriage. *SmithKline*, 740 F.3d at 485.

Intervenor also claims that *Baker* and principles of federalism confirm that the states have an untouchable, absolute immunity to draw marriage eligibility lines as they please — invidiously or otherwise. ECF No. 110-3 at 67, 72-74. But *Windsor* is simply the latest in a long line of cases to confirm that "State laws defining and regulating marriage, of course, must respect the constitutional rights of persons . . . ." 133 S. Ct. at 2691 (citing *Loving*, 388 U.S. 1). Nevada's marriage ban dishonors those constitutional rights, and *Baker* offers no refuge.

CONCLUSION

In the nine months since the Supreme Court handed down its decision in *Windsor*, twelve courts have decided substantive issues relating to marriage by same-sex couples, and, in every single instance, they have ruled in favor of equality.[26] In addition, in four other cases decided since *Windsor*, courts likewise

[26] *Bostic*, 2014 U.S. Dist. LEXIS 19080; *Bourke*, 2014 U.S. Dist. LEXIS 17457; *McGee*, 2014 U.S. Dist. LEXIS 10864; *Bishop*, 2014 U.S. Dist. LEXIS 4374; *Kitchen*, 2013 U.S. Dist. LEXIS 179331; *Obergefell*, 2013 U.S. Dist. LEXIS 179550; *Lee v. Orr*, No. 13-cv-8719, 2014 U.S. Dist. LEXIS 21620 (N.D. Ill. Feb. 21, 2014), and 2013 U.S. Dist. LEXIS 173801, at *12 (N.D. Ill. Dec. 10, 2013) (initially granting injunctive relief allowing sub-class of same-sex couples facing terminal illness to marry now, rather than await effective date of Illinois law permitting marriage by same-sex couples, and subsequently allowing all same-sex couples in Illinois to marry now rather than wait until June); *Gray v. Orr*, No. 13 C 8449, 2013 U.S. Dist. LEXIS 171473, *19-20 (N.D. Ill. Dec. 5, 2013) (granting injunctive relief to woman dying of cancer and her same-sex partner); *Cooper-*

have resolved sexual orientation discrimination cases in favor of equal treatment.[27] While Plaintiffs believe they were entitled to prevail before *Windsor*, it has become more and more obvious with every new decision (even to all of the government defendants in this case) that Nevada's marriage ban cannot stand.

That is rightly so. A government that would permit the intentional exclusion of a minority from one of its most prized institutions and life's most meaningful rites of passage does not live up to America's promise of liberty and equality for all. Only ending that exclusion will.

Harris v. United States, No. 1:12-00887, 2013 U.S. Dist. LEXIS 125030, at *5-6 (C.D. Cal. Aug. 29, 2013) (holding unconstitutional Title 38's exclusion of those married to a same-sex spouse from veteran's benefits); *Cozen O'Connor, P.C. v. Tobits*, No. 11-0045, 2013 U.S. Dist. LEXIS 105507, at *20 (E.D. Pa. July 29, 2013) (finding woman who married same-sex partner in Canada to be surviving spouse for purposes of entitlement to profit-sharing plan's death benefits); *Griego v. Oliver*, No. 34,306, 2013 N.M. LEXIS 414, at *10 (N.M. Dec. 19, 2013) (holding that New Mexico Constitution requires that same-sex couples be allowed to marry); and *Garden State Equal.*, 434 N.J. Super. at 218-19 (holding that New Jersey Constitution requires that same-sex couples be allowed to marry in order to obtain federal benefits in the wake of *Windsor*).

[27] *SmithKline*, 740 F.3d 471; *In re Fonberg*, 736 F.3d 901, 903 (9th Cir. Jud. Council 2013) (denial of health benefits to same-sex domestic partner of former U.S. District of Oregon law clerk violated District's EDR plan, as well as equal protection and due process); *Bassett v. Snyder*, 951 F. Supp. 2d 939, 973 (E.D. Mich. 2013) (granting preliminary injunction against Michigan law that prohibited provision of fringe benefits to same-sex partners of state and local government employees); *D.M.T. v. T.M.H.*, No. SC12-261, 2013 Fla. LEXIS 2422, at *55 (Fla. Nov. 7, 2013) (Florida statute exempting sperm and egg donors who were part of a heterosexual "commissioning couple" from relinquishment of parental rights, but not exempting donors in same-sex relationships, violated state and federal equal protection guarantees).

DATE: February 26, 2014

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

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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 February 26, 2014. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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