No. _____

IN THE

Supreme Court of the United States

COALITION FOR THE PROTECTION OF MARRIAGE,
Petitioner,

v.

BEVERLY SEVCIK, et al.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

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QUESTION PRESENTED

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

PARTIES TO THE PROCEEDING

The Petitioner is Coalition for the Protection of Marriage. The Petitioner was the Intervenor-Defendant in the District Court and is an Appellee in the Court of Appeals.

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

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

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

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

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PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

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

OPINION BELOW

The opinion of the District Court for the District of Nevada, which granted final judgment in favor of the Petitioner and the Government Respondents and denied the Plaintiff Respondents' motion for summary judgment, is published at 2012 WL 5989662, (D. Nev. Nov. 26, 2012), App. 1a–55a.

JURISDICTION

The jurisdiction of the District Court was invoked under 28 U.S.C. § 1331(general federal question jurisdiction) and 28 U.S.C. § 1343 (civil rights). The final judgment of the District Court was entered on December 3, 2012. App. 56a. The Plaintiff Respondents filed a Notice of Appeal on December 3, 2012. App. 57a–58a. The case is docketed as No. 12-17668 in the Court of Appeals for the Ninth Circuit, which has jurisdiction pursuant to 28 U.S.C. § 1291. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are set forth in the appendix to this petition. App. 78a.

STATEMENT OF THE CASE

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

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

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

can either be legally married in Nevada or have their foreign marriages legally recognized there. The Complaint was filed April 10, 2012. Dkt. No. 1, *Sevcik et al. v. Sandoval et al.*, Case No. 2:12-CV-00578-RCJ (PAL).

As the proponent of the ballot initiative leading to the Marriage Amendment, the Petitioner timely moved to intervene as a party defendant. Dkt. No. 30. The Government Respondents did not oppose the motion. Dkt. Nos. 37, 38. The Plaintiff Respondents initially opposed the motion, Dkt. No. 40, but later withdrew their opposition, Dkt. No. 67. The District Court granted the Petitioner's motion to intervene. *Id.*

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

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

sex couples most of the rights, benefits, and obligations of marriage—undercut the State's reasons for the Marriage Amendment and Statute. The Plaintiff Respondents relied on the testimony (in affidavit form) of six expert witnesses, including Prof. Nancy Cott of Harvard University and Prof. Michael Lamb of Cambridge University, and on some 548 total pages of factual materials filed with the District Court. That testimony and those materials encompassed both the standard-of-review issue and the merits.

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

the scholarly literature encompassed both the standard-of-review issue and the merits.

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

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

In an Order dated November 26, 2012, but entered on November 29, 2012, the District Court granted the summary judgment motions of the Petitioner and the two moving Government Respondents and denied the Plaintiff Respondents' summary judgment motion. App. 55a. The District Court granted the motions to dismiss in part and denied them in part: "The Complaint is dismissed as

precluded by *Baker v. Nelson* with respect to the traditional equal protection challenge, but the Complaint is not dismissed with respect to the challenge under *Romer v. Evans*." *Id.* The District Court further ordered that the Clerk enter judgment and close the case. *Id.*

The District Court held that "the present equal protection claim is precluded by *Baker [v. Nelson]* insofar as the claim does not rely on the *Romer* line of cases . . . ." App. 14a. The District Court then said: "Although the Court finds that *Baker* precludes a large part of the present challenge, the Court will conduct a full equal protection analysis so that the Court of Appeals need not remand for further proceedings should it rule that *Baker* does not control or does not control as broadly as the Court finds." *Id.*

In its equal protection analysis, the District Court considered and rejected the notion that the Marriage Amendment and Statute draw "a gender-based distinction" and held instead that "the distinction is definitely sexual-orientation based" in light of "the alleged discriminatory intent behind the challenged laws," citing *Washington v. Davis*, 426 U.S. 229, 240 (1976) and other cases. App. 15a–20a.

The District Court devoted the majority of its equal protection analysis to the level of judicial scrutiny applicable to claims of sexual orientation discrimination. *Id.* at 20a–38a. It held that Ninth Circuit decisions applying rational-basis review to such claims are still valid and binding on the district courts. The District Court rejected the Plaintiff Respondents' arguments that those Ninth Circuit

decisions, particularly *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990), have been materially undermined by subsequent decisions of this Court, such as *Lawrence v. Texas*, 539 U.S. 558 (2003). The District Court noted the Ninth Circuit's observation that "homosexuals had suffered a history of discrimination, but that homosexuality was not immutable and that homosexuals were not politically powerless because they had successfully lobbied legislatures to pass anti-discrimination legislation protecting them." App. 23a. The District Court stated: "In the context of a characteristic like homosexuality, where no lingering effects of past discrimination are inherited, it is contemporary disadvantages that matter for the purposes of assessing disabilities due to discrimination" and "[a]ny such disabilities with respect to homosexuals have been largely erased since 1990," the year of the *High Tech Gays* decision. *Id*. at 24a.

Regarding immutability, the District Court deemed itself bound by the *High Tech Gays* holding because "the Supreme Court has not yet ruled that homosexuality is immutable for the purposes of equal protection." *Id*. at 25a.

The District Court developed at great length the issue of the relative political power of advocates for homosexuals' rights and causes. *Id*. at 25a–37a. It began by tracing the sea change in our society's acceptance of homosexuals over recent years and of the laws' recent and repeated enactment of measures favorable to homosexuals. *Id*. at 25a–26a, 35a–36a. It then took issue with and contested point by point the Second Circuit's analysis leading to adoption of

heightened scrutiny for sexual orientation discrimination in *Windsor v. United States*, 699 F.3d 169 (2nd Cir. 2012). The District Court began by noting the Second Circuit's conclusion: "The question is not whether homosexuals have achieved political successes over the years; they clearly have. The question is whether they have the strength to politically protect themselves from wrongful discrimination." *Id*. at 184. The District Court then reasoned:

> That statement is strictly true, but the answer to the second question is powerfully influenced by the answer to the first question, because political success is the most direct, if not defining, indicator of the ability to protect oneself through political processes. The Court believes the test as presented, or at least as applied, by the Second Circuit is little test at all, but rather a reason behind an absolute (or nearly absolute) rule that the Second Circuit has now impliedly adopted, i.e., that a discrete minority group challenging a discriminatory law necessarily lacks political power for the purposes of a level-of-scrutiny analysis based purely upon the fact that the group has not been able democratically to avoid or alter the law it is challenging in a particular case. That result obviates the Supreme Court's use of political powerlessness as a factor in assessing the level of scrutiny to be applied. If a plaintiff could necessarily win on the political powerlessness factor of the level-of-scrutiny analysis by the very fact that he was unable to challenge a particular law democratically, the

> factor would be meaningless. Political powerlessness for the purpose of an equal protection analysis does not mean that the members of a group have failed to achieve all of their goals or have failed to achieve the particular goal they aim to achieve via the lawsuit in which the political powerlessness issue is litigated. . . . If there were no legal space in which a minority group had sufficient political power such that it were not entitled to heightened scrutiny under an equal protection analysis, but where it had failed to succeed democratically on a particular challenged issue, then the analysis of the group's political power for the purposes of a heightened scrutiny analysis would be no analysis at all—a plaintiff would have prevailed on the issue by the mere fact that he had standing to file a lawsuit.

App. 27a–28a.

The District Court stated that the Second Circuit also erred in emphasizing the minority status of homosexuals because the "question of 'powerlessness' under an equal protection analysis requires that the group's chances of democratic success be virtually hopeless, not simply that its path to success is difficult or challenging because of democratic forces." App. 28a. The District Court reasoned that the Second Circuit further erred in its analysis of the seemingly small number of acknowledged homosexuals in positions of power or authority. It identified multiple plausible explanations other than the Second Circuit's, which was anti-homosexual hostility. App. 29a–31a.

Engaging Justice Brennan's plurality opinion in *Frontiero v. Richardson*, 411 U.S. 677, 685–86 (1973), that women's then-recent political successes should not be dispositive of the political powerlessness analysis, the District Court stated the material differences between women as a class and homosexuals as a class: the former, not the latter, had been denied the right to vote, serve on juries, and own property, and the visibility of the sex characteristic was high, unlike "the characteristic of homosexuality." App. 31a–32a.

The District Court then engaged in depth the reality that a holding of heightened scrutiny in large measure removes a public issue from democratic processes. Where a particular prohibition affecting a minority group is not textually clear in the Constitution, using heightened scrutiny analysis to largely remove the public issue from the democratic processes "can cause an awkward unbalancing of powers in a Madisonian constitutional democracy and undermine both public confidence in the judiciary and the legitimacy of the government in general." *Id.* at 32a–33a. The District Court reasoned that "a court must only take such action when the constitutional rule is reasonably clear." *Id.* at 35a. Noting that difficult problems arise when the text of a constitutional provision provides vague standards, such as "equal protection of the laws," because judges and laymen alike often disagree whether a particular law contravenes the vaguer prohibitions, the District Court stated:

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

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

Id. at 35a. This is particularly so at the present time when "[t]he States are currently in the midst of an intense debate about the novel concept of same-sex marriage, and homosexuals have meaningful political power to protect their interests," as evidenced by their 2012 general election victories on marriage-related ballot measures in Maine, Maryland, Washington, and Minnesota. *Id.* at 35a–36a.

Applying rational-basis review, the District Court held that preserving the traditional institution of marriage was a state interest adequate to sustain the Marriage Amendment and Statute against constitutional attack. The District Court relied particularly on the following statement from Justice O'Connor's concurring opinion in *Lawrence*, 539 U.S. at 585: "[O]ther reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group." The District Court went on to state: "The *Lawrence* Court

appears to have strongly implied that in an appropriate case, such as the present one, the preservation of the traditional institution of marriage should be considered a legitimate state interest rationally related to prohibiting same-sex marriage." App. 40a. Among the additional reasons to promote the traditional institution of marriage, the District Court noted:

> The perpetuation of the human race depends upon traditional procreation between men and women. The institution developed in our society, its predecessor societies, and by nearly all societies on Earth throughout history to solidify, standardize, and legalize the relationship between a man, a woman, and their offspring, is civil marriage between one man and one woman.

Id. at 41a–42a.

The District Court rejected the Plaintiff Respondents' argument that Nevada's Domestic Partnership Act, enacted in 2009, somehow undercut the rational bases for man-woman marriage. That argument "would permit a plaintiff to show an equal protection violation by the very fact that a state had recently *increased* his rights in relevant respects, which is not the law." *Id*. at 46a (emphasis in original).

Finally, the District Court rejected the argument that *Romer v. Evans*, 517 U.S. 620 (1996), required a ruling of unconstitutionality. The ballot measure invalidated in *Romer* had no legitimate (and hence no rational) basis; Nevada's laws

sustaining man-woman marriage have such a basis. Those laws withstand constitutional challenge

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

Id. at 54a.

The Plaintiff Respondents filed timely notice of appeal to the United States Circuit Court for the Ninth Circuit. App. 57a–58a. The appeal was docketed as No. 12-17668. The Court of Appeals has jurisdiction pursuant to 28 U.S.C. § 1291.

This case is "in the court[] of appeals" within the meaning of 28 U.S.C. § 1254. *See* Eugene Gressmen et al., *Supreme Court Practice* § 2.4 (9th ed. 2007).

REASONS FOR GRANTING THE WRIT

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

is optimal for resolving the fundamental issue for several reasons. This case is the only one that cannot be resolved without answering the fundamental issue. Further, this case has developed most comprehensively and thoroughly the societal interests justifying preservation of marriage's man-woman meaning; the record here will thus be most helpful in judicial review. Moreover, important collateral issues that may be the basis for resolving the other pending marriage cases will be more prudently and intelligently answered *after* this Court resolves the fundamental issue. Finally, this case is free of standing issues. We respectfully submit that this case is optimal for resolving the fundamental marriage issue.

I. After twenty years of intense judicial and extra-judicial engagement with the question of the public meaning of marriage, the Nation is now looking to this Court for the federal constitutional answer to the fundamental marriage issue.

The year 2012 is the twentieth year of an intense national engagement with the question whether a core public meaning of the marriage institution should continue to be the union of a man and a woman ("man-woman marriage") or, by force of law, should be changed to the union of two persons regardless of gender ("genderless marriage"). During that time, at least 21 state appellate court decisions and 13 federal court decisions have addressed some aspect of the question. App. 59a–61a. The voters of 36 states have cast their ballots on measures taking a position one way or the other on it. App. 62a–66a. Nearly every state legislature

and the Congress have, in one way or other, engaged the question. App. 67a–70a. The platform of each of the two major national political parties contains a plank setting forth a position.

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

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

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

This case's record makes a further powerful demonstration of this issue's national importance. That importance is centered in certain social institutional realities regarding contemporary American marriage. Explanation of those social realities in this Petition, however, serves purposes beyond demonstrating the high national importance of the fundamental marriage issue. The explanation also demonstrates both the powerful societal interests in perpetuating the man-woman marriage institution and the optimal nature of this case as the

means to resolve the fundamental marriage issue. Accordingly, that explanation follows. [2]

Every social institution consists of, is constituted by, a unique web of public meanings. Marriage is a vital and fundamental social institution and is constituted in important part by the public meaning of the union of a man and a woman. Institutionalized meanings, including the man-woman meaning at the core of marriage, teach, form, and transform individuals, providing them with statuses, identities, perceptions, aspirations, and projects and guiding their conduct. By forming

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

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

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

and transforming individuals in these ways, institutionalized meanings provide the social benefits ("goods") that society needs and justify society's expenditure of resources to perpetuate the institution.

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

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

- the irreplaceable foundation of the optimal child-rearing mode;
- an essential bulwark protecting the religious liberties of large portions of the Nation's churches and people of faith.

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

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

In material ways, genderless marriage will be an institution radically different from the man-woman marriage institution.[3] This radical difference between the two possible marriage institutions could not be otherwise: fundamentally different meanings, when magnified by institutional power and influence, produce divergent social identities, aspirations, projects, or ways of behaving,

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

and thus different social goods. To say otherwise would be to ignore the undisputed effects that social institutions have in the formation and transformation of individuals.[4] The reality is that changing the meaning of marriage to that of "any two persons" will transform the institution profoundly, if not immediately then certainly over time as the new meaning is mandated in texts, in schools, and in many other parts of the public square and voluntarily published by the media and other institutions, with society, especially its children, thereby losing the ability to discern the meanings of the old institution.

The law did not create the man-woman marriage institution. However, the law, especially constitutional law, has the power to suppress the now widely shared man-woman meaning and, by mandating a genderless marriage regime, will over time indeed suppress that meaning by displacing it with the radically different any-two-persons meaning.[5] By suppressing and displacing the man-woman meaning in that way, the law will cause the

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[4] This case's record shows that well-informed observers of marriage—regardless of their sexual, political, or theoretical orientations—uniformly acknowledge the magnitude of the differences between the two possible institutions of marriage.

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

diminution over time and then the loss of the valuable social goods materially and even uniquely provided by that now-institutionalized meaning.

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

- the child's bonding interest;
- natural parenthood as the foundation for the construction of parenthood in our society;
- the concept that relational rights within the natural family are not created, dispensed, and withdrawn at the will of the state;
- the personally and socially valuable statuses and identities of *husband* and *wife*, each of which "is a distinct mode of association and commitment that carries centuries and volumes of social and personal meaning"[6]; and
- the religious liberties of large portions of the Nation's churches and people of faith.

Even though this summary of the relevant social institutional realities of contemporary American marriage is necessarily compressed,[7] it

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

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

serves to illuminate the profound importance and the broad and deep social consequences of this Court's resolution of the fundamental marriage issue. Regarding consequences: First, if federal constitutional law were to suppress the man-woman meaning at the core of the marriage institution, society would see first the diminution over time and then the loss of the valuable social goods that meaning uniquely provides. Those valuable social goods have no source in our society other than the man-woman marriage institution, and a genderless marriage regime will not produce them; indeed, it will be inimical to them. Second, at the same time, a constitutionally mandated genderless marriage regime will effectively advance a particular conception of the moral equality of forms of sexuality, a conception grounded in the influential "comprehensive doctrines"[8] of many Americans, particularly among the Nation's elites, but one contested by the comprehensive doctrines of many other Americans.

This case presents the profoundly important fundamental marriage issue in a way ripe for review.

Connecticut, and Iowa Supreme Courts, 2012 B.Y.U.L. Rev. 193.

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

III. Relative to the other marriage cases pending before this Court, this case presents the fundamental marriage issue in the optimal fashion.

In addition to this Petition, the Court has pending before it Petitions from several other cases implicating the marriage issue.[9] We refer to those cases collectively as "the other marriage cases." They are:

- *Bipartisan Legal Advisory Group of the United States House of Representatives v. Gill*, No. 12-13 (also No. 12-15 and No. 12-97);
- *Office of Personnel Management v. Golinski*, No. 12-16;
- *Windsor v. United States*, No. 12-63 (under a subsequent Petition, labeled *United States v. Windsor*, No. 12-307);
- *Pedersen v. Office of Personnel Management*, No. 12-231 (also No. 12-302); and

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[9] *Brewer v. Diaz,* No. 12-23, does not implicate the marriage issue in any meaningful way, and we do not include it among "the other marriage cases." The plaintiffs in that case (state employees in same-sex domestic partnerships) did *not* attack the constitutionality of Arizona's marriage law. Rather, invoking *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973), the plaintiffs argued that Arizona had no legitimate purpose for a change in its law withdrawing health insurance coverage from domestic partners; allegedly, its only purpose was to deprive a politically unpopular group of state-provided benefits. Both the District Court and the Ninth Circuit accepted that argument without considering the constitutionality of Arizona's marriage law. *See Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011).

- *Hollingsworth v. Perry,* No. 12-144.

We do ***not*** contend that the Court should grant the Petition in this case to the exclusion of the Petitions in the other marriage cases. Our point is that, whatever happens with the other marriage cases, the Court should grant the Petition in this case because it presents the fundamental marriage issue in the optimal fashion.

a. Unlike this case, the other marriage cases may be decided without resolution of the fundamental marriage issue.

The first four cases listed—*Gill, Golinski, Windsor,* and *Pedersen*—make Fifth Amendment equal protection challenges to a section of the Defense of Marriage Act ("DOMA") defining marriage for all federal purposes as "only a legal union between one man and one woman as husband and wife." 1 U.S.C. § 7. The fifth case, *Perry*, is a Fourteenth Amendment equal protection challenge to California's Proposition 8, which provides that "[o]nly marriage between a man and a woman is valid or recognized in California." Thus, at some level, this case and each of the other marriage cases raise the fundamental issue of whether a law limiting marriage to a man and a woman violates the Fourteenth Amendment's Equal Protection Clause or the equal protection component of the Fifth Amendment's Due Process Clause. However, the nature of each of the other marriage cases leaves unclear whether that case will serve as a vehicle to resolve the fundamental issue. This case will so serve; it cannot be resolved without a resolution of that issue.

This case and the *Perry* case are similar in some important respects but differ in one way material to the question of which of the two is most likely to result in resolution of the fundamental marriage issue. In both cases, the plaintiffs attacked a voter-approved, state constitutional amendment limiting marriage to the union of a man and a woman, and did so after the respective state legislatures had made available to same-sex couples most of the incidents of marriage through a domestic partnership statutory scheme. However, Nevada's amendment reinforced the State's consistent legal treatment of marriage as a man-woman union. In contrast, California's amendment ended the state constitutional right of same-sex couples to marry (announced some months earlier by the California Supreme Court). The Ninth Circuit in *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), seized on this "take-away" feature and, relying on *Romer*, 517 U.S. 620, made that feature the basis of its holding that the California amendment violated the Fourteenth Amendment. In doing so, the Ninth Circuit expressly declined to address the fundamental marriage issue because, in its view, the case presented a more narrow ground for affirming the District Court's judgment. *Perry*, 671 F.3d at 1064. The panel majority repeated throughout its decision the limitation on the scope of its holding to a situation where same-sex couples enjoyed a state-granted right to marry that the state's voters subsequently ended. *Id.* at 1064, 1076, 1082 n.14, 1087 n.20, 1096.[10] Then in concurring in denial of

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[10] Regarding the fundamental marriage issue which it expressly declined to resolve, the Ninth Circuit said: "We do not

rehearing en banc and referring to "the narrow issue that we decided in our opinion," the panel majority said: "We held only that under the particular circumstances relating to California's Proposition 8, that measure was invalid. . . . [W]e did not resolve the fundamental question . . . whether the Constitution prohibits the states from banning same-sex marriage." *Perry v. Brown*, 681 F.3d 1065, 1067 (9th Cir. 2012) (Reinhardt, J. and Hawkins, J., concurring in denial of rehearing en banc).

Because the "more narrow ground" principle applied by the Ninth Circuit is also a guiding principle in this Court's jurisprudence, *see*, *e.g.*, *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'"); *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008), a decision in *Perry* by this Court may not resolve the fundamental marriage issue—just as the Ninth Circuit's decision did not. However, the "more narrow ground" principle has no application to this case from Nevada. There is no way to resolve this case other than by a decision on the fundamental marriage issue.

A somewhat similar analysis applies to the four DOMA cases pending before this Court. In each of those cases, the individual plaintiff had a same-

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doubt the importance of the more general questions presented to us concerning the rights of same-sex couples to marry, nor do we doubt that these questions will likely be resolved in other states, and for the nation as a whole, by other courts." *Perry*, 671 F.3d at 1096.

sex marriage recognized by state law, and DOMA was operating to block the plaintiff from receiving a federal benefit that a similarly situated person in a man-woman marriage would have received. The lower courts recognized that the issue before them was somewhat different from and more narrow than the fundamental marriage issue because of federalism principles. Regulation of marriage is "an area that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). DOMA is apparently the first instance of a federal law defining marriage for broad purposes, the venerable federal practice having been to look to state law to say who was and who was not married. *See Massachusetts v. United States Dep't of Health and Human Servs.,* 682 F.3d 1, 12–13 (1st Cir. 2012) ("*Gill*"). On this basis, the Second Circuit said: "Therefore, our heightened scrutiny analysis of DOMA's marital classification under federal law is *distinct* from the analysis necessary to determine whether the marital classification of a state would survive such scrutiny." *Windsor*, 699 F.3d at 179 (emphasis added). Similarly, the First Circuit, acknowledging that the case before it was "difficult because it couples issues of equal protection and federalism," *Gill*, 682 F.3d at 8, stated: "Given that DOMA intrudes broadly into an area of traditional state regulation, a closer examination of the justifications that would prevent DOMA from violating equal protection (and thus from exceeding federal authority) is *uniquely* reinforced by federalism concerns." *Id.* at 13 (emphasis added). This language underscores the First Circuit's opening paragraph's distinction between the issue before it and the fundamental marriage issue:

"Rather than challenging the right of states to define marriage as they see fit, the appeals [to the First Circuit] contest the right of Congress to undercut the choices made by same-sex couples and by individual states in deciding who can be married to whom." *Id.* at 5.[11]

Despite the importance of the DOMA issue (given that Congress enacted DOMA with broad bi-partisan support), it is the fundamental marriage issue that is of utmost national importance. That is so because resolution of that issue will determine whether this Nation has imposed upon it by force of federal constitutional law a genderless marriage regime or rather will be left, to the extent the several States and their peoples so choose, to preserve and perpetuate the man-woman marriage institution and the valuable social goods it materially and even uniquely provides. Only this case can give assurance that, in resolving it, the Court will of necessity resolve the fundamental marriage issue.

b. Standing issues are present in the other marriage cases but not in this case.

The presence of standing issues in the other marriage cases but not in this case is also significant. In noting standing issues in the other marriage cases, we take no position on how any of those issues should be resolved; it is the presence of

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[11] The Commonwealth of Massachusetts's conditional cross-petition for a writ of certiorari in *Gill*, No. 12-97, presenting the question whether DOMA's section 3 violates the Tenth Amendment, further underscores how federalism principles make different and more narrow the DOMA issue compared to the fundamental marriage issue.

such issues that may appropriately bear on the evaluation of the cert-worthiness of the various marriage cases now before the Court. Although the Ninth Circuit (with aid from a California Supreme Court response to a certified question) ruled in favor of the standing of the *Perry* petitioners, *Perry*, 671 F.3d at 1070–75, the individual plaintiffs in that case have continued to argue against the petitioners' standing. Brief in Opposition, No. 12-144, at pp. 26–27 (Aug. 24, 2012). In *Windsor*, the Bipartisan Legal Advisory Group of the United States House of Representatives (the "House") continues to argue that plaintiff Windsor lacks standing because she was not married under New York law at the time of the alleged DOMA-caused injury. Supplemental Brief for Respondent House, Nos. 12-63 and 12-307, at pp. 6–9 (Nov. 1, 2012). Scholarly analysis raises questions about the House's standing in the four DOMA cases before the Court,[12] although the "piggy-back" doctrine of *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003), *overruled in part on other grounds by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), may moot those questions in light of the Department of Justice's decision to have the federal defendant parties petition for writs of certiorari despite the executive branch's current position that DOMA is unconstitutional.

In contrast, standing is not an issue in this case, for two reasons. First, the Petitioner has the benefit of *McConnell*'s "piggy-back" doctrine because

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[12] *See, e.g.,* Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 Fordham L. Rev. 1539 (2012).

two government officials named as defendants (Nevada's governor and one of the three county clerks) are actively defending Nevada's Marriage Amendment and Statute. *E.g.*, Dkt. Nos. 74, 85, 96, 97. Second, at the time of its intervention as a party-defendant, the Petitioner established its Article III standing on four different, fully adequate, and independent grounds. Dkt. Nos. 30, 42.

c. This case has developed most deeply and comprehensively the powerful societal and hence governmental interests sustaining the constitutionality of the man-woman meaning in marriage.

The other marriage cases have to an extent developed some of the governmental interests sustaining the constitutionality of the man-woman meaning in marriage. In contrast, this case has developed the governmental interests comprehensively and in depth, including the most important interests.

The *Perry* petitioners have advanced these governmental interests: the traditional definition of marriage furthers society's vital interest in responsible procreation and child-rearing, and California's marriage amendment (Proposition 8) serves that state's legitimate interest in proceeding cautiously when considering redefining the institution of marriage. Petition for Writ of Certiorari, No. 12-144, at pp. 26-37 (July 30, 2012). *See also Perry*, 671 F.3d at 1086 (listing four reasons offered by the petitioners here or *amici* in support of Proposition 8, with the two additional reasons being "protecting religious freedom[] and . . . preventing

children from being taught about same-sex marriage in school."); *id.* at 1105–12 (Smith, R., J., concurring in part and dissenting in part) (examining the rationales proffered in support of Proposition 8).

In the DOMA cases, the governmental interests that the House advanced are summarized in its opening brief to the First Circuit: (1) Congress rationally acted cautiously in facing the unknown consequences of a novel redefinition of a foundational social institution; (2) Congress rationally protected the public fisc and preserved the balance struck by earlier Congresses allocating federal burdens and benefits; (3) Congress rationally maintained uniformity in eligibility for federal marital benefits; (4) DOMA furthers the government's interest in encouraging responsible procreation; (5) Congress rationally desired to preserve the social link between marriage and children; and (6) Congress rationally desired to encourage childrearing by parents of both sexes. App. 75a.

Some of the governmental interests developed in the other marriage cases touch on or allude to the reality that man-woman marriage is a vital social institution and touch on or allude to some of the social institutional realities that make perpetuation of that institution such a compelling endeavor. For example, the House's First Circuit opening brief refers to "the foundational and fundamental nature of the institution of marriage," App. 77a, a reference based on numerous similar statements made by Senators and Representatives during the debate on DOMA. *See* App. 76a. That brief also states "that one of Congress's aims in enacting DOMA was to

ensure that the undeniable social benefits derived from this foundational institution were not lost by substantially redefining the institution." App. 77a. But neither the parties nor the lower courts in the other marriage cases examined and developed fully the social realities and the argument for the man-woman marriage institution summarized in section II, *supra*.

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

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

Because this case has developed much beyond the other marriage cases the social institutional argument for man-woman marriage and because that argument demonstrates that man-woman marriage can withstand every constitutional attack (regardless of the level of judicial scrutiny deployed),

an important prudential consideration is in play. If this Court mandates genderless marriage, the resulting social divisions and political contentions will probably equal and may surpass those resulting from *Roe v. Wade*, 410 U.S. 113 (1973). In such a situation where public respect for this Court generally and its marriage decision in particular are especially important, prudence counsels that the Court's marriage decision (however it comes down) reflect engagement with the strongest argument for man-woman marriage. We respectfully suggest that means engagement with this case and its record.

In sum, this case is the optimal vehicle for resolving the fundamental marriage issue for several reasons. Unlike the other marriage cases, resolution of this case requires resolution of the fundamental marriage issue; there are no standing issues in this case; and this case's record presents a deep and comprehensive development of the social institutional argument for man-woman marriage, while also fully and fairly setting forth the other side's position.

IV. The important but more narrow marriage issues presented by the other marriage cases will be more intelligently resolved *after* this Court resolves the fundamental issue.

Although we do ***not*** contend that the Court should grant the Petition in this case to the exclusion of the Petitions in the other marriage cases, it is helpful to consider how resolution of the fundamental marriage issue optimally presented by this case will aid resolution of the important but

more narrow issues presented by the other marriage cases.

Regarding *Perry* and its more narrow "take away"/*Romer* issue, if this Court were to rule in this case in favor of genderless marriage, then *Perry*'s more narrow issue would be *ipso facto* resolved without more. If, however, this Court were to rule in this case in favor of man-woman marriage, with a full development of the societal interests justifying such a holding, the Court's decision would shed ample light on *Perry*'s more narrow issue. That more narrow issue is whether the impugned enactment (Proposition 8) flows from a bare desire to harm a disfavored minority (gay men and lesbians). That question is resolved by determining the presence or absence of any legitimate reasons for Proposition 8. That determination will be profoundly aided by the full development of the societal interests justifying man-woman marriage generally that will necessarily inhere in the Court's review of this case.

What we say in the *Perry* context applies also to the DOMA cases and their more narrow issue with its federalism overlay. Resolution in this case of the fundamental marriage issue in favor of genderless marriage would resolve the DOMA issue entirely. *See Buckley v. Valeo*, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."). Further, use of this case's record on key social institutional realities will do much to augment and illuminate the important argument advanced by the House based on "the foundational and fundamental nature of the institution of marriage," App. 77a: "[O]ne of Congress's aims in

enacting DOMA was to ensure that the undeniable social benefits derived from this foundational institution were not lost by substantially redefining the institution." *Id.* The record in this case specifies "the undeniable social benefits" and explains the social mechanisms by which those benefits will indeed be "lost by substantially redefining the institution."

V. A direct conflict exists between the Circuit Courts on the standard of review (level of judicial scrutiny) applicable to federal claims of sexual orientation discrimination, and this case is the optimal vehicle for resolving that conflict.

The Circuit Courts have deemed important in their handling of federal claims of sexual orientation discrimination the issue of the standard of review (or level of judicial scrutiny). They have focused on the now venerable categories of strict scrutiny (as in race discrimination cases), intermediate, or heightened, scrutiny (as in sex discrimination cases), and rational-basis review (the default position). They have also considered such notions as "rational basis with bite," "rational basis plus," and even "intermediate scrutiny minus." *See*, *e.g.*, *Windsor*, 699 F.3d at 180.

The Second Circuit has adopted intermediate, or heightened, scrutiny. *Id.* at 181 ("[W]e conclude that review of Section 3 of DOMA requires heightened scrutiny."); *id.* at 185 ("[H]omosexuals compose a class that is subject to heightened scrutiny. We further conclude that the class is quasi-suspect (rather than suspect) . . . ."). No other

Circuit Court has taken that step; instead, all the other Circuit Courts have chosen rational-basis review for claims of sexual orientation discrimination,[13] except for the Third Circuit, which has not yet ruled on the issue. Thus, the conflict between the Circuit Courts is clear and direct. It also pertains to a matter of nationwide importance in federal equal protection jurisprudence, one with large practical consequences for the work of the federal courts.

This case is the optimal vehicle for resolving the circuit split. In important part, that is because of two endeavors by the Plaintiff Respondents in the District Court. First, they argued that the issue was open in the Ninth Circuit because of what they characterized as doctrinal developments in this Court relative to sexual orientation discrimination claims. In that context, they pointed to a recent

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[13] *See Gill*, 682 F.3d at 9; *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012); *Perry*, 671 F.3d at 1082; *Cook v. Gates*, 528 F.3d 42, 61-62 (1st Cir. 2008); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113-14 & n.9 (10th Cir. 2008); *Scarborough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006); *Citizens for Equal Protect. v. Bruning*, 455 F.3d 859, 866-69 (8th Cir. 2006); *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 817-18 & n.16 (11th Cir. 2004); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 950-51, 953-54 (7th Cir. 2002); *Thomasson v. Perry*, 80 F.3d 915, 927-28 (4th Cir. 1996) (en banc); *High Tech Gays v. Def. Indus. Servs. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990); *Woodward v. United States*, 871 F.2d 1068, 1075-76 (Fed. Cir. 1989); *Padula v. Webster*, 822 F.2d 97, 101-04 (D.C. Cir. 1987).

For Judge Straub's analysis of the position of the Circuit Courts on the level-of-judicial-scrutiny issue, see *Windsor*, 699 F.3d at 208–10 (Straub, J., concurring and dissenting).

District Court decision in the Northern District of California that concluded the issue was open and went on to adopt heightened scrutiny. *Golinski v. United States Office of Personnel Mgmt.*, 824 F. Supp. 2d 968, 982–91 (N.D. Cal. 2012). Second, the Plaintiff Respondents placed in the record ample materials addressing what are generally considered to be relevant factors leading to application of a more rigorous level of judicial scrutiny. The Petitioner also added materials of that kind to the record.

This case is the optimal vehicle for resolving the circuit split for an additional reason, and that is the District Court's rigorous and thorough engagement with the issue, including its critique of the Second Circuit's arguments for invoking heightened scrutiny.

In this context, some authorities suggest the possibility that this Court may have moved beyond the rigid "categories" (or "tiers") approach in its review of equal protection claims. In *Gill,* the First Circuit observed that certain decisions of this Court and Circuit Court decisions relying on them appear to have "concluded that equal protection assessments are sensitive to the circumstances of the case and not dependent entirely on abstract categorizations." 682 F.3d at 10–11. At least one noted scholar has suggested that the "canon has closed" on the old "tiers" approach to equal protection claims.

> All classifications based on other characteristics—including age, disability, and sexual orientation—currently receive rational basis review. Litigants still argue that new

> classifications should receive heightened scrutiny. Yet these attempts have an increasingly antiquated air in federal constitutional litigation, as the last classification accorded heightened scrutiny by the Supreme Court was that based on nonmarital parentage in 1977. At least with respect to federal equal protection jurisprudence, this canon has closed.

Kenji Yoshino, *The New Equal Protection*, 124 Harv. L. Rev. 747, 756-57 (2011).

This case is the optimal vehicle not just to resolve the clear split among the Circuit Courts on an issue of major importance to all the federal courts but also to remedy more broadly the "doctrinal instability in this area." *Windsor*, 699 F.3d at 181.

CONCLUSION

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

Respectfully submitted,

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December 5, 2012

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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

BEVERLY SEVCIK, et al., Plaintiffs

v.

BRIAN SANDOVAL, et al., Defendants

Filed: November 26, 2012

ORDER

ROBERT C. JONES
UNITED STATES DISTRICT JUDGE

This case arises out of the refusal of the State of Nevada to permit same-sex couples to enter into civil marriages, as well as its refusal to recognize same-sex marriages performed in other states as "marriages" under Nevada law. The question before the Court is not the wisdom of providing for or recognizing same-sex marriages as a matter of policy but whether the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution prohibits the People of the State of Nevada from maintaining statutes that reserve the institution of civil marriage to one-man–one-woman relationships or from amending their state constitution to prohibit the State from recognizing marriages formed in

other states as "marriages" under Nevada law if those marriages do not conform to Nevada's one-man–one-woman civil marriage institution. For the reasons given herein, the Court rules that it does not. To the extent the present challenge is not precluded by U.S. Supreme Court precedent, Defendants are entitled to summary judgment. ***2**

I. FACTS AND PROCEDURAL HISTORY

The sixteen Plaintiffs in this case comprise eight same-sex couples who desire to marry one another in Nevada or who have validly married one another in other jurisdictions and desire to have their marriages recognized as "marriages" by the State of Nevada. (*See* Compl. ¶¶ 5–12, Apr. 10, 2012, ECF No. 1). Defendants are Governor Brian Sandoval, Clark County Clerk and Commissioner of Civil Marriages Diana Alba, Washoe County Clerk and Commissioner of Civil Marriages Amy Harvey, and Carson City Clerk–Recorder Alan Glover. (*See id.* ¶¶ 13–16). Except for the fact that they are of the same sex, the unmarried Plaintiff couples are otherwise legally qualified to marry one another in Nevada. (*See id.* ¶ 24). Between April 1 and 6, 2012, four of the unmarried Plaintiff couples were denied marriage licenses in Clark County, Washoe County, and Carson City, variously, for this reason. (*See id.* ¶¶ 25–28). The other four Plaintiff couples were validly married in other jurisdictions and challenge the State's refusal to recognize their foreign marriages as "marriages," as opposed to "domestic partnerships," under Nevada law. (*See id.* ¶¶ 29–32).

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

II. LEGAL STANDARDS

A. Dismissal

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the ***3** claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action that fails to state a claim upon which relief can be granted. A motion to dismiss under Rule 12(b)(6) tests the complaint's sufficiency. *See N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the factual grounds upon which it rests. *See Bell Atl. Corp. v. Twombly*,

550 U.S. 544, 555 (2007). In considering whether the complaint is sufficient to state a claim, the court will take all material allegations as true and construe them in the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). The court, however, is not required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action with conclusory allegations is not sufficient; a plaintiff must plead facts pertaining to his own case making a violation plausible, not just possible. *Ashcroft v. Iqbal*, 556 U.S. 662, 677–79 (2009) (citing *Twombly*, 550 U.S. at 556) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."). In other words, under the modern interpretation of Rule 8(a), a plaintiff must not only specify a cognizable legal theory (*Conley* review), but also must plead the facts of his own case so that the court can determine whether he has any plausible basis for relief under the legal theory he has specified, assuming the facts are as he alleges (*Twombly-Iqbal* review).

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

Similarly, "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss" without converting the motion to dismiss into a motion for summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Moreover, under Federal Rule of Evidence 201, a court may take judicial notice of "matters of public record." *Mack v. S. Bay Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court considers materials outside of the pleadings, the motion to dismiss is converted into a motion for summary judgment. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001).

B. Summary Judgment

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

> When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case.

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

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

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

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

III. ANALYSIS

A. Nevada's Marriage and Domestic Partnership Laws

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

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

A couple desiring to enter into a domestic partnership in Nevada must satisfy eligibility requirements similar to, but not identical to, those requirements a couple desiring to enter into a marriage must satisfy. *See* Nev. Rev. Stat. §§ 122A.100, 122A.110. Prospective domestic partners must prove to the Secretary of State that they share a residence on at least a part-time basis, that they are neither married nor in a domestic partnership in any state, that they are not related by blood in a way that would prevent them from being married in Nevada, and that they are both eighteen years old and competent to consent. *See id.* at § 122A.100(2), (4). If these requirements are satisfied, the couple must then file with the Secretary of State a signed, notarized form declaring their decision "to share one another's lives in an intimate and committed relationship of mutual caring" and that they desire of their own free will to enter into a domestic partnership, and they must pay a reasonable fee to the Office of the Secretary of State. *See id.* at § 122A.100(1). Domestic partners may solemnize their relationship, but they need not do so to perfect it, and religious ministers and organizations may choose not to solemnize or otherwise recognize such relationships. *See id.* at § 122A.110. Nevada's laws

do not purport to prevent the celebration of domestic partnerships in religious or secular ceremonies, nor do they ***7** purport to prevent domestic partners or others from using the word "marriage" to describe the relationship.

A couple desiring to enter into a civil marriage must satisfy slightly different requirements, some of which are more stringent, and some of which are less stringent. Prospective spouses must be one male and one female, and both must be eighteen years old, although a person who is at least sixteen years old may marry with the permission of at least one parent or legal guardian, and a person under sixteen may marry with the permission of at least one parent or legal guardian plus approval by the district court—exceptions that are not available to prospective domestic partners. *See id.* at §§ 122.020, 122.025. Although prospective domestic partners must be neither married nor in another domestic partnership, *see* Nev. Rev. Stat. § 122A.100(2)(b), a person who is already in a domestic partnership could apparently marry a third person in Nevada, because the anti-bigamy clause under the marriage chapter prevents only married persons from marrying again and says nothing of persons who are already in domestic partnerships, *see id.* at § 122.020(1). Also, Chapter 122A is silent on whether opposite-sex couples may enter into domestic partnerships; presumably, therefore, they can, though such a union would not constitute a "marriage" under the Nevada Constitution. *See id.* at § 122A.510. Unlike prospective domestic partners, prospective spouses may obtain the required marriage license from the county clerk in any county

in Nevada but must provide the clerk with certain documentary evidence and must answer questions on the application form under oath. *See id*. at § 122.040. They must also pay a fee to the county clerk. *See id.* at § 122.060. However, unlike the "reasonable fee" to be charged by the Secretary of State to prospective domestic partners, the fees to be paid by prospective spouses to county clerks are fixed by statute. *See id.* at § 122.060. Unlike domestic partnerships, a judge, justice, or minister must solemnize a marriage. *See id*. at § 122.010.

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

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

B. *Baker v. Nelson*

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

The summary dismissal of an appeal for want of a substantial federal question operates as a decision on the merits. *Hicks v. Miranda*, 422 U.S. 332, 344–45 (1975) ("[U]nless and until the Supreme Court should instruct otherwise, inferior federal courts had best adhere to the view that if the Court has branded a question as unsubstantial, it remains so except

when doctrinal developments indicate otherwise. . . . [L]ower courts are bound by summary decisions by this Court until such time as the Court informs [them] that [they] are not." (citations and internal quotation marks omitted; alterations in original)). "Summary . . . dismissals for want of a substantial federal question . . . reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). "A summary disposition affirms only the judgment of the court below, and no more may be read into [the] action than was essential to sustain that judgment." *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 182–83 (1979) (citation omitted). "Questions which 'merely lurk in the record' are not resolved, and no resolution of them may be inferred." *Id.* at 183 (citation omitted). Accordingly, *Baker* controls the present case, unless the specific challenge presented in this case was not decided by the Minnesota Supreme Court.

In *Baker*, the Minnesota Supreme Court ruled, *inter alia*, that "[t]he equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry. . . . We hold, therefore, that [the statute permitting only opposite-sex marriage] does not offend the . . . Fourteenth Amendment[] to the United States Constitution." *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971). The Supreme Court summarily dismissed the appeal from this

decision "for want of a substantial federal question." *See Baker*, 409 U.S. at 810. The challenged statute in *Baker* was Chapter 517 of the Minnesota ***10** Statutes, which prohibited same-sex marriages. *See Baker*, 191 N.W.2d at 186. The plaintiffs in *Baker* challenged that statute under the Ninth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See id.* The Minnesota Supreme Court ruled that the statute offended none of these constitutional provisions. *See id.* at 186–87. The U.S. Supreme Court summarily dismissed the appeal, *see Baker*, 409 U.S. at 810, so this Court "had best adhere to the view that" the question of whether a state's refusal to recognize same-sex marriage offends the Equal Protection Clause is constitutionally insubstantial, *see Hicks*, 422 U.S. at 344–45, and the Court is prevented from coming to an opposite conclusion, *see Mandel*, 432 U.S. at 176.

Governor Sandoval and Clerk–Recorder Glover therefore ask the Court to dismiss. Plaintiffs respond that *Baker* does not control because *Baker* concerned the broader question of whether the Equal Protection Clause requires a state to permit same-sex marriages, whereas the present case concerns the narrower question of whether the Equal Protection Clause permits a state to set up nearly identical civil institutions, i.e., marriage and domestic partnership, and then exclude same-sex couples from one and not the other. As discussed in more detail, *infra*, the State of Nevada has not done this in the way Plaintiffs argue it has. The Court finds that the present challenge is in the main a garden-variety equal protection challenge precluded by *Baker*. Plaintiffs also argue that the outcome in

Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012) cannot be squared with Defendants' interpretation of the *Hicks* doctrine. But the Court finds *Perry* to be consistent with the view that *Baker* precludes a large part of the present challenge. The equal protection claim is the same in this case as it was in *Baker*, i.e., whether the Equal Protection Clause prevents a state from refusing to permit same-sex marriages. There is an additional line of argument potentially applicable in this case based upon *Romer v. Evans*, 517 U.S. 620 (1996) concerning the withdrawal of existing rights or a broad, sweeping change to a minority group's legal status. A *Romer*-type analysis is not precluded by *Baker*, because the *Romer* doctrine was ***11** not created until after *Baker* was decided. But the traditional equal protection claim is precluded, and this is consistent with *Perry*. The *Perry* court was clear and emphatic that its decision was based solely upon the Supreme Court's withdrawal-of-existing-rights theory adopted in *Romer* in 1996, twenty-four years after *Baker* was decided, not upon a general equal protection challenge, which the Court finds *Baker* precludes.

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

C. Plaintiffs' Equal Protection Challenge

"[B]ecause of the[] differences [in the rights and responsibilities of spouses and domestic partners], coupled with the stigma of exclusion and of being branded by the government as inferior, same-sex couples and their children suffer both tangible and dignitary harms, all of which are of constitutional dimension." (*See* Compl. ¶ 39). For this reason, Plaintiffs challenge Section 21 of Article I of the Nevada Constitution ("Section 21") and Nevada Revised Statutes ("NRS") section 122.020 under the Equal Protection Clause of the Fourteenth Amendment, both facially and as applied. (*See* Compl. ¶¶ 88–89). Section 21 provides that only a marriage between one man and one woman may be recognized as a marriage in Nevada, *see* Nev. Const. art I, § 21, and NRS section 122.020 provides that prospective spouses must be, *inter alia*, of opposite sexes to qualify for marriage, *see* Nev. Rev. Stat. § 122.020. Plaintiffs do not appear to challenge any other provisions of Nevada law in the present lawsuit, and they have brought no due process challenge.

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

1. Identification of the Distinction Drawn by the State

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

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

In another sense, the State of Nevada may be said to have drawn a gender-based distinction, because although the prohibition against same-sex marriage applies equally to men ***13** and women, "the statutes proscribe generally accepted conduct if engaged in by members of" the same gender. *Loving v. Virginia*, 388 U.S. 1, 11 (1967). In pre-1967 Virginia, both Caucasians and non-Caucasians were prohibited from interracial marriage (though a non-Caucasian could marry another non-Caucasian of a difference race), and in Nevada, both men and women are prohibited from same-sex marriage. The *Loving* Court, however, specifically rejected the argument that a reciprocal disability necessarily prevents heightened scrutiny under the Equal Protection Clause. *See id.* at 8 ("Because we reject the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations, we do not accept the State's contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose."). In other words, *Loving* could fairly be said to stand, *inter alia*, for the proposition that if a person could engage in generally acceptable activity (marriage) but for characteristic X_1 (non-Caucasian), then the level of scrutiny applicable to X-based (race-based) distinctions applies to the disability, regardless of whether persons with characteristic X_2 (Caucasian) are subject to a reciprocal disability according to their own X-based characteristic. Application of this principle here might counsel the use of intermediate scrutiny. That is, just as in pre-1967 Virginia a

Caucasian but not a non-Caucasian could marry another Caucasian, and vice versa, in Nevada a man but not a woman may marry another woman, and vice versa. *Cf. id.* at 11 ("There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races."). Under this conception of the distinction drawn by the State, i.e., a gender-based distinction, the Court would apply intermediate scrutiny. *See*, *e.g.*, *Hibbs v. Dep't of Human Res.*, 273 F.3d 844, 855 (9th Cir. 2001).

Although the State appears to have drawn no distinction at all at first glance, and although the distinction drawn by the State could be characterized as gender-based under the *Loving* ***14** reciprocal-disability principle, the Court finds that for the purposes of an equal protection challenge, the distinction is definitely sexual-orientation based. The issue turns upon the alleged discriminatory intent behind the challenged laws, which is the *sine qua non* of a claim of unconstitutional discrimination. *See Washington v. Davis*, 426 U.S. 229, 240 (1976). "To state a claim under 42 U.S.C. § 1983 for a violation of the Equal Protection Clause of the Fourteenth Amendment a plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class." *Lee v. City of L.A.*, 250 F.3d 668, 686 (9th Cir. 2001) (quoting *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998)). "Where the challenged governmental policy is 'facially neutral,' proof of its disproportionate impact on an identifiable group can satisfy the intent

requirement only if it tends to show that some invidious or discriminatory purpose underlies the policy." *Id.* (citing *Vill. Of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–66 (1977) (citing *Washington*, 426 U.S. at 242)).

The laws at issue here are not directed toward persons of any particular gender, nor do they affect people of any particular gender disproportionately such that a gender-based animus can reasonably be perceived. So although the *Loving* reciprocal-disability principle would indicate a gender-based distinction in a case where the members of a particular gender were targeted, because it is homosexuals who are the target of the distinction here, the level of scrutiny applicable to sexual-orientation-based distinctions applies. *See Loving*, 388 U.S. at 11 (noting that the anti-miscegenation laws at issue in that case targeted racial minorities because the laws were "designed to maintain White Supremacy"). Here, there is no indication of any intent to maintain any notion of male or female superiority, but rather, at most, of heterosexual superiority or "heteronormativity" by relegating (mainly) homosexual legal unions to a lesser status. In *Loving*, the elements of the disability were different as between Caucasians and non-Caucasians, whereas here, the burden on men and women is the same. The distinction might be gender based ***15** if only women could marry a person of the same sex, or if only women could marry a transgendered person, or if the restriction included some other asymmetry between the burdens placed on men and the burdens placed on women. But there is no distinction here between men and

women, and the intent behind the law is to prevent homosexuals from marrying.

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

The Supreme Court has never explicitly stated what level of scrutiny inferior courts are to apply to distinctions drawn according to sexual orientation, though it has implied that rational basis scrutiny applies because it has never applied any higher standard in relevant cases. *See*, *e.g.*, *Romer*, 517 U.S. at 631–32 (citing *Heller v. Doe*, 509 U.S. 312, 319–20 (1993)) (applying the rational basis standard). The Court of Appeals, however, has ruled that "homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny under the equal protection component of the Due Process Clause of the Fifth Amendment." *High Tech Gays*, 895 F.2d at 574.[1] Although the *High Tech Gays* court cited to *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that private, homosexual activity may be criminalized), which was overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003), *see Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 983–84 (N.D. Cal. 2012), the *Lawrence* Court did not adopt any standard of review applicable to distinctions drawn according to sexual orientation for the purposes of equal protection, and therefore *Lawrence* is not on point for the purposes of the

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

standard of review to be applied, and only the Court of Appeals sitting en banc may overrule *High Tech Gays*' adoption of the rational basis standard for distinctions drawn according to sexual orientation, *see Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc).

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

And this would be the result even in the absence of *Witt*. The *Lawrence* Court had certified three questions: (1) whether Texas' anti-sodomy law was infirm under the Equal Protection Clause of the Fourteenth Amendment; (2) whether the law was infirm under the Due Process Clause of the Fourteenth Amendment; and (3) whether *Bowers* should be overruled. *See* 539 U.S. at 564. The Court resolved the case under the second two questions. *See id.* ("We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution. For this inquiry we deem it necessary to reconsider the Court's holding in *Bowers*."). *Lawrence's* rejection of Texas' anti-sodomy law was based upon the Due Process Clause, not upon the Equal Protection Clause. *See id.* at 578 ***17** ("Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."). *Bowers* in turn had also been decided purely under the Due Process Clause. *See Bowers*, 478 U.S. at 190 ("The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy . . . ."); *id.* at 201 (Blackmun, J., dissenting) (lamenting the Court's refusal to consider an equal protection challenge).

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

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

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

past discrimination against one's ancestors will have effects upon oneself. In the context of a characteristic like homosexuality, where no lingering effects of past discrimination are inherited, it is contemporary disadvantages that matter for the purposes of assessing disabilities due to discrimination. Any such disabilities with respect to homosexuals have been largely erased since 1990.

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

Third, and most importantly, the Supreme Court has not ruled that homosexuals lack political power such that *High Tech Gays*' determination that they do not lack it has been undermined, and homosexuals have in fact gained significant political power in the years since *High Tech Gays* was decided. Today, unlike in 1990, the public media are flooded with editorial, commercial, and artistic messages urging the acceptance of homosexuals. Anti-homosexual messages are rare in the national informational and entertainment media, except that anti-homosexual characters are occasionally used as foils for pro-homosexual viewpoints in entertainment media. Homosexuals serve openly in federal and state political offices. The President of the United States has announced his personal acceptance of the

concept of same-sex marriage, and the announcement was widely applauded in the national media. Not only has the President expressed his moral support, he has directed the Attorney General not to defend against legal challenges to the Defense of Marriage Act ("DOMA"), a federal law denying recognition to same-sex marriages at the federal level. It is exceedingly rare that a president refuses in his official capacity to defend a democratically enacted federal law in court based upon his personal political disagreements. That the homosexual-rights lobby has achieved this indicates that the group has great political power. The State of Nevada has itself outlawed sexual-orientation- based discrimination as a general matter. *See generally* Nev. Rev. Stat. ch. 233. Congress has not included the category under Title VII's protections, however. *See* 42 U.S.C. § 2000e-2. In 2012 America, anti-homosexual viewpoints are widely regarded as uncouth. All in all, the ***20** political power of homosexuals has increased tremendously since 1990 when the *High Tech Gays* court ruled that the group did not, even then, sufficiently lack political power for the purposes of an equal protection analysis. This factor therefore weighs greatly in favor of rational basis review.

The Court respectfully disagrees with the recent conclusion of the Second Circuit to the contrary in a DOMA case. *See Windsor v. United States*, Nos. 12-2335, 12-2435, 2012 WL4937310 (2nd Cir. 2012). That court concluded: "The question is not whether homosexuals have achieved political successes over the years; they clearly have. The question is whether they have the strength to politically protect

themselves from wrongful discrimination." *Id.* at *9. That statement is strictly true, but the answer to the second question is powerfully influenced by the answer to the first question, because political success is the most direct, if not defining, indicator of the ability to protect oneself through political processes. The Court believes the test as presented, or at least as applied, by the Second Circuit is little test at all, but rather a reason behind an absolute (or nearly absolute) rule that the Second Circuit has now impliedly adopted, i.e., that a discrete minority group challenging a discriminatory law necessarily lacks political power for the purposes of a level-of-scrutiny analysis based purely upon the fact that the group has not been able democratically to avoid or alter the law it is challenging in a particular case. That result obviates the Supreme Court's use of political powerlessness as a factor in assessing the level of scrutiny to be applied. If a plaintiff could necessarily win on the political powerlessness factor of the level-of-scrutiny analysis by the very fact that he was unable to challenge a particular law democratically, the factor would be meaningless. Political powerlessness for the purpose of an equal protection analysis does not mean that the members of a group have failed to achieve all of their goals or have failed to achieve the particular goal they aim to achieve via the lawsuit in which the political powerlessness issue is litigated. The English suffix "-less" means "without," and "powerless" means "without power," not "without total ***21** power." If there were no legal space in which a minority group had sufficient political power such that it were not entitled to heightened scrutiny under an equal protection analysis, but where it had failed to

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

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

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

The *Windsor* court wrote that "it is safe to say that the seemingly small number of acknowledged homosexuals [in positions of power or authority] is attributable either to a hostility that excludes them

or to a hostility that keeps their sexual preference private—which, for our purposes, amounts to much the same thing." *Id.* But it is not necessarily safe to say this. A small number of homosexuals in certain positions of power could just as easily indicate that homosexuals constitute an equally small proportion of the population. The number of open homosexuals in such positions will only "seem[] small" to an observer who assumes that the proportion of homosexuals in society at large is greater than the proportion of open homosexuals in these kinds of positions. And there is a third option the *Windsor* court did not discuss, i.e., that the "seemingly" small number of open homosexuals in positions of power or authority may be largely attributable to neither exclusion nor sexual-orientation-based shame that discourages them from identifying themselves, but rather to the fact that people as a general matter—and especially people in positions of power and prestige—tend not to draw attention to their sexual ***23** practices or preferences, whatever they may be, for social, career, and economic reasons. This natural disinclination of public figures to announce their sexual practices or preferences does not necessarily transform into passive oppression simply because the sexual practices or preferences of a particular subset of persons also happens to be a matter of special social controversy. Lastly, a homosexual person simply need not announce his or her own homosexuality to be active in the fight for homosexual rights. Many advocates of homosexual rights are themselves heterosexual, and there is no need to announce one's sexual orientation or preferences in order to advocate for homosexual rights. To whatever degree homosexuals have not

been able to succeed politically to the extent many people wish, it is clear that, in Nevada at least, homosexuals have been able to enact laws protecting their interests through the democratic process, including laws protecting them from discrimination in areas such as employment and housing, as well as laws creating outright legal status for homosexual relationships.

In arguing for heightened scrutiny for gender-based distinctions in 1973, Justice Brennan opined that women's recent political successes should not be dispositive of the political powerlessness analysis. *See Frontiero v. Richardson*, 411 U.S. 677, 685–86 (1973) (Brennan, J.) (plurality opinion).[2] But even assuming this reasoning were precedential, the reasons with which Justice Brennan supported his conclusion in that case are for the most part not present here. Although women had been able to attract the attention of lawmakers during the early- and mid-Twentieth Century, they had been under-represented democratically for a long time prior to those political successes because they could not vote, such that for centuries their political voice was disproportionately small compared to their numbers. *See id.* at 685. Women had also been excluded from juries and even been denied the basic right of property ownership for centuries. ***24** *See id.* Homosexuals have not historically been denied the

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

right to vote, the right to serve on juries, or the right to own property. Although the right to vote could have been lost for conviction under a felony anti-sodomy law, the fraction of homosexuals disenfranchised due to conviction of such crimes was almost certainly minuscule, and the need or desire to keep one's sexual orientation secret because of such laws, though perhaps regrettable, would have no effect on one's ability to vote, serve on a jury, or otherwise participate in American democracy. Also, the continued discrimination against women in 1973 was largely due to the high visibility of the sex characteristic, a visibility that the characteristic of homosexuality does not have to nearly the same extent as gender. *See id.* at 686.

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

Gross movements by the judiciary with respect to democratic processes can cause an awkward unbalancing of powers in a Madisonian

constitutional democracy[3] and undermine both ***25** public confidence in the judiciary and the legitimacy of the government in general. Where a constitutional prohibition is reasonably clear, a court's removal of the relevant issue from legislative control is largely uncontroversial, and appropriately so, because the People realize that the issue has in fact already been decided democratically, either at the Constitutional Convention or later via the Article V amendment procedure. In such cases, the judiciary does not usurp the democratic process but rather respects and enforces a democratic decision made at the constitutional level as against a more recent democratic attempt to change the law at a lower legislative level.

The Constitution and Amendments thereto, which have been ratified by the States, represent a

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

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

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[4] It is often said that the Constitution is "anti-democratic" because it restricts legislative choices. But so long as judges read constitutional restrictions reasonably, the process remains democratic at its core, because the Constitution itself was and is subject to democratic forces. It was ratified by the People of the States, and it remains subject to amendment through a defined, democratic process. By contrast, in some nations, such as in the Islamic Republic of Iran, the process of judicial review is truly anti-democratic, because the standards by which a body such as the Guardian Council reviews the acts of the legislature are subject not only to a written constitution, but also to the Guardian Council's interpretation of a religious tradition that is not and has never been subject to democratic forces. Whether such a standard is grounded in religion or secular philosophy makes no difference with respect to the issue of self-governance. If the standards by which a judge reviews legislative acts are the product of his private philosophical views, and not simply a reasonable interpretation of a legal text to which the governed have agreed, he exceeds his lawful power over the governed and to that extent becomes a despot just as if an executive officer had made the decision

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

The States are currently in the midst of an intense democratic debate about the novel concept of same-sex marriage, and homosexuals have

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himself. Were a court's opinions in the area of judicial review treated only as advisory, the possibility of harm would not be so great. But so long as the Executive and the States are not practically free to ignore a court's opinions in the area of judicial review, but rather will follow them as a matter of course according to the constitutional culture of the Nation, it makes no difference that the judge himself does not have the power of execution via officers directly in his employ.

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

"[D]emocratic institutions are weakened, and confidence in the restraint of the Court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional processes." *Frontiero*, 401 U.S. at 692 (Powell, J., concurring in the judgment). Only where a discrete minority group's political power is so weak and ineffective as to make attempts to succeed democratically utterly futile is it even arguably appropriate for a court to remove relevant issues from the democratic process, except where a constitutional prohibition clearly removes the issue from legislative control, in which case a court's

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

intervention is mandated by democratic constitutional principles. *See Marbury*, 5 U.S. at 176–80. The Equal Protection Clause of the Fourteenth Amendment does not clearly remove laws distinguishing between persons on the basis of sexual orientation from democratic control. Although the courts have ruled that a challenge to virtually any law is entitled to at least rational basis review under the Equal Protection Clause, the above analysis makes heightened scrutiny inappropriate in this case.

The *High Tech Gays* court also ruled that no fundamental rights were burdened in that case, because there was no fundamental right to homosexual activity. That holding has been directly overruled by the *Lawrence* Court, but unlike the Department of Defense policy at issue in *High Tech Gays* that made homosexual activity an automatic trigger for heightened investigative attention when applying for a security clearance, *see* 895 F.2d at 568, the laws at issue in the present case do not burden the right to private, consensual, homosexual activity that ***28** the *Lawrence* Court recognized. The rights burdened under the challenged laws in this case are certain state-created rights, such as the right to have one's partner covered under an employer- provided health insurance plan and the right to enter into a marriage or quasi-marriage relationship with a sixteen or seventeen year-old person if that person's parent or guardian consents, *see supra*, which rights are not fundamental. Although there is a fundamental right to "marry," that right consists substantively of the ability to establish a family, raise children, and, in certain

contexts, maintain privacy. *Zablocki v. Redhail*, 434 U.S. 374, 383–84 (1978) (collecting cases). It is these components that comprise the fundamental "right to marry" recognized under the Fourteenth Amendment, not the civil benefits and responsibilities accompanying the legal status of marriage, which vary from state to state. Although the title of "marriage" has been withheld, the State of Nevada has burdened none of the core substantive rights that comprise the right to marry, sometimes referred to as the "constitutional incidents of marriage." Plaintiffs may establish legally cognizable families under Nevada's domestic partnership laws—an option that was not available to Mr. Redhail in 1978 Wisconsin.

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

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

3. Application of Rational Basis Scrutiny

Under rational basis review, a court does not judge the perceived wisdom or fairness of a law, nor does it examine the actual rationale for the law when adopted, but asks only whether "there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller*, 509 U.S. at 319–20 (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)). Those challenging a law on rational basis grounds "have the burden to negat[e] every conceivable basis which might support it." *Diaz v. Brewer*, 676 F.3d 823, 826 (9th Cir. 2012) (O'Scannlain, J., dissenting from order denying rehearing en banc) (quoting *Beach Commc'ns*, 508 U.S. at 315 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973))) (alteration in *Diaz*; internal quotation marks omitted)). The question of rationality is a matter of law for which a state need not provide evidence but may rely on speculation alone. *Heller*, 509 U.S. at 320. In the summary judgment context, if the facts determining a question that is subject only to rational basis review are "at least debatable," the state is entitled to summary judgment. *See Jackson*, 2012 WL 3255201, at *33 (citing *Vance v. Bradley*, 440 U.S. 93, 110–11 (1979); *Lupert v. Cal. State Bar*, 761 F.2d 1325, 1328 (1985)).

The protection of the traditional institution of marriage, which is a conceivable basis for the distinction drawn in this case, is a legitimate state interest. Although traditional moral disapproval is not alone a valid state interest for prohibiting private, consensual activity, *see Lawrence*, 539 U.S. at 577–78 (quoting *Bowers*, 478 U.S. at 216 (Stevens,

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

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

Id. at 585 (O'Connor, J., concurring in the judgment) (emphases added). The *Lawrence* Court appears to have strongly implied that in an appropriate case, such as the present one, the preservation of the traditional institution of marriage should be considered a legitimate state interest rationally related to prohibiting same-sex marriage. *See id.* at 578 (majority opinion) ("The present case does not involve . . . whether the government must give formal recognition to any relationship that homosexual persons seek to enter."). The State of Nevada has made available to same-sex partners the vast majority of the civil rights and responsibilities of marriage, and it has made all of the fundamental rights comprising the "right to marry" available via

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

As Justice O'Connor noted in concurrence in *Lawrence*, there are additional reasons to promote the traditional institution of marriage apart from mere moral disapproval of homosexual behavior, and these reasons provide a rational basis for distinguishing between opposite-sex and same-sex couples in the context of civil marriage. Human beings are created through the conjugation of one man and one woman. The percentage of human beings conceived through non-traditional methods is minuscule, and adoption, the form of child-rearing in which same-sex couples may typically participate together, is not an alternative means of creating children, but ***31** rather a social backstop for when traditional biological families fail. The perpetuation of the human race depends upon traditional procreation between men and women. The institution developed in our society, its predecessor

societies, and by nearly all societies on Earth throughout history to solidify, standardize, and legalize the relationship between a man, a woman, and their offspring, is civil marriage between one man and one woman. *See Maynard v. Hill*, 125 U.S. 190, 211 (1888) ("It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.").[6] Should that institution be expanded to include same-sex couples with the state's imprimatur, it is conceivable that a

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[6] Plaintiffs' historical and sociological experts attest that marriage has changed in various ways throughout history, that homosexuality is no longer considered a "disorder" by mainstream psychiatrists and sociologists, that same-sex couples can be suitable parents, that same-sex marriage would not harm traditional marriages, that there is and has been discrimination against homosexuals, that they lack political power, and even concerning the alleged economic impact of the challenged laws, but even assuming the Court were to find all of these opinions credible—a finding the Court need not make in the rational basis context—none of Plaintiffs' experts attest that same sex marriage has ever been recognized in the history of the Anglo-American peoples except very recently and sporadically. (*See generally* Cott. Decl., Sept. 4, 2012, ECF No. 86-2, at 3; Peplau Decl., Aug. 20, 2012, ECF No. 86-2, at 45; Badgett Decl., Spet. 7, 2012, ECF No. 86-2, at 92; Chauncey Decl., June 27, 2012, ECF No. 86-2, at 132; Segura Decl., Sept. 5, 2012, ECF No. 86-3, at 3; Lamb Decl., Aug. 27, 2012, ECF No. 86-3, at 57). The level of scrutiny is controlled by precedent in this case. Because that level of scrutiny is rational basis scrutiny, the Court need not examine the parties' evidence (which evidence is, in any case, better characterized as dueling collections of sociological opinions as opposed to scientific or other specialized evidence). The State need only have a conceivable basis for its laws.

meaningful percentage of heterosexual persons would cease to value the civil institution as highly as they previously had and hence enter into it less frequently, opting for purely private ceremonies, if any, whether religious or secular, but in any case without civil sanction, because they no longer wish to be associated with the civil institution as redefined,[7] leading to an increased percentage of out-of- ***32** wedlock children, single-parent families, difficulties in property disputes after the dissolution of what amount to common law marriages in a state where such marriages are not recognized, or other unforeseen consequences. *See Jackson*, 2012 WL 3255201, at *39–41. Because the family is the basic societal unit, the State could have validly reasoned

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[7] Some commentators have argued that the fact that same-sex couples may marry takes nothing from the value of an opposite-sex couple's marriage. *See*, *e.g.*, Michael Mello, *For Today, I'm Gay: The Unfinished Battle for Same-Sex Marriage in Vermont*, 25 Vt. L. Rev. 149, 229 (2000). Traditional spouses will have lost no rights, after all. But the legal question under rational basis review is not whether spouses or prospective spouses have good reasons (in a court's reckoning) for believing that their marriages will be harmed by the inclusion of same-sex couples in the institution of civil marriage. The question is whether the State has any conceivable basis, even speculatively, to believe that spouses or prospective spouses might feel this way, for whatever reason, and that their reaction to the redefinition of civil marriage to include same-sex couples might have detrimental societal effects. *See Jackson*, 2012 WL 3255201, at *44. One might argue by analogy that the expected reaction of bigots would be an insufficient reason for a state to refuse to implement policies of racial equality, but the analogy would be flawed, because race-based distinctions command strict scrutiny under the Equal Protection Clause, whereas sexual-orientation-based restrictions command only rational basis scrutiny.

that the consequences of altering the traditional definition of civil marriage could be severe. *See id.* at *44 ("[I]t is not beyond rational speculation to conclude that fundamentally altering the definition of marriage to include same-sex unions might result in undermining the societal understanding of the link between marriage, procreation, and family structure."). The Court finds Judge Kay's conclusions concerning the rational bases for Hawaii's marriage–civil union regime equally persuasive as applied to Nevada's marriage–domestic partnership regime. *See id.* at *38–45.

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

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

legal question is whether the State of Nevada has any conceivable rational basis for the distinction it has drawn. It does, and the laws at issue in this case therefore survive rational basis review under the Equal Protection Clause.[9]

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

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[9] As to a putative due process challenge, which Plaintiffs do not bring, unlike laws against homosexual activity per se, which were not prevalent in the United States until the late Nineteenth Century and therefore have no "ancient roots," *see Lawrence*, 539 U.S. at 568–70, the prohibition against same-sex civil marriage has been nearly ubiquitous since antiquity, *see, e.g.*, *Andersen v. King Cnty.*, 138 P.3d 963, 976–77 (Wash. 2006) (en banc) (collecting cases). Until very recently, it has been utterly unknown to the history or traditions of this Nation, and it is still unknown in the vast majority of American jurisdictions, as well as in the vast majority of international jurisdictions. Unlike private, consensual, homosexual activity, therefore, same-sex civil marriage is not a fundamental right.

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

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

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

Furthermore, standing in this case cannot be based upon an allegation of harm consisting of pure stigma, because the relief Plaintiffs seek cannot redress that measure of harm. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 568 (1992). Any stigma arising out of the State's refusal to recognize

same-sex relationships as "marriages" simply cannot be removed by judicial decree. In some cases, where the stigma complained of is entirely created by the state, as in the hypothetical example given above, a judicial decree might remedy it. Here, however, one-man–one-woman civil marriage is a longstanding institution not created by State of Nevada, and the decision not to recognize same-sex marriages was adopted by the People through ballot initiative. It is not plausible that the People of the State of Nevada will change their views on the matter because of any judicial decree or proclamation by the State (voluntary or not) that conflicts with their private beliefs concerning the nature of marriage. Nor can a judicial decree cure the State's own contribution to any stigma, because an act or statement made involuntarily is not, and will be known both by Plaintiffs and the rest of the populace not to be, a genuine reflection of the State's viewpoint, which is, of course, simply the collection of the viewpoints of its citizens. That is, the People will know—because they know their own opinions—that the State of Nevada does not approve of same-sex marriages despite the fact that it has been forced by judicial decree to act as if it does. This is not to say that Plaintiffs have no recourse, but they must rely on more than pure stigma as the measure of harm. Plaintiffs must rely on a measure of ***36** harm that the Court can actually redress, i.e., the denial of equal treatment under the law itself. The Court has addressed Plaintiffs' claim in this regard under the relevant standards.

4. *Romer v. Evans*

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

Based upon *Romer*, the Court of Appeals recently struck down an amendment to the California Constitution that had withdrawn an existing state law right to same-sex marriage while leaving the constitutional incidents of marriage in place via the

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[10] The *Perry* Court struck down the amendment to the California Constitution enacted via Proposition 8 because it believed *Romer* prevented the targeted withdrawal of any right whatsoever from a minority group, whereas the dissent believed *Romer* prevented only sweeping changes in a minority group's legal status. In other words, the dispositive disagreement in that case concerned the meaning of *Romer*, which is somewhat cryptic as to its applicability beyond the facts of that case itself. Although the *Romer* doctrine is still nascent and controversial, the Court will for the sake of argument assume that either type of state action—withdrawal of an existing right or a sweeping change in legal status—is infirm under *Romer*.

domestic partnership laws. *See Perry*, 671 F.3d at 1076 (citing *Romer*, 517 U.S. at 634–35) ("Proposition 8 singles out same-sex couples for unequal treatment by taking away from them alone the right to marry, and this action amounts to a distinct constitutional violation because the Equal Protection Clause protects minority groups from being targeted for the deprivation of an existing right without a legitimate reason."). The *Perry* court, however, explicitly declined to address whether the amendment would have failed under the Fourteenth Amendment had there never been a right to same-sex ***37** marriage in California. *See id.* at 1064. The dispositive issue in Perry was that the State of California had targeted a discrete group and withdrawn an existing right from its members. *See id.* at 1076. The People of California had only withdrawn from same-sex couples the right to the title of "marriage," while leaving the constitutional incidents of marriage in place via a domestic partnership regime. *See id.* at 1077–78 ("Proposition 8 did not affect [certain civil incidents of marriage under California law] or any of the other constitutionally based incidents of marriage guaranteed to same-sex couples and their families. In adopting the amendment, the People simply took the designation of marriage away from lifelong same-sex partnerships, and with it the State's authorization of that official status . . . ." (citations and internal quotation marks omitted)). The Court of Appeals ruled that the right to the title of marriage was concrete enough to establish an injury (though not itself of constitutional dimension), and that the withdrawal of the right to the title of marriage was therefore unconstitutional under

Romer regardless of the constitutional dimension of the right itself. *See id.* at 1096 ("By using their initiative power to target a minority group and withdraw a right that it possessed, without a legitimate reason for doing so, the People of California violated the Equal Protection Clause.").

Because there has never been a right to same-sex marriage in Nevada, *Romer* and *Perry* are inapplicable here as to NRS section 122.020. That section of the NRS removed no preexisting right and effected no change whatsoever to the legal status of homosexuals when adopted by the Nevada Territorial Legislature in 1861. *See* Nev. Comp. Laws § 196 § 2, at 65 (1861–1873).

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

The *Romer* Court does not, however, appear to have announced a general constitutional principle that any state action making it more difficult for the People to achieve a particular goal in aid of the rights of a discrete minority group through democratic processes is necessarily infirm under the Equal Protection Clause. Such a rule would be so broad and dramatic as to be unmistakable when announced.[11] Rather, the *Romer* Court emphasized the insidious nature of laws that impose general hardships, as contrasted with laws imposing only particular disabilities. *See* 517 U.S. at 633 ("Respect for this principle explains why laws singling out a certain class of citizens for *disfavored legal status or general hardships* are rare. A law declaring that *in general* it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." (emphases added)). That is not to say that laws imposing particular disabilities are immune from equal

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

protection challenges, but it is to say that such challenges are governed by traditional equal protection principles, not by *Romer*, which governs only the imposition of generalized disabilities upon a disfavored group.

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

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

Because the maintenance of the traditional institution of civil marriage as between one man and one woman is a legitimate state interest, because the exclusion of same-sex couples from the institution of civil marriage is rationally related to furthering that interest, and because ***40** the challenged laws neither withdraw any existing rights nor effect a broad change in the legal status or protections of homosexuals based upon pure animus, the State is entitled to summary judgment. As to those Plaintiffs validly married in other jurisdictions whose marriages the State of Nevada refuses to recognize, the protection of Nevada's public policy is a valid reason for the State's refusal to credit the judgment of another state, lest other states be able to dictate the public policy of Nevada. *See Nevada v. Hall*, 440 U.S. 410, 423–24 (1979) ("Full Faith and Credit does not . . . enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it." (quoting

Pac. Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 504–05 (1939))). ***41**

CONCLUSION

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

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

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

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

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

IT IS SO ORDERED.

DATED: This 26th day of November, 2012.

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

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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

BEVERLY SEVCIK, et al., Plaintiffs

v.

BRIAN SANDOVAL, et al., Defendants

Filed: December 3, 2012

JUDGMENT IN A CIVIL CASE

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

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

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

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

Dated: December 3, 2012

/s/ Lance S. Wilson
Clerk

/s/ Molly Morrison
(By) Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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

BEVERLY SEVCIK, et al., Plaintiffs

v.

BRIAN SANDOVAL, et al., Defendants

Filed: December 3, 2012

PLAINTIFFS' NOTICE OF APPEAL

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

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

Dated: December 3, 2012

Respectfully submitted,

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EDUCATION FUND, INC.

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APPENDIX D

COURT DECISIONS ON THE MARRIAGE ISSUE SINCE 1993

State Appellate Court Decisions:

- *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993)
- *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995)
- *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999)
- *Standhardt v. Super. Ct.,* 77 P.3d 451 (Ariz. Ct. App. 2003)
- *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003)
- *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004)
- *Li v. Oregon*, 110 P.3d 91 (Or. 2005)
- *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005)
- *Hernandez v. Robles,* 805 N.Y.S.2d 354 (N.Y. App. Div. 2005), *aff'd Hernandez v. Robles,* 855 N.E.2d 1 (N.Y. 2006)
- *Lewis v. Harris,* 875 A.2d 259 (N.J. Super. Ct. App. Div. 2005), *aff'd in part, rev'd in part Lewis v. Harris*, 908 A.2d 196 (N.J. 2006)
- *Samuels v. New York Dep't of Pub. Health,* 811 N.Y.S.2d 136 (N.Y. App. Div. 2006), *aff'd Hernandez v. Robles,* 855 N.E.2d 1 (N.Y. 2006)

- *Kane v. Marsolais*, 808 N.Y.S.2d 566 (N.Y. App. Div. 2006), *aff'd Hernandez v. Robles,* 855 N.E.2d 1 (N.Y. 2006)
- *Seymour v. Holcomb*, 811 N.Y.S.2d 134 (N.Y. App. Div. 2006), *aff'd Hernandez v. Robles,* 855 N.E.2d 1 (N.Y. 2006)
- *Hernandez v. Robles,* 855 N.E.2d 1 (N.Y. 2006)
- *Andersen v. King County,* 138 P.3d 963 (Wa. 2006)
- *In re Marriage Cases,* 49 Cal. Rptr. 3d 675 (Cal. Ct. App. 2006), *rev'd In re Marriage Cases*, 183 P.3d 384 (Cal. 2008)
- *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006)
- *Conaway v. Deane*, 932 A.2d 571 (Md. 2007)
- *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008)
- *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008)
- *Varnum v. Brien,* 763 N.W.2d 862 (Iowa 2009)

Federal Court Decisions:

- *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004)
- *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005)
- *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859 (8th Cir. 2006)
- *Gill v. Office of Personnel Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010)

- *In re Balas*, 449 B.R. 567 (Bankr. C.D. Cal. 2011)
- *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012)
- *Golinski v. Office of Personnel Mgmt.,* 824 F.Supp.2d 968 (N.D. Cal. 2012)
- *Massachusetts v. Health & Human Servs.*, 862 F.3d 1 (1st Cir. 2012)
- *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012)
- *Pedersen v. Office of Personnel Mgmt*., 3:10-CV-1750 (VLB), 2012 WL 3113883 (D. Conn. July 31, 2012)
- J*ackson v. Abercrombie*, 11-00734 ACK (KSC), 2012 WL 3255201 (D. Haw. Aug. 8, 2012)
- *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012)
- *Sevcik v. Sandoval,* 2:12-CV-00578-RCJ (PAL), 2012 WL 5989662 (D. Nev. November 26, 2012)

APPENDIX E

THE DEFINITION OF MARRIAGE: BALLOT MEASURES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPENDIX F

THE DEFINITION OF MARRIAGE: STATUTORY AND STATE CONSTITUTIONAL PROVISIONS

United States: 1 U.S.C. § 7 (man-woman)

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

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

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

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

California: Cal. Const. art. I, § 7.5 (man-woman);

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

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

Delaware: Del. Code tit. 13, § 101 (man-woman)

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

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

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

Hawaii: Haw. Const. art. I, § 23; Haw. Rev. Stat. § 572-1 (man-woman)

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

Illinois: 750 Ill. Comp. Stat. 5/213.1 (man-woman)

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

Iowa: Struck down by *Varnum v. Brien,* 763 N.W.2d 862 (Iowa 2009) (genderless)

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

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

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

Maine: Me. Rev. Stat. tit. 19-A, § 650, 701. (man-woman; repealed effective December 29, 2012, to be replaced by genderless marriage)

Maryland: Md. Code, Fam. Law § 2-201 (man-woman; repealed effective January 1, 2013, to be replaced by genderless marriage)

Massachusetts: Decided by *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (genderless)

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

Minnesota: Minn. Stat. § 517.03 (man-woman)

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

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

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

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

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

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

New Jersey: N.J. Stat. § 37:1-1 *et seq*. (implicitly defining as man-woman)

New Mexico: No definition in statute (man-woman is accepted *de facto* definition)

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

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

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

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

Oklahoma: Okla. Const. art. II, § 35 (man-woman)

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

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

Rhode Island: R.I. Gen. Laws § 15-1-1 *et seq.* (implicitly defining as man-woman)

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

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

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

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

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

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

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

Washington: Wash. Rev. Code § 26.04.020 et. seq. (man-woman; repealed effective December 9, 2012, to be replaced by genderless marriage)

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

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

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

APPENDIX G

SELECTED EXCERPTS

Nos. 10-2204, 10-2207, 10-2214

IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellee,
v.
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al., Defendants-Appellants.

NANCY GILL, et al.,
Plaintiffs-Appellees,
DEAN HARA,
Plaintiff-Appellee/Cross-Appellant,
v.
OFFICE OF PERSONNEL MANAGEMENT, et al.,
Defendants-Appellants/Cross-Appellees.

On Appeal from Final Orders of the U.S. District Court for the District of Massachusetts

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BRIEF FOR INTERVENOR-APPELLANT THE BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES

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***12** During deliberations over DOMA, Congress repeatedly emphasized "[t]he enormous importance of marriage for civilized society." House Rep. 13 (quoting Council on Families in America, *Marriage in America: A Report to the Nation* 10 (1995)). The House Report quoted approvingly from *Murphy v. Ramsey*, referring to "the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization." House Rep. 12 (quoting *Murphy*, 114 U.S. 15, 45 (1885)); *see also* 142 Cong. Rec. at 16970 (Rep. Hutchinson) (marriage "has been the foundation of every human society"); *id.* at 22442 (Sen. Gramm) ("[T]he traditional family has stood for 5,000 years. There is no moment in recorded history when the traditional family was not recognized and sanctioned by civilized society—it is the oldest institution that exists."); *id.* at 22454 (Sen. ***13** Burns) ("[M]arriage between one man and one woman is still the single most important social institution."); *cf.* 150 Cong. Rec. S7994 (2004) (Sen. Clinton) (traditional marriage is "one of the foundational institutions of history and humanity and civilization"); *id.* S7959 (2004) (Sen. Talent) ("[M]arriage may be the most important of all [social] institutions . . . ."); *id.* S7879 (Sen. Hatch) ("[T]raditional marriage has been a civilizational anchor for thousands of years.").

. . . .

***39** *1. Congress Rationally Acted Cautiously in Facing the Unknown Consequences of a Novel Redefinition of a Foundational Social Institution.*

In light of the foundational and fundamental nature of the institution of marriage, Congress was justified in proceeding with caution in considering whether to eliminate a criterion—opposite-sex partners—that has been historically regarded as an essential element of marriage. Under any level of scrutiny, this amply justifies DOMA against equal protection attack.

In the district court, DOJ offered only a watered-down version of this argument, contending that Congress rationally could have desired "to preserve the 'status quo,' pending the resolution of a socially contentious debate taking place in the states over whether to sanction same-sex marriage." Add. 33a. And the district court—suggesting that DOJ's position was that "[t]he only 'problem' . . . DOMA might address is that of state-to-state inconsistencies in the distribution of federal marriage-based benefits," Add. 39a—failed to give any weight to the fact that the "status quo" preserved by DOMA is a defining element of the most foundational institution of our society, which element has existed for all of history. Nor did the district court even acknowledge that one of Congress's aims in enacting DOMA was to ensure that the undeniable social benefits derived from this foundational institution were not lost by substantially redefining the institution. *See Lawrence*, ***40** 539 U.S. at 585 (O'Connor, J., concurring) ("preserving the traditional institution of marriage" is a rational basis).

APPENDIX H

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

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

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

Nevada Revised Statutes 122.020(1) provides: "Except as otherwise provided in this section, a male and a female person, at least 18 years of age, not nearer of kin than second cousins or cousins of the half blood, and not having a husband or wife living, may be joined in marriage."