APPEAL NO. 12-17668

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BEVERLY SEVCIK, et al.,

Plaintiffs-Appellants,

v.

BRIAN SANDOVAL, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the District of Nevada
Civil Case No. 2:12-cv-00578-RCJ-PAL (Judge Robert C. Jones)

BRIEF OF AMICUS CURIAE ALLIANCE DEFENDING FREEDOM IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Alliance Defending Freedom states that it is a nonprofit organization, that it does not have any stock, and that it does not have any parent corporations.

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Alliance Defending Freedom is a nonprofit legal organization committed to preserving marriage as an institution inherently linked to procreation and childrearing—an institution that connects children to their mothers and fathers, for the good of children and society as a whole. Because redefining marriage to include same-sex couples severs marriage from its inherent link to childbearing and childrearing, and undermines the idea that children deserve to be raised by their own mothers and fathers, Amicus has consistently defended against legal challenges asserting that sovereign States or nations must redefine marriage.[2] Amicus has a significant interest in defending against the constitutional claims that Plaintiffs assert here.

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[1] All parties have consented to this amicus brief, *see* Notice of All Parties' Consent to Amicus Curiae Briefs, ECF No. 19; thus Amicus need not file a motion for leave to file this brief. *See* Fed. R. App. P. 29(a). No one other than Amicus, its members, or its counsel contributed money intended to fund the preparation or submission of this brief. No counsel for a party in this case authored this brief in whole or in part. While this Court has ordered that "[a]micus briefs . . . *may* be jointly submitted" in this case (No. 12-17668) and the pending appeals in *Jackson v. Abercrombie* (Nos. 12-16995 & 12-16998), *see* Order at 2, ECF No. 12 (emphasis added), Amicus submits this brief only in *Sevcik*. Thus, Amicus's role as counsel for a party in *Jackson* is consistent with its representation that no counsel for a party in *Sevcik* authored this brief in whole or in part.

[2] Amicus's defense against these legal challenges includes representing the official proponents of California's Proposition 8 before both this Court and the Supreme Court.

SUMMARY OF ARGUMENT

The Equal Protection Clause of the Fourteenth Amendment does not require Nevada to redefine marriage to include same-sex couples. The age-old definition of marriage distinguishes between relationships of a man and a woman and all other types of relationships, including same-sex relationships. This distinction is rooted in a basic biological fact that goes to the heart of the State's interest in regulating marriage: the unique capacity of intimate relationships between men and women to create new life. This indisputable difference between same-sex relationships and opposite-sex relationships demonstrates that Nevada's marriage laws are constitutional, for the Constitution requires only that a State "treat similarly situated persons similarly, not that it engage in gestures of superficial equality." *Rostker v. Goldberg*, 453 U.S. 57, 79 (1981).

Throughout human history, societies have regulated sexual relationships between men and women so that the unique procreative capacity of such relationships benefits rather than harms society. In particular, an animating purpose of marriage is to increase the likelihood that children will be born and raised in stable and enduring family units by their own mothers and fathers. Because relationships between same-sex couples do not have the capacity to produce children, they do not implicate this interest in responsible procreation and childrearing in the same way. The Equal Protection Clause does not require the

State to ignore this difference. Nor does the Equal Protection Clause require the State to demonstrate that redefining marriage would harm marriage as an institution or society in general, for a legal classification survives equal-protection analysis so long as "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not." *Johnson v. Robison*, 415 U.S. 361, 383 (1974).

Nevertheless, redefining marriage as a genderless institution would work a profound change in an institution critical to the stable progression of society throughout the generations. The Equal Protection Clause does not require Nevada to disregard reasonable concerns that this profound change, by severing any inherent connection between marriage and the creation and nurture of the next generation, could impair the ability of marriage to serve this critical societal function. Rather, the People of Nevada are free to continue debating this controversial issue and seeking to resolve it in a way that will best serve society as a whole.

ARGUMENT

I. The Equal Protection Clause Does Not Forbid Nevada from Defining Marriage as the Union of a Man and a Woman.

The first task in evaluating an equal protection claim is to identify the precise classification at issue. *See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18-29 (1973); *Califano v. Boles*, 443 U.S. 282, 293-94 (1979) ("The

proper classification . . . begin[s] with the statutory classification itself."). By defining marriage as the union of man and woman, societies throughout history have drawn a line between opposite-sex couples and all other types of relationships, including same-sex couples. This is the precise classification at issue here, and it is based on an obvious difference between same-sex and opposite-sex couples: the natural capacity to create children. And as demonstrated below, this distinction goes to the heart of society's traditional interest in regulating intimate relationships.

This relevant biological distinction between same-sex couples and opposite-sex couples establishes that Nevada's definition of marriage is subject only to rational-basis review, for as the Supreme Court has explained:

> [W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.

City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 441-42 (1985). Relying on this Supreme Court precedent, New York's highest court "conclude[d] that rational basis scrutiny is appropriate" when "review[ing] legislation governing marriage and family relationships" because "[a] person's preference for the sort of sexual activity that cannot lead to the birth of children is relevant to the State's

interest in fostering relationships that will serve children best." *Hernandez v. Robles*, 855 N.E.2d 1, 11 (N.Y. 2006). That court affirmed the need to apply rational-basis analysis when reviewing the marriage laws even though sexual-orientation discrimination might require "heightened scrutiny" in circumstances outside the context of "marriage and family relationships." *Id.* For this reason, this Court's recent decision in *SmithKline Beecham Corp. v. Abbott Laboratories*, --- F.3d ---, 2014 WL 211807, at *9 (9th Cir. 2014), which opined that "heightened scrutiny" applies "to classifications based on sexual orientation," does not mandate closer scrutiny here.

Moreover, unlike laws that explicitly classify individuals based on sexual orientation, Nevada's definition of marriage implicates sexual orientation only to the extent that it distinguishes between opposite-sex couples and all other couplings or groupings of people. Because this distinction, as explained below, reflects biological realities closely related to society's traditional interest in marriage, the biologically based, plainly relevant classification drawn by Nevada's definition of marriage calls for nothing more than rational-basis review, regardless of what level of scrutiny applies to other sorts of laws that explicitly classify individuals based on sexual orientation. *Cf. Cabell v. Chavez-Salido*, 454 U.S. 432, 438-39 (1982) (stating that even though classifications based on alienage are ordinarily subject to strict scrutiny, "strict scrutiny is out of place when the

[classification] primarily serves a political function" because "citizenship . . . is a relevant ground for determining membership in the political community").[3]

Rational-basis review constitutes a "paradigm of judicial restraint," under which courts have no "license . . . to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-14 (1993). "A statutory classification fails rational-basis review only when it rests on grounds wholly irrelevant to the achievement of the State's objective." *Heller v. Doe*, 509 U.S. 312, 324 (1993) (quotation marks omitted). Thus, Nevada's marriage laws must "be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for" them. *Id*. at 320. Furthermore, because "marriage has always been, in our federal system, the predominant concern of state government . . . rational-basis review must be particularly deferential" in this context. *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006); *see also United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013) (observing that the regulation of

[3] Were this Court to conclude that heightened scrutiny applies here, Nevada's definition of marriage nevertheless satisfies it because even under that more demanding standard, "[t]he Constitution requires that [a State] treat similarly situated persons similarly, not that it engage in gestures of superficial equality." *Rostker*, 453 U.S. at 79. "To fail to acknowledge even our most basic biological differences," like the procreative differences between same-sex couples and opposite-sex couples, "risks making the guarantee of equal protection superficial, and so disserving it." *Nguyen v. INS*, 533 U.S. 53, 73 (2001); *see also Michael M. v. Sup. Ct. of Sonoma Cnty.*, 450 U.S. 464, 471 (1981) (plurality opinion).

marriage is "an area that has long been regarded as a virtually exclusive province of the States").

As demonstrated below, Nevada's marriage laws clearly satisfy this standard of review. Indeed, no appellate court applying the United States Constitution has held that the traditional definition of marriage fails it. *See, e.g.*, *Bruning*, 455 F.3d 859; *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654 (Tex. Ct. App. 2010); *Standhardt v. Super. Ct.*, 77 P.3d 451 (Ariz. Ct. App. 2003); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971).

II. Nevada's Marriage Laws Advance Society's Vital Interest in Responsible Procreation and Childrearing.

A. Responsible Procreation and Childrearing Has Been an Animating Purpose of Marriage in Virtually Every Society throughout History.

The definition of marriage as a union between a man and a woman has prevailed throughout this Nation since before its founding, including the period when the Fourteenth Amendment was framed and adopted. *See, e.g.*, Joel Prentiss Bishop, *Commentaries on the Law of Marriage & Divorce* § 225 (1st ed. 1852) ("It has always . . . been deemed requisite to the entire validity of every marriage . . . that the parties should be of different sex"). Indeed, until very recently "it was an accepted truth for almost everyone who ever lived, in any society in which

marriage existed, that there could be marriages only between participants of different sex." *Hernandez*, 855 N.E.2d at 8; *see also Windsor*, 133 S. Ct. at 2689 ("[M]arriage between a man and a woman no doubt ha[s] been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization").

Moreover, "the family—based on a union, more or less durable, but socially approved, of two individuals of opposite sexes who establish a household and bear and raise children—appears to be a practically universal phenomenon, present in every type of society." Claude Levi-Strauss, *The View From Afar* 40-41 (1985); *see also* James Q. Wilson, *The Marriage Problem* 24 (2002) (noting that "a lasting, socially enforced obligation between man and woman that authorizes sexual congress and the supervision of children" exists and has existed "[i]n every community and for as far back in time as we can probe"). The record of human history leaves no doubt that the institution of marriage owes its existence to the undeniable biological reality that opposite-sex unions—and only such unions—can produce children. Marriage is thus "a social institution with a biological foundation." Claude Levi-Strauss, *Introduction, in* 1 A History of the Family: Distant Worlds, Ancient Worlds 5 (Andre Burguiere et al., eds., 1996); *see also* Bertrand Russell, Marriage & Morals 77 (Liveright Paperbound Edition, 1970) ("But for children, there would be no need of any institution concerned with sex.").

That biological foundation—the unique procreative potential of sexual relationships between men and women—implicates vital social interests. On the one hand, procreation is necessary to the survival and perpetuation of the human race; accordingly, the responsible creation, nurture, and socialization of the next generation is a vital—indeed existential—social good. On the other hand, unintended procreation and childrearing—the all-too-frequent result of casual or transient sexual relationships between men and women—commonly results in hardships, costs, and other ills for children, parents, and society as a whole. As eminent authorities from every discipline and every age have uniformly recognized, an overriding purpose of marriage in virtually every society is, and has always been, to regulate sexual relationships between men and women so that the unique procreative capacity of such relationships benefits rather than harms society. In particular, through the institution of marriage, societies seek to increase the likelihood that children will be born and raised in stable and enduring family units by both the mothers and the fathers who brought them into this world.

This animating purpose of marriage was well explained by Blackstone. Speaking of the "great relations in private life," he described the relationship of "husband and wife" as "directing man to continue and multiply his species" and "prescribing the manner in which that natural impulse must be confined and regulated." William Blackstone, 1 Commentaries *410. Blackstone then turned to

the relationship of "parent and child," which he described as "consequential to that of marriage, being its principal end and design: and it is by virtue of this relation that infants are protected, maintained, and educated." *Id*.

Throughout history, other leading thinkers have likewise recognized the essential connection between marriage and responsible procreation and childrearing. *See, e.g.*, John Locke, *Second Treatise of Civil Government* § 78-79 (1690); Montesquieu, 2 *The Spirit of Laws* 96 (1st American from the 5th London ed., 1802); Bronislaw Malinowski, *Sex, Culture, and Myth* 11 (1962); Kingsley Davis, *Introduction: The Meaning and Significance of Marriage in Contemporary Society*, *in* Contemporary Marriage: Comparative Perspectives on a Changing Institution 1, 7-8 (Kingsley Davis ed., 1985); G. Robina Quale, *A History of Marriage Systems* 2 (1988) ("Through marriage, children can be assured of being born to both a man and a woman who will care for them as they mature."). As the late James Q. Wilson observed, "[m]arriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve." Wilson, *supra*, at 41.

Before the recent movement to redefine marriage to include same-sex relationships, it was commonly understood and accepted, without a hint of controversy, that an overriding purpose of marriage is to further society's vital

interest in responsible procreation and childrearing. That is why the Supreme Court has repeatedly recognized that marriage is "fundamental to our very existence and survival." *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *accord Zablocki v. Redhail*, 434 U.S. 374, 384 (1978). And certainly no other purpose can plausibly explain why marriage is so universal or even why it exists at all. *See* Robert P. George et al., *What is Marriage?* 38 (2012) ("[T]he only way to account for the remarkable fact that almost all cultures have regulated male-female sexual relationships" is that "[t]hese relationships alone produce new human beings").

B. Nevada's Marriage Laws Directly Further Marriage's Animating Purpose of Responsible Procreation and Childrearing.

By providing special recognition, encouragement, and support to committed opposite-sex relationships, the institution of marriage recognized by Nevada's marriage laws seeks to channel potentially procreative conduct into stable, enduring relationships, where that conduct is likely to further, rather than harm, society's vital interests in responsible procreation and childrearing. Those marriage laws thus bear a close and direct relationship to society's interest in increasing the likelihood that children will be born to and raised by the mothers and fathers who brought them into the world in stable and enduring family units.

1. "[T]he state has a compelling interest in encouraging and fostering procreation of the race and providing status and stability to the environment in which children are [born and] raised. This has always been one of society's

paramount goals." *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff'd on other grounds*, 673 F.2d 1036 (9th Cir. 1982). "It is hard to conceive an interest more legitimate and more paramount for the state than promoting an optimal social structure for educating, socializing, and preparing its future citizens to become productive participants in civil society." *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 819 (11th Cir. 2004). These interests are, without question, "fundamental to our very existence and survival." *Loving*, 388 U.S. at 12.

Underscoring the State's interest in marriage is the undisputed truth that children suffer when procreation and childrearing occur outside stable family units, which is the *usual* result, unfortunately, of unintended pregnancies outside of marriage. A leading survey of social science explains:

> Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes than do children in intact families headed by two biological parents. Parental divorce is also linked to a range of poorer academic and behavioral outcomes among children. There is thus value for children in promoting strong, stable marriages between biological parents.

Kristin Anderson Moore et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We do About It?*, Child Trends Research Brief 6 (June 2002).

In addition, when parents, and particularly fathers, do not take responsibility for raising their children, society is often forced to assist through social welfare programs and other means. A recent study estimates that divorce and unwed childbearing "costs U.S. taxpayers at least $112 billion each and every year, or more than $1 trillion each decade." Benjamin Scafidi, *The Taxpayer Costs of Divorce and Unwed Childbearing: First-Ever Estimates for the Nation and All Fifty States* 5 (2008) (emphasis omitted). The adverse outcomes for children associated with single parenthood harm society in other ways as well. As President Obama has emphasized:

> We know the statistics—that children who grow up without a father are five times more likely to live in poverty and commit crime; nine times more likely to drop out of schools and twenty times more likely to end up in prison. They are more likely to have behavioral problems, or run away from home or become teenage parents themselves. And the foundations of our community are weaker because of it.

Barack Obama, *Obama's Speech on Fatherhood* (June 15, 2008), *transcript available at* http://www.realclearpolitics.com/articles/2008/06/obamas_speech_on_fatherhood.html.

2. Supreme Court precedent makes clear that rational-basis review is satisfied when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not." *Johnson*, 415 U.S. at 383. Conversely, the Supreme Court has observed that a law may make special provision for a group if its activities "threaten legitimate interests . . . in a way that

other [groups' activities] would not." *Cleburne*, 473 U.S. at 448. Thus, the relevant inquiry here is not whether retaining marriage as an opposite-sex union is *necessary* to promote the State's interest in responsible procreation and childrearing or, as Plaintiffs would have it, whether "allowing same-sex couples to marry would somehow" harm that interest. *Cf.* Pls.' Br. at 73. "Rather, the relevant question is whether an opposite-sex definition of marriage furthers legitimate interests that would not be furthered, or furthered to the same degree, by allowing same-sex couples to marry." *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1107 (D. Haw. 2012); *accord Andersen v. King County*, 138 P.3d 963, 984 (Wash. 2006) (plurality opinion); *Morrison v. Sadler*, 821 N.E.2d 15, 23, 29 (Ind. Ct. App. 2005); *Standhardt*, 77 P.3d at 463.[4]

Other equal-protection jurisprudence confirms that this is the appropriate standard, for the Constitution does not compel a State to include groups that do not advance a legitimate purpose alongside those that do. This common-sense rule

[4] Even where heightened scrutiny applies, the Supreme Court has rejected the argument that a classification may be upheld only if it is necessary to achieve the government's purpose. *See Michael M.*, 450 U.S. at 473 (rejecting as not reflecting "[t]he relevant inquiry" the argument that a statutory-rape law punishing only males was "not *necessary* to deter teenage pregnancy because a gender-neutral statute, where both male and female would be subject to prosecution, would serve that goal equally well"); *Nguyen*, 533 U.S. at 63 (upholding under heightened scrutiny a statute that imposed stricter requirements for a foreign-born child of unwed parents to establish citizenship through a father than through a mother because "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood").

represents an application of the general principle that "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Vacco v. Quill*, 521 U.S. 793, 799 (1997) (quotation marks and citation omitted). "[W]here a group possesses distinguishing characteristics relevant to interests the State has the authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation." *Board of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366-67 (2001) (quotation marks omitted).

Applying the proper analytical focus, Nevada's marriage laws plainly satisfy constitutional review. Because same-sex relationships cannot naturally produce children, they do not implicate the State's interest in responsible procreation and childrearing in the same way that opposite-sex relationships do. Sexual relationships between men and women, and only such relationships, can produce children—often unintentionally. *See, e.g.*, Lawrence B. Finer & Mia R. Zolna, *Unintended Pregnancy in the United States: Incidence and Disparities, 2006*, 84 Contraception 478, 481 Table 1 (2011) (finding that nearly half of all pregnancies in the United States, and nearly 70 percent of pregnancies that occur outside marriage, were unintended). And as demonstrated above, it is the procreative capacity of heterosexual relationships—including the very real threat that capacity poses to the interests of society and to the welfare of children conceived

unintentionally—that the institution of marriage has always sought to address. Nor can there be any doubt that providing recognition and support to committed opposite-sex couples through the institution of marriage generally makes those potentially procreative relationships more stable and enduring and thus promotes society's interest in responsible procreation. *See, e.g.*, Elizabeth Wildsmith et al., *Childbearing Outside of Marriage: Estimates and Trends in the United States*, Child Trends Research Brief 5 (Nov. 2011); Wendy D. Manning et al., *The Relative Stability of Cohabiting and Marital Unions for Children*, 23 Population Research & Pol'y Rev. 135, 136 (2004).

Sexual relationships between individuals of the same sex, by contrast, cannot create children as a natural byproduct of their sexual relationship; they bring children into their relationship only through intentional choice and action. Same-sex couples thus neither advance nor threaten society's interest in responsible procreation and childrearing in the same manner, or to the same degree, that sexual relationships between men and women do. Under *Johnson* and *Cleburne*, that is the end of the analysis. The challenged marriage laws withstand constitutional scrutiny.

In short, it is plainly reasonable for Nevada to maintain a unique institution to address the unique challenges posed by the unique procreative potential of sexual relationships between men and women. *See, e.g.*, *Vance v. Bradley*, 440

U.S. 93, 109 (1979) (stating that a law may "dr[aw] a line around those groups . . . thought most generally pertinent to its objective"); *Johnson*, 415 U.S. at 378 (stating that a classification will be upheld if "characteristics peculiar to only one group rationally explain the statute's different treatment of the two groups"). Consequently, the "commonsense distinction," *Heller*, 509 U.S. at 326, that Nevada law has always drawn between same-sex couples and opposite-sex couples "is neither surprising nor troublesome from a constitutional perspective." *Nguyen*, 533 U.S. at 63.

That is why "a host of judicial decisions" have concluded that "the many laws defining marriage as the union of one man and one woman and extending a variety of benefits to married couples are rationally related to the government interest in 'steering procreation into marriage.'" *Bruning*, 455 F.3d at 867-68; *see, e.g.*, *Jackson*, 884 F. Supp. 2d at 1112-14; *In re Marriage of J.B. & H.B.*, 326 S.W.3d at 677-78; *Hernandez*, 855 N.E.2d at 7-8; *Conaway v. Deane*, 932 A.2d 571, 630-34 (Md. 2007); *Andersen*, 138 P.3d at 982-85; *Morrison*, 821 N.E.2d at 23-31; *Standhardt*, 77 P.3d at 461-64; *Singer*, 522 P.2d at 1197; *Baker*, 191 N.W.2d at 186-87; *Adams*, 486 F. Supp. at 1124-25.[5]

[5] While consideration of foreign case law is not necessary to uphold the challenged marriage laws under the United States Constitution, it is noteworthy that a number of foreign judicial tribunals have reached the same conclusion. *See, e.g.*, Conseil Constitutionnel, decision no. 2010-92, ¶ 9, Jan. 28, 2011 (Fr.), *available at* http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/

C. That Not All Opposite-Sex Couples Have Children Does Not Undermine the Rationality of Nevada's Marriage Laws.

That "[n]o state in the country has barred couples either unwilling or unable to produce children from marriage," Pls.' Br. at 75, does not undermine Nevada's marriage laws or their close connection to responsible procreation and childrearing. To begin with, the overriding societal purpose of marriage is *not* to ensure that all marital unions produce children. Instead, marriage's public purpose is to channel the presumptive procreative *potential* of opposite-sex relationships into enduring marital unions so that *if* any children are born, they are more likely to be raised in stable family units by both their mothers and fathers. In other words, because society prefers married opposite-sex couples without children to children without married mothers and fathers, it encourages marriage for all (otherwise eligible) opposite-sex relationships, including those relatively few that may not produce offspring. *See* Charles J. Rothwell et al., *Fertility, Family Planning, and Reproductive Health of U.S. Women: Data from the 2002 National Survey of*

201092QPCen201092qpc.pdf (English version) (deferring to the legislature's judgment that "the difference of situation between couples of the same sex and those composed of a man and a woman can justify a difference in treatment with regard to the rules regarding . . . family"); Corte Costituzionale, judgment no. 138 of 2010, p. 26-27, Apr. 15, 2010 (It.), *available at* http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S2010138_Amirante_Criscuolo_EN.doc (English version) (recognizing the "creative purpose of marriage which distinguishes it from homosexual unions," and holding that defining marriage as an opposite-sex union "does not result in unreasonable discrimination, since homosexual unions cannot be regarded as homogeneous with marriage").

Family Growth, Centers for Disease Control and Prevention (Dec. 2005), *available at* http://www.cdc.gov/nchs/data/series/sr_23/sr23_025.pdf (showing on Table 69 that 6,925 of 7,740—nearly 90%—of married women between the ages of 40 and 44 have given birth).

Even if a State (implausibly) wanted to *mandate* that all married couples be willing and able to procreate, such a policy would presumably require enforcement measures—from premarital fertility testing to eventual annulment of childless marriages—that would surely trench upon constitutionally protected privacy rights. *See Standhardt*, 77 P.3d at 462. And such Orwellian measures would be unreliable in any event. Most obviously, many fertile opposite-sex couples who do not plan to have children may have unplanned pregnancies or simply change their minds. And some couples who do not believe they can have children may find out otherwise, given the medical difficulty of determining fertility. *See id.* Moreover, even where a couple's infertility is clear, rarely are both spouses infertile. In such cases, marriage still furthers society's interest in responsible procreation by decreasing the likelihood that the fertile spouse will engage in sexual activity with a (potentially fertile) third party and by strengthening the social norm that sexual relationships between men and women should occur in marital unions.

Courts have thus repeatedly rejected the same infertility argument that Plaintiffs advance here. *See*, *e.g.*, *Conaway*, 932 A.2d at 631-34; *Hernandez*, 855

N.E.2d at 11-12; *Andersen*, 138 P.3d at 983; *Morrison*, 821 N.E.2d at 27; *Standhardt*, 77 P.3d at 462-63; *Baker*, 191 N.W.2d at 187. The line that Nevada and, until very recently, all other societies have drawn between opposite-sex couples, who in the vast majority of cases are capable of natural procreation, and same-sex couples, who are categorically infertile, is precisely the type of "commonsense distinction" between groups that "courts are compelled under rational-basis review to accept." *Heller*, 509 U.S. at 321, 326. Indeed, the Supreme Court has recognized that even under heightened scrutiny, a classification need not be accurate "in every case" so long as "in the aggregate" it advances the underlying objective. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 579, 582-83 (1990), *overruled on other grounds*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *see also Nguyen*, 533 U.S at 69-70 (upholding "easily administered scheme" that avoids "the subjectivity, intrusiveness, and difficulties of proof" of an "inquiry into any particular bond or tie" because it is not necessary that "the statute under consideration . . . be capable of achieving its ultimate objective in every instance"); *Michael M.*, 450 U.S. at 475 (rejecting as "ludicrous" the argument that a law criminalizing statutory rape to prevent teenage pregnancy was "impermissibly overbroad because it makes unlawful sexual intercourse with prepubescent females, who are, by definition, incapable of becoming pregnant").

D. Nevada's Domestic Partnership Law Does Not Render Its Marriage Laws Irrational.

Plaintiffs ironically seek to turn against the People of Nevada the solicitude that they have shown for same-sex couples, arguing that the State's domestic-partnership law destroys any governmental interest in preserving marriage as an opposite-sex union that uniquely furthers responsible procreation and childrearing. *See* Pls.' Br. at 81-83. But it is illogical to suggest that the State's demonstrated consideration for same-sex couples dooms its ability to retain marriage as the union of a man and a woman.

Nevada law preserves the established public meaning of marriage and its inherent link to its animating purpose of channeling potentially procreative conduct into committed, lasting relationships. *See infra* at (II)(A)-(B). Reserving the name "marriage" to committed opposite-sex couples is designed, now as always, to provide special recognition, encouragement, and support to those relationships most likely to further society's vital interests in responsible procreation and childrearing. This time-honored designation, wholly apart from the more tangible benefits traditionally associated with marriage, encourages opposite-sex couples to commit to each other and remain a family.

It may be true that reserving to opposite-sex couples not only the name of marriage, but also the benefits and obligations traditionally associated with that institution, would provide additional incentives for such couples to marry and

thereby further advance society's interest in "steering procreation into marriage." *See Bruning*, 455 F.3d at 867. But it would do so at the expense of the separate interests served by Nevada's domestic-partnership statute. And the Constitution does not require Nevada to adopt an all-or-nothing approach in its domestic-relations laws. *See Coyote Publ'g, Inc. v. Miller*, 598 F.3d 592, 610 (9th Cir. 2010) ("[The Constitution] does not require that a regulatory regime single-mindedly pursue one objective to the exclusion of all others."). It is well settled that a law "is not invalid under the Constitution because it might have gone farther than it did." *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966).

In any event, Nevada's definition of marriage is part of the State Constitution and thus carries greater force as a statement of Nevada's family-law policy than does the domestic-partnership statute. Thus, to the extent that any irreconcilable tension exists between the State's marriage law and its domestic-partnership statute, the policies embodied in that statute must yield to the State Constitution.

Plaintiffs also argue that same-sex couples and the children that they have brought into their homes through prior opposite-sex relationships, adoption, or the intervention of a third-party donor are harmed by Nevada's marriage laws. *See* Pls.' Br. at 78-79. Yet this argument ignores that the State provides the legal incidents of marriage to same-sex couples and their children through the domestic-

partnership statute. And while Plaintiffs offer no empirical evidence that same-sex couples or their children would obtain any incremental benefits through marriage above and beyond those available through domestic partnerships,[6] it is eminently rational, as explained below, to believe that redefining marriage as a genderless institution could substantially undermine its ability to serve the child-welfare purposes that it has always existed to further. *See infra* at (III).

Through the marriage amendment challenged here, the Nevada Constitution reflects the policy that the best situation for a child is to be raised by his or her own mother and father. The State, to be sure, has also enacted laws (like the domestic-partnership statute) addressing the practical realities that some same-sex couples raise children, that some children will be born outside of marriage, and that some marriages end due to death or divorce. But Nevada's recognition that the family structure it regards as ideal will not be achieved in all circumstances does not disable it from providing special recognition and support to the only relationships capable of achieving that ideal.

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[6] In fact, the available evidence belies Plaintiffs' argument. One recent study compared the psychological well-being of same-sex couples married in California with same-sex couples in registered domestic partnerships in that State. *See* Richard G. Wight et al., *Same-Sex Legal Marriage and Psychological Well-Being: Findings from the California Health Interview Survey*, 103 Am. J. of Pub. Health 339 (2013). This study found that the difference in psychological well-being between same-sex couples who were married and those who were in domestic partnerships was not statistically significant.

III. It Is Reasonable to Believe that Judicially Redefining Marriage to Sever its Inherent Connection to Responsible Procreation and Childrearing Will Undermine Marriage's Ability to Further that Societal Interest.

Marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress." *Maynard v. Hill*, 125 U.S. 190, 211 (1888). It is "an institution more basic in our civilization than any other," *Williams v. North Carolina*, 317 U.S. 287, 303 (1942), "fundamental to the very existence and survival of the race." *Zablocki*, 434 U.S. at 384.

It is simply impossible to "escape the reality that the shared societal meaning of marriage . . . has always been the union of a man and a woman. To alter that meaning would render a profound change in the public consciousness of a social institution of ancient origin." *Lewis v. Harris*, 908 A.2d 196, 222 (N.J. 2006). Even marriage "[r]evisionists agree that it matters what [the government] *calls* a marriage, because this affects how [citizens] come to *think* of marriage." George, *supra*, at 54. As Professor William Eskridge, a prominent supporter of redefining marriage, explains, much support for redefining marriage is *premised* on the understanding that "enlarging the concept [of marriage] to embrace same-sex couples would necessarily transform it into something new." William N. Eskridge, Jr. & Darren R. Spedale, *Gay Marriage: For Better or for Worse? What We've Learned from the Evidence* 19 (2006). It is plainly reasonable for the People of

Nevada to be concerned about the potential consequences of such a profound redefinition of a bedrock social institution.

As an initial matter, the People could reasonably fear that redefining marriage without first securing a democratic consensus for the change could weaken that institution, which has traditionally drawn much of its strength not from the State, but from social norms derived from and sustained by public opinion, the community, and the private organizations that have long partnered with the State in encouraging marriage and otherwise supporting that vital institution. As one well-known supporter of redefining marriage has put it, social "consensus" is important because marriage's "unique strength is its ability to fortify, not just ratify, the bond that creates family; and that ability comes from the web of social expectations and support that the community brings to the marriage." Jonathan Rauch, *How Can the Supreme Court Help Gay Rights? By Keeping Out Entirely*, New Republic, Dec. 12, 2012, http://www.newrepublic.com/blog/plank/110949/the-only-way-the-supreme-court-can-help-gay-marriage-staying-out-it. Redefining marriage through a judicial decision—without broad democratic and community support—thus could cause some critical segments of society to withdraw from or de-emphasize marriage as an important social institution, thereby threatening the vitality of that institution going forward.

Moreover, officially changing the public meaning of marriage from a gendered to a genderless institution would necessarily entail a significant risk of adverse consequences over time to the institution of marriage and the interests it has always served. A large group of prominent scholars from all relevant academic fields have expressed "deep[] concerns about the institutional consequences of same-sex marriage for marriage itself." Witherspoon Institute, *Marriage and the Public Good: Ten Principles* 18 (2008). As they explained:

> Same-sex marriage would further undercut the idea that procreation is intrinsically connected to marriage. It would undermine the idea that children need both a mother and a father, further weakening the societal norm that men should take responsibility for the children they beget.

Id. at 18-19. Other leading thinkers on these matters have further explained that by redefining marriage, the law would teach that marriage is "essentially an emotional union" without any inherent connection "to procreation and family life." George, *What is Marriage?* 7. And "if marriage is understood as an essentially emotional union, then marital norms, especially permanence and exclusivity, will make less sense" and thus erode over time. *Id*. at 67.

The People of Nevada could rationally share these concerns. Indeed, the reasonableness of concerns like these is *underscored* by the claims and arguments that Plaintiffs press in this very case. They ask this Court to *put the force of our Constitution* behind a conception of marriage that (1) severs it from any inherent

connection to its animating purpose of promoting responsible procreation and childrearing, (2) transforms marriage from a public institution with well-established, venerable purposes focused on children into a private, self-defined relationship focused on adults, and (3) denigrates the importance of mothers and fathers raising the children they create together. It is certainly reasonable to fear that officially changing the public meaning of marriage in this manner will send a message that the desires of adults, as opposed to the needs of children (or any other social good that transcends the marriage partners), are the paramount concern of marriage and may weaken the social norms encouraging parents, especially fathers, to make the sacrifices necessary to marry, remain married, and play an active role in raising their children.[7]

Tellingly, some same-sex marriage advocates favor redefining marriage *because* of its likely adverse effects on the traditional understanding and purposes of marriage. They argue that redefining marriage "is a breathtakingly subversive idea," E.J. Graff, *Retying the Knot*, The Nation, June 24, 1996, at 12, that "will introduce an implicit revolt against the institution [of marriage] into its very heart."

[7] Available empirical evidence does not eliminate these reasonable concerns. Massachusetts's divorce rate, for example, was 22.7% *higher* in 2011 than it was in 2004—the year that State redefined marriage. *See* Divorce rates by State: 1990, 1995, and 1999-2011, Centers for Disease Control and Prevention, *available at* http://www.cdc.gov/nchs/data/dvs/divorce_rates_90_95_99-11.pdf. The national divorce rate, in contrast, was 2.7% *lower*. *See* National Marriage and Divorce Rate Trends, Centers for Disease Control and Prevention, *available at* http://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm.

Ellen Willis, contribution to *Can Marriage be Saved? A Forum*, The Nation, July 5, 2004 at 16. And they emphasize that after marriage's redefinition, "that venerable institution will ever after stand for sexual choice, for cutting the link between sex and diapers." Graff, *supra*, at 12; *see also*, *e.g.*, Michelangelo Signorile, *Bridal Wave*, OUT Magazine 161 (Dec./Jan. 1994) (urging same-sex couples to "demand the right to marry not as a way of adhering to society's moral codes but rather to . . . radically alter an archaic institution"); *I Do, I Don't: Queers on Marriage* 58-59 (Greg Wharton et al. eds., 2004) ("[He] is correct . . . when he states that allowing same-sex couples to marry will weaken the institution of marriage."). Statements such as these do nothing to alleviate, but serve only to substantiate, the concerns of many Nevada voters.

Even some supporters of redefining marriage, such as Professor Andrew Cherlin of Johns Hopkins University, identify same-sex marriage as "the most recent development in the deinstitutionalization of marriage," which he describes as the "weakening of the social norms that define people's behavior in . . . marriage." Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. Marriage & Family 848, 848, 850 (2004). This weakening of social norms, as Professor Norval Glenn agrees, entails shifting the focus of marriage from serving vital societal needs to facilitating the personal fulfillment of individuals. *See id*. at 853; Norval D. Glenn, *The Struggle For Same-Sex Marriage*, 41 Soc'y 25, 26

(2004) (expressing concern that "acceptance of the arguments made by some advocates of same-sex marriage would" result in a "definition of marriage as being for the benefit of those who enter into it rather than as an institution for the benefit of society, the community, or any social entity larger than the couple"). Cherlin predicts that if the deinstitutionalization of marriage continues, "the proportion of people who ever marry could fall further." Cherlin, *supra*, at 858. The process of deinstitutionalization could even culminate, Cherlin writes, in "the fading away of marriage" to the point that it becomes "just one of many kinds of interpersonal romantic relationships." *Id*. Reasonable Nevada citizens who share these concerns may rationally decline to redefine the fundamental definition of this vital social institution.

In sum, many thoughtful people, including respected scholars from a variety of relevant disciplines and perspectives, reasonably believe that redefining marriage as a genderless institution will have harmful consequences for society, especially if brought about by judicial decree. It is therefore rational for the People of Nevada to decline to redefine this critical social institution.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's decision and uphold Nevada's marriage laws.

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Respectfully submitted,

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,996 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: January 28, 2014

s/ Byron J. Babione
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CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2014, I electronically filed this Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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