

**FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

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U.S. COURT OF APPEALS

SUSAN LATTA; TRACI EHLERS; LORI  
WATSEN; SHARENE WATSEN;  
SHELIA ROBERTSON; ANDREA  
ALTMAYER; AMBER BEIERLE;  
RACHAEL ROBERTSON,

Plaintiffs - Appellees,

v.

C. L. OTTER, "Butch"; Governor of the  
State of Idaho, in his official capacity,

Defendant - Appellant,

And

CHRISTOPHER RICH, Recorder of Ada  
County, Idaho, in his official capacity,

Defendant,

STATE OF IDAHO,

Intervenor-Defendant.

No. 14-35420

D.C. No. 1:13-cv-00482-CWD

OPINION

SUSAN LATTA; TRACI EHLERS; LORI  
WATSEN; SHARENE WATSEN;  
SHELIA ROBERTSON; ANDREA  
ALTMAYER; AMBER BEIERLE;  
RACHAEL ROBERTSON,

Plaintiffs - Appellees,

v.

C. L. OTTER, “Butch”; Governor of the  
State of Idaho, in his official capacity,

Defendant,

And

CHRISTOPHER RICH, Recorder of Ada  
County, Idaho, in his official capacity,

Defendant - Appellant,

STATE OF IDAHO,

Intervenor-Defendant -  
Appellant.

No. 14-35421

D.C. No. 1:13-cv-00482-CWD

Appeal from the United States District Court  
for the District of Idaho  
Candy W. Dale, Magistrate Judge, Presiding

BEVERLY SEVCIK; MARY  
BARANOVICH; 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; MEGAN LANZ; SARA  
GEIGER,

Plaintiffs - Appellants,

v.

BRIAN SANDOVAL, in his official  
capacity as Governor of the State of  
Nevada; DIANA ALBA, in her official  
capacity as the County Clerk and  
Commissioner of Civil Marriages for  
Clark County, Nevada; AMY HARVEY,  
in her official capacity as the County Clerk  
and Commissioner of Civil Marriages for  
Washoe County, Nevada; ALAN  
GLOVER, in his official capacity as the  
Clerk Recorder for Carson City, Nevada,

Defendants - Appellees,

And

COALITION FOR THE PROTECTION

No. 12-17668

D.C. No. 2:12-cv-00578-RCJ-PAL

OPINION

OF MARRIAGE,

Intervenor-Defendant -  
Appellee.

Appeal from the United States District Court  
for the District of Nevada  
Robert Clive Jones, District Judge, Presiding

Argued and Submitted September 8, 2014<sup>1</sup>  
San Francisco, California

Before: REINHARDT, GOULD, and BERZON, Circuit Judges.

Opinion by Judge Reinhardt:

Both Idaho and Nevada have passed statutes and enacted constitutional amendments preventing same-sex couples from marrying and refusing to recognize same-sex marriages validly performed elsewhere.<sup>2</sup> Plaintiffs, same-sex couples

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<sup>1</sup>A disposition in *Jackson v. Abercrombie*, Nos. 12-16995 & 12-16998, is forthcoming separately.

<sup>2</sup>Idaho Const. Art. III, § 28 (“A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state.”); Idaho Code §§ 32-201 (“Marriage is a personal relation arising out of a civil contract between a man and a woman . . . .”), 32-202 (identifying as qualified to marry “[a]ny unmarried male . . . and unmarried female” of a certain age and “not otherwise disqualified.”); 32-209 (“All marriages contracted without this state, which would be valid by the laws of the state or country in which the same were contracted, are valid in this state, unless they violate the public policy of this state. Marriages that violate the public policy of this state include, but are not limited to, same-sex marriage, and marriages entered into under the laws of another state or

(continued...)

who live in Idaho and Nevada and wish either to marry there or to have marriages entered into elsewhere recognized in their home states, have sued for declaratory relief and to enjoin the enforcement of these laws. They argue that the laws are subject to heightened scrutiny because they deprive plaintiffs of the fundamental due process right to marriage, and because they deny them equal protection of the law by discriminating against them on the bases of their sexual orientation and their sex. In response, Governor Otter, Recorder Rich, and the State of Idaho, along with the Nevada intervenors, the Coalition for the Protection of Marriage (“the Coalition”), argue that their laws survive heightened scrutiny, primarily because the states have a compelling interest in sending a message of support for the institution of opposite-sex marriage. They argue that permitting same-sex marriage will seriously undermine this message, and contend that the institution of opposite-sex marriage is important because it encourages people who procreate to be responsible parents, and because opposite-sex parents are better for children than same-sex parents.

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<sup>2</sup>(...continued)  
country with the intent to evade the prohibitions of the marriage laws of this state.”); Nev. Const. Art. 1, § 21 (“Only a marriage between a male and female person shall be recognized and given effect in this state.”); Nev. Rev. Stat. § 122.020(1) (“[A] male and female person . . . may be joined in marriage.”).

Without the benefit of our decision in *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014), *reh'g en banc denied*, 759 F.3d 990 (9th Cir. 2014), the *Sevcik* district court applied rational basis review and upheld Nevada's laws. *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012). After we decided *SmithKline*, the *Latta* district court concluded that heightened scrutiny applied to Idaho's laws because they discriminated based on sexual orientation, and invalidated them.<sup>3</sup> *Latta v. Otter*, No. 1:13-CV-00482-CWD, 2014 WL 1909999, at \*14–18 (D. Idaho May 13, 2014). We hold that the Idaho and Nevada laws at issue violate the Equal Protection Clause of the Fourteenth Amendment because they deny lesbians and gays<sup>4</sup> who wish to marry persons of the same sex a right they afford to individuals who wish to marry persons of the opposite sex, and do not satisfy the heightened scrutiny standard we adopted in *SmithKline*.

## I.

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<sup>3</sup>The *Latta* court also found a due process violation because, it concluded, the laws curtailed plaintiffs' fundamental right to marry. *Latta v. Otter*, No. 1:13-CV-00482-CWD, 2014 WL 1909999, at \*9–13 (D. Idaho May 13, 2014).

<sup>4</sup>We have recognized that “[s]exual orientation and sexual identity are immutable; they are so fundamental to one’s identity that a person should not be required to abandon them.” *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1093 (9th Cir. 2000), *overruled on other grounds by Thomas v. Gonzales*, 409 F.3d 1177, 1187 (9th Cir. 2005), *vacated*, 547 U.S. 183 (2006).

Before we reach the merits, we must address two preliminary matters: first, whether an Article III case or controversy still exists in *Sevcik*, since Nevada's government officials have ceased to defend their laws' constitutionality; and second, whether the Supreme Court's summary dismissal in *Baker v. Nelson*, 409 U.S. 810 (1972), is controlling precedent that precludes us from considering plaintiffs' claims.

**A.**

Governor Sandoval and Clerk-Recorder Glover initially defended Nevada's laws in the district court. However, they have since withdrawn their answering briefs from consideration by this Court, in light of our decision in *SmithKline*, 740 F.3d at 480-81 (holding heightened scrutiny applicable). Governor Sandoval now asserts that *United States v. Windsor*, 133 S. Ct. 2675 (2013), "signifies that discrimination against same-sex couples is unconstitutional," and that "[a]ny uncertainty regarding the interpretation of *Windsor* was . . . dispelled" by *SmithKline*. As a result, we have not considered those briefs, and the Governor and Clerk-Recorder were not heard at oral argument, pursuant to Fed. R. App. P. 31(c).

The Nevada Governor and Clerk Recorder remain parties, however, and continue to enforce the laws at issue on the basis of a judgment in their favor below. As a result, we are still presented with a live case or controversy in need of

resolution. Despite the fact that Nevada “largely agree[s] with the opposing party on the merits of the controversy, there is sufficient adverseness and an adequate basis for jurisdiction in the fact the [state] intend[s] to enforce the challenged law against that party.” *Windsor*, 133 S. Ct. at 2686–87 (citation and quotation marks omitted). Although the state defendants withdrew their briefs, we are required to ascertain and rule on the merits arguments in the case, rather than ruling automatically in favor of plaintiffs-appellants. *See Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 887 n.7 (9th Cir. 2010) (“[Defendant’s] failure to file a brief does not compel a ruling in [plaintiff’s] favor, given that the only sanction for failure to file an answering brief is forfeiture of oral argument.”).

There remains a question of identifying the appropriate parties to the case before us—specifically, whether we should consider the arguments put forward by the Nevada intervenor, the Coalition for the Protection of Marriage. As plaintiffs consented to their intervention in the district court—at a point in the litigation before Governor Sandoval and Clerk-Recorder Glover indicated that they would no longer argue in support of the laws—and continue to so consent, the propriety of the intervenor’s participation has never been adjudicated.

Because the state defendants have withdrawn their merits briefs, we face a situation akin to that in *Windsor*. There, a case or controversy remained between



Windsor and the United States, which agreed with her that the Defense of Marriage Act was unconstitutional but nonetheless refused to refund the estate tax she had paid. Here as there, the state defendants’ “agreement with [plaintiffs’] legal argument raises the risk that instead of a real, earnest and vital controversy, the Court faces a friendly, non-adversary proceeding . . . .” 133 S. Ct. at 2687 (citations and quotation marks omitted). Hearing from the Coalition helps us “to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.” *Baker v. Carr*, 369 U.S. 186, 204 (1962). As a result, we consider the briefs and oral argument offered by the Coalition, which, Governor Sandoval believes, “canvass the arguments against the Appellants’ position and the related policy considerations.”<sup>5</sup>

## B.

Defendants argue that we are precluded from hearing this case by *Baker*, 409 U.S. 810. In that case, the Minnesota Supreme Court had rejected due process and equal protection challenges to a state law limiting marriage to a man and a woman.

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<sup>5</sup>For the sake of convenience, we refer throughout this opinion to arguments advanced generally by “defendants”; by this we mean the parties that continue actively to argue in defense of the laws—the Idaho defendants and the Nevada intervenor—and not Governor Sandoval and Clerk-Recorder Glover.

191 N.W.2d 185, 186–87 (Minn. 1971). The United States Supreme Court summarily dismissed an appeal from that decision “for want of a substantial federal question.” *Baker*, 409 U.S. at 810. Such summary dismissals “prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions,” *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam), until “doctrinal developments indicate otherwise,” *Hicks v. Miranda*, 422 U.S. 332, 343–44 (1975) (citation and quotation marks omitted). Defendants contend that this decades-old case is still good law, and therefore bars us from concluding that same-sex couples have a due process or equal protection right to marriage.

However, “subsequent decisions of the Supreme Court” not only “suggest” but make clear that the claims before us present substantial federal questions.<sup>6</sup>

*Wright v. Lane Cnty. Dist. Ct.*, 647 F.2d 940, 941 (9th Cir. 1981); see *Windsor*,

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<sup>6</sup>To be sure, the Court made explicit in *Windsor* and *Lawrence* that it was not deciding whether states were required to allow same-sex couples to marry. *Windsor*, 133 S. Ct. at 2696 (“This opinion and its holding are confined to those lawful marriages [recognized by states.]”); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“The present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”). The Court did not reach the question we decide here because it was not presented to it. Although these cases did not tell us the *answers* to the federal questions before us, *Windsor* and *Lawrence* make clear that these are substantial federal *questions* we, as federal judges, must hear and decide.

133 S. Ct. at 2694–96 (holding unconstitutional under the Fifth Amendment a federal law recognizing opposite-sex-sex but not same-sex marriages because its “principal purpose [was] to impose inequality, not for other reasons like governmental efficiency”); *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (recognizing a due process right to engage in intimate conduct, including with a partner of the same sex); *Romer v. Evans*, 517 U.S. 620, 631–34 (1996) (invalidating as an irrational denial of equal protection a state law barring protection of lesbians and gays under state or local anti-discrimination legislation or administrative policies). Three other circuits have issued opinions striking down laws like those at issue here since *Windsor*, and all agree that *Baker* no longer precludes review. *Accord Baskin v. Bogan*, No. 14-2386, 2014 WL 4359059, at \*7 (7th Cir. Sept. 4, 2014); *Bostic v. Schaefer*, 760 F.3d 352, 373–75 (4th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1204–08 (10th Cir. 2014). As any observer of the Supreme Court cannot help but realize, this case and others like it present not only substantial but pressing federal questions.

## II.

Plaintiffs are ordinary Idahoans and Nevadans. One teaches deaf children. Another is a warehouse manager. A third is an historian. Most are parents. Like all human beings, their lives are given greater meaning by their intimate, loving,

committed relationships with their partners and children. “The common vocabulary of family life and belonging that other[s] [] may take for granted” is, as the Idaho plaintiffs put it, denied to them—as are all of the concrete legal rights, responsibilities, and financial benefits afforded opposite-sex married couples by state and federal law<sup>7</sup>—merely because of their sexual orientation.

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<sup>7</sup>Nevada, unlike Idaho, has enacted a domestic partnership regime. Since 2009, both same-sex and opposite-sex couples have been allowed to register as domestic partners. Nev. Rev. Stat. §§ 122A.100, 122A.010 *et seq.* Domestic partners are generally treated like married couples for purposes of rights and responsibilities—including with respect to children—under state law. However, domestic partners are denied nearly all of the benefits afforded married couples under federal law—including, since *Windsor*, same-sex couples married under state law.

The fact that Nevada has seen fit to give same-sex couples the opportunity to enjoy the benefits afforded married couples by state law makes its case for the constitutionality of its regime even weaker than Idaho’s. With the concrete differences in treatment gone, all that is left is a message of disfavor. The Supreme Court has “repeatedly emphasized [that] discrimination itself, by perpetuating ‘archaic and stereotypic notions’ or by stigmatizing members of the disfavored group as ‘innately inferior’ and therefore as less worthy participants,” can cause serious “injuries to those who are denied equal treatment solely because of their membership in a disfavored group.” *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984) (citation omitted).

If Nevada were concerned, as the Coalition purports it to be, that state recognition of same-sex unions would make the institution of marriage “genderless” and thereby undermine opposite-sex spouses’ commitments to each other and their children, it would be ill-advised to permit opposite-sex couples to participate in the alternative domestic partnership regime it has established. However, Nevada does just that.

Defendants argue that their same-sex marriage bans do not discriminate on the basis of sexual orientation, but rather on the basis of procreative capacity. Effectively if not explicitly, they assert that while these laws may disadvantage same-sex couples and their children, heightened scrutiny is not appropriate because differential treatment by sexual orientation is an incidental effect of, but not the reason for, those laws. However, the laws at issue distinguish on their face between opposite-sex couples, who are permitted to marry and whose out-of-state marriages are recognized, and same-sex couples, who are not permitted to marry and whose marriages are not recognized. Whether facial discrimination exists “does not depend on why” a policy discriminates, “but rather on the explicit terms of the discrimination.” *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991). Hence, while the procreative capacity distinction that defendants seek to draw could in theory represent a *justification* for the discrimination worked by the laws, it cannot overcome the inescapable conclusion that Idaho and Nevada do discriminate on the basis of sexual orientation.

In *SmithKline*, we held that classifications on the basis of sexual orientation are subject to heightened scrutiny. 740 F.3d at 474. We explained:

In its words and its deed, *Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review. In other words, *Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation.

*Id.* at 481.

*Windsor*, we reasoned, applied heightened scrutiny in considering not the Defense of Marriage Act's hypothetical rationales but its actual, motivating purposes.<sup>8</sup> *SmithKline*, 740 F.3d at 481. We also noted that *Windsor* declined to adopt the strong presumption in favor of constitutionality and the heavy deference to legislative judgments characteristic of rational basis review. *Id.* at 483. We concluded:

*Windsor* requires that when state action discriminates on the basis of sexual orientation, we must examine its actual purposes and carefully consider the resulting inequality to ensure that our most fundamental institutions neither send nor reinforce messages of stigma or second-class status.

*Id.*

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<sup>8</sup>Although as discussed in the text, *SmithKline* instructs us to consider the states' actual reasons, and not post-hoc justifications, for enacting the laws at issue, these actual reasons are hard to ascertain in this case. Some of the statutory and constitutional provisions before us were enacted by state legislatures and some were enacted by voters, and we have been informed by all parties that the legislative histories are sparse. We shall assume, therefore, that the justifications offered in defendants' briefs were in fact the actual motivations for the laws.

We proceed by applying the law of our circuit regarding the applicable level of scrutiny. Because Idaho and Nevada's laws discriminate on the basis of sexual orientation, that level is heightened scrutiny.

### III.

Defendants argue that their marriage laws survive heightened scrutiny because they promote child welfare by encouraging optimal parenting. Governor Otter argues that same-sex marriage “teaches *everyone*—married and unmarried, gay and straight, men and women, and all the children—that a child knowing and being reared by her mother and father is neither socially preferred nor officially encouraged.” Governor Otter seeks to have the state send the opposite message to all Idahoans: that a child reared by its biological parents *is* socially preferred and officially encouraged.

This argument takes two related forms: First, defendants make a “procreative channeling” argument: that the norms of opposite-sex marriage ensure that as many children as possible are raised by their married biological mothers and fathers. They claim that same-sex marriage will undermine those existing norms, which encourage people in opposite-sex relationships to place their children's interests above their own and preserve intact family units, instead of pursuing their own emotional and sexual needs elsewhere. In short, they argue that allowing

same-sex marriages will adversely affect opposite-sex marriage by reducing its appeal to heterosexuals, and will reduce the chance that accidental pregnancy will lead to marriage. Second, Governor Otter and the Coalition (but not the state of Idaho) argue that limiting marriage to opposite-sex couples promotes child welfare because children are most likely to thrive if raised by two parents of opposite sexes, since, they assert, mothers and fathers have “complementary” approaches to parenting.<sup>9</sup> Thus, they contend, children raised by opposite-sex couples receive a better upbringing.

**A.**

We pause briefly before considering the substance of defendants’ arguments to address the contention that their conclusions about the future effects of same-sex marriage on parenting are legislative facts entitled to deference. Defendants have not demonstrated that the Idaho and Nevada legislatures actually found the facts asserted in their briefs; even if they had, deference would not be warranted.

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<sup>9</sup>These arguments are not novel. The Bipartisan Legal Advisory Group (BLAG) relied in part on similar contentions about procreative channeling and gender complementarity in its attempt to justify the federal Defense of Marriage Act, but the Court did not credit them. Brief on the Merits for Respondent BLAG at 44-49, *Windsor*, 133 S. Ct. 2675 (No. 12-307), 2013 U.S. S. Ct. Briefs LEXIS 280 at \*74–82.



Unsupported legislative conclusions as to whether particular policies will have societal effects of the sort at issue in this case—determinations which often, as here, implicate constitutional rights—have not been afforded deference by the Court. To the contrary, we “retain[] an independent constitutional duty to review factual findings where constitutional rights are at stake. . . . Uncritical deference to [legislatures’] factual findings in these cases is inappropriate.” *Gonzales v. Carhart*, 550 U.S. 124, 165–66 (2007); *see also Hodgson v. Minnesota*, 497 U.S. 417, 450–55 (1990).

## B.

Marriage, the Coalition argues, is an “institution directed to certain great social tasks, with many of those involving a man and a woman united in the begetting, rearing, and education of children”; it is being “torn away,” they claim, “from its ancient social purposes and transformed into a government-endorsed celebration of the private desires of two adults (regardless of gender) to unite their lives sexually, emotionally, and socially for as long as those personal desires last.” Defendants struggle, however, to identify any means by which same-sex marriages will undermine these social purposes. They argue vehemently that same-sex marriage will harm existing and especially future opposite-sex couples and their

children because the message communicated by the social institution of marriage will be lost.

As one of the Nevada plaintiffs' experts testified, there is no empirical support for the idea that legalizing same-sex marriage would harm—or indeed, affect—opposite-sex marriages or relationships. That expert presented data from Massachusetts, a state which has permitted same-sex marriage since 2004, showing no decrease in marriage rates or increase in divorce rates in the past decade.<sup>10</sup> *See* Amicus Brief of Massachusetts et al. 23–27; *see also* Amicus Brief of American Psychological Association et al. 8–13. It would seem that allowing couples who want to marry so badly that they have endured years of litigation to win the right to do so would reaffirm the state's endorsement, without reservation, of spousal and parental commitment. From which aspect of same-sex marriages, then, will opposite-sex couples intuit the destructive message defendants fear? Defendants offer only unpersuasive suggestions.

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<sup>10</sup>The Coalition takes issue with this conclusion, arguing that the effects of same-sex marriage might not manifest themselves for decades, because “something as massive and pervasive in our society and humanity as the man-woman marriage institution, like a massive ocean-going ship, does not stop or turn in a short space or a short time.” Given that the discriminatory impact on individuals because of their sexual orientation is so harmful to them and their families, such unsupported speculation cannot justify the indefinite continuation of that discrimination.

First, they argue that since same-sex families will not include both a father and a mother, a man who has a child with a woman will conclude that his involvement in that child's life is not essential. They appear to contend that such a father will see a child being raised by two women and deduce that because the state has said it is unnecessary for that child—who has two parents—to have a father, it is also unnecessary for *his* child to have a father. This proposition reflects a crass and callous view of parental love and the parental bond that is not worthy of response. We reject it out of hand. *Accord Kitchen*, 755 F.3d at 1223 (concluding that it was “wholly illogical” to think that same-sex marriage would affect opposite-sex couples’ choices); *Windsor v. United States*, 699 F.3d 169, 188 (2d Cir. 2012); *Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 998 (N.D. Cal. 2012); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 972 (N.D. Cal. 2010).

Defendants also propose another possible means by which endorsing same-sex marriage could discourage opposite-sex marriage, albeit less explicitly: opposite-sex couples who disapprove of same-sex marriage will opt less frequently or enthusiastically to participate in an institution that allows same-sex couples to participate. However, the fear that an established institution will be undermined due to private opposition to its inclusive shift is not a legitimate basis for retaining the status quo. In *United States v. Virginia*, the Court explained:

The notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved, a prediction hardly different from other "self-fulfilling prophec[ies]," see *Mississippi Univ. for Women v. Hogan*, 458 U.S. [718,] 730 [(1982)], once routinely used to deny rights or opportunities.

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A like fear, according to a 1925 report, accounted for Columbia Law School's resistance to women's admission, although "[t]he faculty . . . never maintained that women could not master legal learning.<sup>11</sup> . . . No, its argument has been . . . more practical. If women were admitted to the Columbia Law School, [the faculty] said, then the choicer, more manly and red-blooded graduates of our great universities would go to the Harvard Law School!" *The Nation*, Feb. 18, 1925, p. 173.

518 U.S. 515, 542–44 (1996); see also *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)

("The Constitution cannot control such prejudices but neither can it tolerate them.

Private biases may be outside the reach of the law, but the law cannot, directly or

indirectly, give them effect." ). The *Sevcik* district court thus erred in crediting the

argument that "a meaningful percentage of heterosexual persons would cease to

value the civil institution as highly as they previously had and hence enter it less

frequently . . . because they no longer wish to be associated with the civil

institution as redefined," both because defendants failed to produce any support for

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<sup>11</sup>Likewise, Governor Otter assures us that Idaho's laws were not motivated by judgments about the relative emotional commitments of same-sex and opposite-sex couples; his argument is about an "ethos," he claims, and so is not weakened by the fact that same-sex couples may, as he admits, be just as child-oriented.

that prediction, and because private disapproval is a categorically inadequate justification for public injustice. *Sevcik*, 911 F. Supp. 2d at 1016.

Same-sex marriage, Governor Otter asserts, is part of a shift towards a consent-based, personal relationship model of marriage, which is more adult-centric and less child-centric.<sup>12</sup> The *Latta* district court was correct in concluding, however, that “marriage in Idaho is and has long been a designedly consent-based institution. . . . Idaho law is wholly indifferent to whether a heterosexual couple wants to marry because they share this vision” of conjugal marriage. *Latta*, 2014 WL 1909999, at \*23.

Idaho focuses on another aspect of the procreative channeling claim. Because opposite-sex couples can accidentally conceive (and women may choose not to terminate unplanned pregnancies), so the argument goes, marriage is important because it serves to bind such couples together and to their children. This makes some sense. Defendants’ argument runs off the rails, however, when they suggest that marriage’s stabilizing and unifying force is unnecessary for same-

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<sup>12</sup>He also states, in conclusory fashion, that allowing same-sex marriage will lead opposite-sex couples to abuse alcohol and drugs, engage in extramarital affairs, take on demanding work schedules, and participate in time-consuming hobbies. We seriously doubt that allowing committed same-sex couples to settle down in legally recognized marriages will drive opposite-sex couples to sex, drugs, and rock-and-roll.

sex couples, because they always choose to conceive or adopt a child.<sup>13</sup> As they themselves acknowledge, marriage not only brings a couple together at the initial moment of union; it helps to keep them together, “from [that] day forward, for better, for worse, for richer, for poorer, in sickness and in health.” Raising children is hard; marriage supports same-sex couples in parenting their children, just as it does opposite-sex couples.

Moreover, marriage is not simply about procreation, but as much about expressions of emotional support and public commitment . . . . [M]any religions recognize marriage as having spiritual significance; . . . therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication . . . . [M]arital status often is a precondition to the receipt of government benefits (e. g., Social Security benefits), property rights (e. g., tenancy by the entirety,

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<sup>13</sup>As Judge Richard Posner put it, bluntly:

[These states] think[] that straight couples tend to be sexually irresponsible, producing unwanted children by the carload, and so must be pressured . . . to marry, but that gay couples, unable as they are to produce children wanted or unwanted, are model parents—model citizens really—so have no need for marriage. Heterosexuals get drunk and pregnant, producing unwanted children; their reward is to be allowed to marry. Homosexual couples do not produce unwanted children; their reward is to be denied the right to marry. Go figure.

*Baskin*, 2014 WL 4359059, at \*10 (7th Cir. Sept. 4, 2014).

Idaho and Nevada’s laws are both over- and under-inclusive with respect to parental fitness. A man and a woman who have been convicted of abusing their children are allowed to marry; same-sex partners who have been adjudicated to be fit parents in an adoption proceeding are not.

inheritance rights), and other, less tangible benefits (e. g., legitimation of children born out of wedlock).

*Turner v. Safley*, 482 U.S. 78, 95–96 (1987) (recognizing that prisoners, too, enjoyed the right to marry, even though they were not allowed to have sex, and even if they did not already have children).

Although many married couples have children, marriage is at its essence an “association that promotes . . . a bilateral loyalty, not commercial or social projects.” *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (recognizing that married couples have a privacy right to use contraception in order to prevent procreation). Just as “it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse,” *Lawrence*, 539 U.S. at 567, it demeans married couples—especially those who are childless—to say that marriage is simply about the capacity to procreate.

Additionally, as plaintiffs argue persuasively, Idaho and Nevada’s laws are grossly over- and under-inclusive with respect to procreative capacity. Both states give marriage licenses to many opposite-sex couples who cannot or will not reproduce—as Justice Scalia put it, in dissent, “the sterile and the elderly are

allowed to marry,” *Lawrence*, 539 U.S. at 604–05—but not to same-sex couples who already have children or are in the process of having or adopting them.<sup>14</sup>

A few of Idaho and Nevada’s other laws, if altered, would directly increase the number of children raised by their married biological parents. We mention them to illustrate, by contrast, just how tenuous any potential connection between a ban on same-sex marriage and defendants’ asserted aims is. For that reason alone, laws so poorly tailored as those before us cannot survive heightened scrutiny.

If defendants really wished to ensure that as many children as possible had *married* parents, they would do well to rescind the right to no-fault divorce, or to divorce altogether. Neither has done so. Such reforms might face constitutional difficulties of their own, but they would at least further the states’ asserted interest in solidifying marriage. Likewise, if Idaho and Nevada want to increase the percentage of children being raised by their two *biological* parents, they might do better to ban assisted reproduction using donor sperm or eggs, gestational surrogacy, and adoption, by both opposite-sex and same-sex couples, as well as by

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<sup>14</sup>Defendants acknowledge this, but argue that it would be unconstitutionally intrusive to determine procreative capacity or intent for opposite-sex couples, and that the states must therefore paint with a broad brush to ensure that any couple that could possibly procreate can marry. However, Idaho and Nevada grant the right to marry even to those whose inability to procreate is obvious, such as the elderly.



single people. Neither state does. *See* Idaho Code §§ 39-5401 *et seq.*; Nev. Rev. Stat. §§ 122A.200(1)(d), 126.051(1)(a), 126.510 *et seq.*, 127.040; *see also* Carla Spivack, *The Law of Surrogate Motherhood in the United States*, 58 Am. J. Comp. L. 97, 102 & n.15 (2010); *Idaho is a destination for surrogacy*, KTVB.com (Dec. 5, 2013).

In extending the benefits of marriage only to people who have the capacity to procreate, while denying those same benefits to people who already have children, Idaho and Nevada materially harm and demean same-sex couples and their children.<sup>15</sup> *Windsor*, 133 S. Ct. at 2694. Denying children resources and stigmatizing their families on this basis is “illogical and unjust.” *Plyler v. Doe*, 457 U.S. 202, 220 (1982) (citation omitted). It is counterproductive, and it is unconstitutional.

### C.

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<sup>15</sup>Idaho attempts to rebut testimony by the Idaho plaintiffs’ expert that children of unmarried same-sex couples do just as well as those of married opposite-sex couples; the state mistakenly argues that this evidence shows that the children of same-sex couples are not harmed when the state withholds from their parents the right to marry. A more likely explanation for this expert’s findings is that when same-sex couples raise children, whether adopted or conceived through the use of assisted reproductive technology, they have necessarily chosen to assume the financial, temporal, and emotional obligations of parenthood. This does not lead, however, to the conclusion that these children, too, would not benefit from their parents’ marriage, just as children with opposite-sex parents do.

Governor Otter and the Coalition, but not the state of Idaho, also argue that children should be raised by both a male parent and a female parent. They assert that their marriage laws have “recognized, valorized and made normative the roles of ‘mother’ and ‘father’ and their uniting, complementary roles in raising their offspring,” and insist that allowing same-sex couples to marry would send the message that “men and women are interchangeable [and that a] child does not need a mother and a father.”

However, as we explained in *SmithKline, Windsor* “forbid[s] state action from ‘denoting the inferiority’” of same-sex couples. 740 F.3d at 482 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954)).

It is the identification of such a class by the law for a separate and lesser public status that “make[s] them unequal.” *Windsor*, 133 S. Ct. at 2694. DOMA was “practically a brand upon them, affixed by the law, an assertion of their inferiority.” *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879). *Windsor* requires that classifications based on sexual orientation that impose inequality on gays and lesbians and send a message of second-class status be justified by some legitimate purpose.

*SmithKline*, 740 F.3d at 482. *Windsor* makes clear that the defendants’ explicit desire to express a preference for opposite-sex couples over same-sex couples is a categorically inadequate justification for discrimination. Expressing such a preference is precisely what they *may not do*.

Defendants' argument is, fundamentally, non-responsive to plaintiffs' claims to *marriage* rights; instead, it is about the suitability of same-sex couples, married or not, as parents, adoptive or otherwise. That it is simply an ill-reasoned excuse for unconstitutional discrimination is evident from the fact that Idaho and Nevada already allow adoption by lesbians and gays. The Idaho Supreme Court has determined that "sexual orientation [is] wholly irrelevant" to a person's fitness or ability to adopt children. *In re Adoption of Doe*, 326 P.3d 347, 353 (Idaho 2014). "In a state where the privilege of becoming a child's adoptive parent does not hinge on a person's sexual orientation, it is impossible to fathom how hypothetical concerns about the same person's parental fitness could possibly relate to civil marriage." *Latta*, 2014 WL 1909999, at \*23. By enacting a domestic partnership law, Nevada, too, has already acknowledged that no harm will come of treating same-sex couples the same as opposite-sex couples with regard to parenting. Nev. Rev. Stat. § 122A.200(1)(d) affords same-sex domestic partners parenting rights identical to those of married couples, including those related to adoption, custody and visitation, and child support. *See also St. Mary v. Damon*, 309 P.3d 1027, 1033 (Nev. 2013) (en banc) ("Both the Legislature and this court have acknowledged that, generally, a child's best interest is served by maintaining two actively involved parents. To that end, the Legislature has recognized that the children of

same-sex domestic partners bear no lesser rights to the enjoyment and support of two parents than children born to married heterosexual parents.”).

To allow same-sex couples to adopt children and then to label their families as second-class because the adoptive parents are of the same sex is cruel as well as unconstitutional. Classifying some families, and especially their children, as of lesser value should be repugnant to all those in this nation who profess to believe in “family values.” In any event, Idaho and Nevada’s asserted preference for opposite-sex parents does not, under heightened scrutiny, come close to justifying unequal treatment on the basis of sexual orientation.

Thus, we need not address the constitutional restraints the Supreme Court has long imposed on sex-role stereotyping, which may provide another potentially persuasive answer to defendants’ theory. *See Virginia*, 518 U.S. at 533 (explaining that justifications which “rely on overbroad generalizations about the different talents, capacities, or preferences of males and females” are inadequate to survive heightened scrutiny); *see also Caban v. Mohammed*, 441 U.S. 380, 389 (1979) (rejecting the claim that “any universal difference between maternal and paternal relations at every phase of a child’s development” justified sex-based distinctions in adoption laws). We note, in addition, that defendants have offered no probative evidence in support of their “complementarity” argument.

#### IV.

Both the Idaho defendants and the Coalition advance a few additional justifications, though all are unpersuasive.<sup>16</sup> First, they argue that the population of each state is entitled to exercise its democratic will in regulating marriage as it sees fit. Each state “has an undeniable interest in ensuring that its rules of domestic relations reflect the widely held values of its people.” *Zablocki v. Redhail*, 434 U.S. 374, 399 (1978) (Powell, J., concurring). True enough. But a primary purpose of the Constitution is to protect minorities from oppression by majorities. As *Windsor* itself made clear, “state laws defining and regulating marriage, of course, must respect the constitutional rights of persons.” 133 S. Ct. at 2691 (citing *Loving v. Virginia*, 388 U.S. 1 (1967)). Thus, considerations of federalism cannot carry the day for defendants. They must instead rely on the substantive arguments that we find lacking herein.

Second, defendants argue that allowing same-sex couples to marry would threaten the religious liberty of institutions and people in Idaho and Nevada.

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<sup>16</sup>None of the arguments advanced by other states in defense of their bans is any more persuasive. In particular, we agree with the Seventh Circuit that states may not “go slow” in extending to same-sex couples the right to marry; “it is sufficiently implausible that allowing same-sex marriage would cause palpable harm to family, society, or civilization to require the state to tender evidence justifying [if not proving] its fears; it has provided none.” *Baskin*, 2014 WL 4359059, at \*16–17.

Whether a Catholic hospital must provide the same health care benefits to its employees' same-sex spouses as it does their opposite-sex spouses, and whether a baker is civilly liable for refusing to make a cake for a same-sex wedding, turn on state public accommodations law, federal anti-discrimination law, and the protections of the First Amendment.<sup>17</sup> These questions are not before us. We merely note that avoiding the enforcement of anti-discrimination laws that “serv[e] compelling state interests of the highest order” cannot justify perpetuation of an otherwise unconstitutionally discriminatory marriage regime. *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (citation omitted).

Third, the Coalition argues that Nevada's ban is justified by the state's interest in protecting “the traditional institution of marriage.”<sup>18</sup> Modern marriage

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<sup>17</sup>*See, e.g., Elane Photography, LLC v. Willock*, 284 P.3d 428 (N.M. 2012) (holding that a wedding photographer was liable for discrimination against a same-sex couple under state public accommodations law, and that this law did not violate the First Amendment), *cert. denied*, 134 S. Ct. 1787 (2014). Nevada law currently prohibits discrimination based on sexual orientation in public accommodations, while Idaho law does not. Nev. Rev. Stat. §§ 651.050(3), 651.070; Dan Popkey, *Idaho doesn't protect gays from discrimination, but Otter says that does not make the state anti-gay*, Idaho Statesman (Feb. 23, 2014).

We note also that an increasing number of religious denominations do sanctify same-sex marriages. Amicus Brief of Bishops of the Episcopal Church in Idaho et al. 8–9. Some religious organizations prohibit or discourage interfaith and interracial marriage, but it would obviously not be constitutional for a state to do so. Amicus Brief of the Anti-Defamation League et al. 23–25.

<sup>18</sup>This argument was not advanced to this Court by the Idaho defendants.

regimes, however, have evolved considerably; within the past century, married women had no right to own property, enter into contracts, retain wages, make decisions about children, or pursue rape allegations against their husbands. *See generally* Claudia Zaher, *When A Woman's Marital Status Determined Her Legal Status: A Reserach Guide on the Common Law Doctrine of Coverture*, 94 Law Libr. J. 459, 460–61 (2002) (“Under coverture, a wife simply had no legal existence. She became . . . ‘civilly dead.’”). Women lost their citizenship when they married foreign men. *See* Kristin Collins, *When Father’s Rights Are Mothers’ Duties*, 109 Yale L.J. 1669, 1686–89 (2000). (In fact, women, married or not, were not allowed to serve on juries or even to vote. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 131–35 (1994).). Before no-fault divorce laws were enacted, separated spouses had to fabricate adulterous affairs in order to end their marriages. Lawrence M. Friedman, *A History of American Law* 577–78 (2005). As plaintiffs note, Nevada has been a veritable pioneer in changing these practices, enacting (and benefitting economically from) laws that made it among the easiest places in the country to get married and un-married. Both Idaho and Nevada’s marriage regimes, as they exist today, bear little resemblance to those in place a century ago. As a result, defendants cannot credibly argue that their laws protect a

“traditional institution”; at most, they preserve the status quo with respect to one aspect of marriage—exclusion of same-sex couples.

Certainly, the exclusion of same-sex couples from marriage is longstanding. However, “it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been.” *Goodridge v. Dep't of Pub. Health*, 798 N.E. 2d 941, 961 n.23 (Mass. 2003). The anti-miscegenation laws struck down in *Loving* were longstanding. Here as there, however, “neither history nor tradition [can] save [the laws] from constitutional attack.” *Lawrence*, 539 U.S. at 577–78 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

## V.

Idaho and Nevada’s marriage laws, by preventing same-sex couples from marrying and refusing to recognize same-sex marriages celebrated elsewhere,<sup>19</sup> impose profound legal, financial, social and psychic harms on numerous citizens of those states. These harms are not inflicted on opposite-sex couples, who may, if

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<sup>19</sup>Because we hold that Idaho and Nevada may not discriminate against same-sex couples in administering their own marriage laws, it follows that they may not discriminate with respect to marriages entered into elsewhere. Neither state advances, nor can we imagine, any different—much less more persuasive—justification for refusing to recognize same-sex marriages performed in other states or countries.



they wish, enjoy the rights and assume the responsibilities of marriage. Laws that treat people differently based on sexual orientation are unconstitutional unless a “legitimate purpose . . . overcome[s]” the injury inflicted by the law on lesbians and gays and their families. *SmithKline*, 740 F.3d at 481–82.

Defendants’ essential contention is that bans on same-sex marriage promote the welfare of children, by encouraging good parenting in stable opposite-sex families. Heightened scrutiny, however, demands more than speculation and conclusory assertions, especially when the assertions are of such little merit. Defendants have presented no evidence of any such effect. Indeed, they cannot even explain the manner in which, as they predict, children of opposite-sex couples will be harmed. Their other contentions are equally without merit. Because defendants have failed to demonstrate that these laws further any legitimate purpose, they unjustifiably discriminate on the basis of sexual orientation, and are in violation of the Equal Protection Clause.

The official message of support that Governor Otter and the Coalition wish to send in favor of opposite-sex marriage is equally unconstitutional, in that it necessarily serves to convey a message of disfavor towards same-sex couples and their families. This is a message that Idaho and Nevada simply may not send.

The lessons of our constitutional history are clear: inclusion strengthens, rather than weakens, our most important institutions. When we integrated our schools, education improved. *See Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 492–95 (1954). When we opened our juries to women, our democracy became more vital. *See Taylor v. Louisiana*, 419 U.S. 522, 535–37 (1975). When we allowed lesbian and gay soldiers to serve openly in uniform, it enhanced unit cohesion. *See Witt v. Dep't of Air Force*, 527 F.3d 806, 821 n.11 (9th Cir. 2008). When same-sex couples are married, just as when opposite-sex couples are married, they serve as models of loving commitment to all.

The judgment of the district court in *Latta v. Otter* is AFFIRMED. The judgment of the district court in *Sevcik v. Sandoval* is REVERSED, and the case is REMANDED to the district court for the prompt issuance of an injunction permanently enjoining the state, its political subdivisions, and its officers, employees, and agents, from enforcing any constitutional provision, statute, regulation or policy preventing otherwise qualified same-sex couples from marrying, or denying recognition to marriages celebrated in other jurisdictions which, if the spouses were not of the same sex, would be valid under the laws of the state.

**AFFIRMED REVERSED and REMANDED.**

Counsel

Lawrence G. Wasden, Attorney General, Steven L. Olsen, Chief of Civil Litigation Division, W. Scott Zanzig, Deputy Attorney General, and Clay R. Smith, Deputy Attorney General, Office of the Attorney General, Boise, Idaho, for Defendant-Appellant Christopher Rich and Intervenor-Defendant-Appellant State of Idaho

Monte Neil Stewart (argued) and Daniel W. Bower, Stewart Taylor & Morris PLLC, Boise, Idaho; Thomas C. Perry and Cally A. Younger, Office of the Governor, Boise, Idaho, for Defendant-Appellant Governor C.L. “Butch” Otter

Deborah A. Ferguson (argued), The Law Office of Deborah A. Ferguson, PLLC, Boise, Idaho; Craig Harrison Durham, Durham Law Office, PLLC, Boise, Idaho; Shannon P. Minter and Christopher F. Stoll, National Center for Lesbian Rights, San Francisco, California, for Plaintiffs-Appellees Susan Latta, Traci Ehlers, Lori Watsen, Sharene Watsen, Shelia Robertson, Andrea Altmeyer, Amber Beierle, and Rachael Robertson

Tara L. Borelli (argued), Lambda Legal Defense and Education Fund, Inc., Atlanta, Georgia; Jon W. Davidson, Peter C. Renn, and Shelbi D. Day, Lambda Legal Defense and Education Fund, Inc., Los Angeles, California; Carla Christofferson, Dawn Sestito, Dimitri Portnoi, Melanie Cristol, and Rahi Azizi, O’Melveny & Myers LLP, Los Angeles, California; Kelly H. Dove and Marek P. Bute, Snell & Wilmer LLP, Las Vegas, Nevada, for Plaintiffs-Appellants Beverly Sevcik, Mary Baranovich, 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, Megan Lanz, Sara Geiger

Catherine Cortez Masto, Attorney General, C. Wayne Howle, Solicitor General, Office of the Attorney General, Carson City, Nevada, for Defendant-Appellee Governor Brian Sandoval

Neil A. Rombardo, District Attorney, Randal R. Munn, Chief Deputy District Attorney, Joseph L. Ward, Jr., Senior Deputy District Attorney, Carson City District Attorney’s Office, Carson City, Nevada, for Defendant-Appellee Alan Glover

Monte Neil Stewart (argued), Craig G. Taylor, and Daniel W. Bower, Stewart Taylor & Morris PLLC, Boise, Idaho, for Intervenor-Defendant-Appellee Coalition for the Protection of Marriage

Counsel for Amici

Shannon P. Minter, Christopher F. Stoll, and Samantha Ames, National Center for Lesbian Rights, San Francisco, California, for Amici Curiae 13 Public Interest and Legal Service Organizations

Michael L. Whitlock, Susan Baker Manning, Jared A. Craft, Sara Carian, John A. Polito, and Erik Wilson, Bingham McCutchen LLP, Washington, D.C., for Amici Curiae 27 Employers and Organizations Representing Employers

Byron J. Babione, David Austin R. Nimocks, and James A. Campbell, Alliance Defending Freedom, Scottsdale, Arizona, for Amicus Curiae Alliance Defending Freedom

Dean Robert Broyles, Western Center for Law & Policy, Escondido, California, for Amicus Curiae Helen M. Alvare

Staci J. Pratt and Allen Lichtenstein, ACLU of Nevada Foundation, Las Vegas, Nevada; Daniel M. Gluck and Lois K. Perrin, ACLU of Hawai'i Foundation, Honolulu, Hawai'i, for Amici Curiae American Civil Liberties Union Foundation of Nevada and American Civil Liberties Union Foundation of Hawai'i

Nathalie F.P. Gilfoyle, American Psychological Association, Washington D.C.; Paul M. Smith, Jenner & Block LLP, Washington, D.C., for Amici Curiae American Psychological Association, American Psychiatric Association, and National Association of Social Workers

Nathalie F.P. Gilfoyle, American Psychological Association, Washington, D.C.; Paul M. Smith, Jenner & Block LLP, Washington, D.C., for Amici Curiae American Psychological Association, National Association of Social Workers, American Association for Marriage and Family Therapy, American Psychoanalytic Association, and Hawaii Psychological Association

Carmine D. Boccuzzi, Jr., Mark A. Lightner, Andra Troy, and Andrew P. Meiser, Cleary Gottlieb Steen & Hamilton LLP, New York, New York, for Amicus Curiae American Sociological Association

Rocky C. Tsai, Samuel P. Bickett, and Rebecca Harlow, Ropes & Gray LLP, San Francisco, California; Steven M. Freeman, Seth M. Marnin, and Michelle Deutchman, Anti-Defamation League, New York, New York, for Amici Curiae Anti-Defamation League, Americans United for the Separation of Church and State, Bend the Arc: A Jewish Partnership for Justice, Central Conference of American Rabbis, Global Justice Institute, Hadassah, the Women's Zionist Organization of America, Hindu American Foundation, Interfaith Alliance Foundation, Japanese American Citizens League, Jewish Social Policy Action Network, Keshet, Metropolitan Community Churches, More Light Presbyterians, National Council of Jewish Women, Nehirim, People for the American Way Foundation, Presbyterian Welcome, Reconcilingworks: Lutherans for Full Participation, Reconstructionist Rabbinical College and Jewish Reconstructionist Communities, Sikh American Legal Defense and Education Fund, Society for Humanistic Judaism, T'ruah: The Rabbinic Call for Human Rights, Women of Reform Judaism, and Women's League for Conservative Judaism

Rocky C. Tsai, Samuel P. Bickett, Rebecca Harlow, and Idin Kashefipour, Ropes & Gray LLP, San Francisco, California; Steven M. Freeman, Seth M. Marnin, and Michelle Deutchman, Anti-Defamation League, New York, New York; Eric Alan Isaacson, Anti-Defamation League, San Diego, California, for Amici Curiae Anti-Defamation League, Americans United for Separation of Church and State, Bend the Arc: A Jewish Partnership for Justice, Board of Trustees of the Pacific Central District/Unitarian Universalist Association, Hadassah, the Women's Zionist Organization of America, Hindu American Foundation, Interfaith Alliance Foundation, Interfaith Alliance Hawai'i, Japanese American Citizens League, Keshet, National Council of Jewish Women, Metropolitan Community Churches, More Light Presbyterians, Nehirim, Pacific Central District/Unitarian Universalist Association, Pacific Southwest District/Unitarian Universalist Association, People for the American Way Foundation, Reconcilingworks: Lutherans for Full Participation, Religious Institute, Inc., Sikh American Legal Defense and Education Fund, Society for Humanistic Judaism, South Asian Americans Leading Together, Southern California Nevada Conference of the United Church of Christ, T'ruah: The Rabbinic Call for Human Rights, Union for Reform Judaism, Central

Conference of American Rabbis, Women of Reform Judaism, Unitarian Universalist Association, Universal Fellowship of Metropolitan Community Churches, and Women's League for Conservative Judaism

Jyotin Hamid and Joseph Rome, Debevoise & Plimpton LLP, New York, New York, for Amicus Curiae Professor Carlos A. Ball

Daniel McNeel Lane, Jr., Akin Gump Strauss Hauer & Feld LLP, San Antonio, Texas; Jessica M. Weisel, Akin Gump Strauss Hauer & Feld LLP, Los Angeles, California, for Amici Curiae Historians of Marriage Peter W. Bardaglio, Norma Basch, Stephanie Coontz, Nancy F. Cott, Toby L. Ditz, Laura F. Edwards, Michael Grossberg, Hendrik Hartog, Ellen Herman, Martha Hodes, Linda K. Kerber, Alice Kessler-Harris, Elaine Tyler May, Serena Mayeri, Steve Mintz, Elizabeth Pleck, Carole Shammas, Mary L. Shanley, Amy Dru Stanley, and Barbara Welke

Jerome C. Roth and Amelia L. B. Sargent, Munger, Tolles & Olson LLP, San Francisco, California, for Amici Curiae Bay Area Lawyers for Individual Freedom, et al.

Jeffrey S. Trachtman, Norman C. Simon, Jason M. Moff, Kurt M. Denk, and Jessica N. Witte, Kramer Levin Naftalis & Frankel LLP, New York, New York, for Amici Curiae Bishops of the Episcopal Church in Idaho, General Synod of the United Church of Christ, Mormons for Equality, Reconstructionist Rabbinical Association, Reconstructionist Rabbinical College and Jewish Reconstructionist Communities, Union for Reform Judaism, Unitarian Universalist Association, Affirmation, Covenant Network of Presbyterians, Methodist Federation for Social Action, More Light Presbyterians, Presbyterian Welcome, Reconciling Ministries Network, Reconcilingworks: Lutherans for Full Participation, Religious Institute, Inc., and 38 Faith Leaders in the State of Idaho

John C. Eastman, Center for Constitutional Jurisprudence, Chapman University, Orange, California; D. John Sauer, Clark & Sauer, LLC, for Amici Curiae Center for Constitutional Jurisprudence and 27 Scholars of Federalism and Judicial Restraint

Lynn D. Wardle, J. Reuben Clark Law School, Provo, Utah; Stephen Kent Ehat, Lindon, Utah, for Amici Curiae Center for Urban Renewal and Education,

Coalition of African-American Pastors USA, and Frederick Douglass Foundation, Inc.

Suzanne B. Goldberg, Columbia Law School Sexuality and Gender Law Clinic, New York, New York, for Amicus Curiae Columbia Law School Sexuality and Gender Law Clinic

Holly Carmichael, San Jose, California, for Amicus Curiae Concerned Women for America

Lawrence J. Joseph, Law Office of Lawrence J. Joseph, Washington, D.C., for Amicus Curiae Eagle Forum Education and Legal Defense Fund

Katherine Keating and Robert Esposito, Bryan Cave LLP, San Francisco, California, for Amicus Curiae Family Equality Council and Colage

K. Lee Marshall, Katherine Keating, Tracy Talbot, and Robert Esposito, Bryan Cave LLP, San Francisco, California, for Amici Curiae Family Equality Council, Equality Hawaii Foundation, We Are Family, and Colage

Joanna L. Grossman, Hofstra Law School, Hempstead, New York; Marjory A. Gentry, Arnold & Porter LLP, San Francisco, California, for Amici Curiae Family Law and Conflict of Laws Professors

Joan Heifetz Hollinger, Berkeley School of Law, Berkeley, California; Courtney Joslin, UC Davis School of Law, Davis, California; Laura W. Brill and Meaghan L. Field, Kendall Brill & Klieger LLP, Los Angeles, California, for Amici Curiae Family Law Professors

Elizabeth L. Deeley, Sarah E. Piepmeier, and Raghay Krishnapriyan, Kirkland & Ellis LLP, for Amicus Curiae Gary J. Gates

Brad W. Seiling and Benjamin G. Shatz, Manatt, Phelps & Phillips, LLP, Los Angeles, California, for Amicus Curiae Gary J. Gates

Mary L. Bonauto, Gay & Lesbian Advocates & Defenders, Boston, Massachusetts, for Amicus Curiae Gay & Lesbian Advocates & Defenders

Charles S. Limandri, Freedom of Conscience Defense Fund, Rancho Santa Fe, California, for Amici Curiae Robert P. George, Sherif Girgis, and Ryan T. Anderson

Nicholas M. O'Donnell, Sullivan & Worcester LLP, Boston, Massachusetts, for Amicus Curiae GLMA - Health Professionals Advancing LGBT Equality

Lynn D. Wardle, Brigham Young University Law School, Provo, Utah, for Amici Curiae Professors Alan J. Hawkins and Jason S. Carroll

Rita F. Lin and Sara Bartel, Morrison & Foerster LLP, San Francisco, California, for Amici Curiae Joan Heifetz Hollinger, Courtney Joslin, and 63 Other Family Law Professors

Catherine E. Stetson, Erica Knieval-Songer, Mary Helen Wimberly, Madeline H. Gitomer, Jenna N. Jacobson, Hogan Lovells US LLP, Washington D.C., for Amicus Curiae Historians of Antigay Discrimination

Aderson Bellegarde Francois, Howard University School of Law Civil Rights Clinic, Washington, D.C.; Brad W. Seiling and Benjamin G. Shatz, Manatt, Phelps & Phillips, LLP, Los Angeles, California, for Amicus Curiae Howard University School of Law Civil Rights Clinic

Gregory F. Zoeller, Attorney General, and Thomas M. Fisher, Solicitor General, Office of the Attorney General of Indiana, Indianapolis, Indiana; Luther Strange, Attorney General, State of Alabama; Michael C. Geraghty, Attorney General, State of Alaska; Thomas C. Horne, Attorney General, State of Arizona; John Suthers, Attorney General, State of Colorado; Lawrence G. Wasden, Attorney General, State of Idaho; Timothy C. Fox, Attorney General, State of Montana; Jon Bruning, Attorney General, State of Nebraska; E. Scott Pruitt, Attorney General, State of Oklahoma; Alan Wilson, Attorney General, State of South Carolina; Sean Reyes, Attorney General, State of Utah, for Amici Curiae States of Indiana, Alabama, Alaska, Arizona, Colorado, Idaho, Montana, Nebraska, Oklahoma, South Carolina and Utah

Robert H. Tyler and Jennifer L. Bursch, Advocates for Faith and Freedom, Murrieta, California, for Amicus Curiae Institute for Marriage and Public Policy



G. David Carter, Joseph P. Bowser, and Hunter T. Carter, Arent Fox LLP, Washington, D.C., for Amici Curiae Law Enforcement Officers, First Responders, and Organizations

Stephen M. Crampton, Mary E. McAlister, and Mandi D. Campbell, Liberty Counsel, Lynchburg, Virginia; Mathew D. Staver and Anita L. Staver, Liberty Counsel, Orlando, Florida, for Amici Curiae Liberty Counsel

William C. Duncan, Marriage Law Foundation, Lehi, Utah, for Amicus Curiae Marriage Law Foundation

Martha Coakley, Attorney General, Genevieve C. Nadeau, Assistant Attorney General, and Jonathan B. Miller, Assistant Attorney General, Commonwealth of Massachusetts, Office of the Attorney General, Boston, Massachusetts; Kamala D. Harris, Attorney General of California, Sacramento, California; George Jepsen, Attorney General of Connecticut, Hartford, Connecticut; Joseph R. Biden, III, Attorney General of Delaware, Department of Justice, Wilmington, Delaware; Irvin B. Nathan, Attorney General for the District of Columbia, Washington, District of Columbia; Lisa Madigan, Attorney General of Illinois, Chicago, Illinois; Tom Miller, Attorney General of Iowa, Des Moines, Iowa; Janet T. Mills, Attorney General of Maine, Augusta, Maine; Douglas F. Gansler, Attorney General of Maryland, Baltimore, Maryland; Joseph A. Foster, Attorney General of New Hampshire, Concord, New Hampshire; Gary K. King, Attorney General of New Mexico, Santa Fe, New Mexico; Eric T. Schneiderman, Attorney General of New York, New York, New York; Ellen F. Rosenblum, Attorney General of Oregon, Salem, Oregon; William H. Sorrell, Attorney General of Vermont, Montpelier, Vermont; Robert W. Ferguson, Attorney General of Washington, Olympia, Washington, for Amici Curiae Massachusetts, California, Connecticut, Delaware, District of Columbia, Illinois, Iowa, Maine, Maryland, New Hampshire, New Mexico, New York, Oregon, Vermont, and Washington

Gerard V. Bradley, Notre Dame Law School, Notre Dame, Indiana, for Amicus Curiae Dr. Paul McHugh

Sherrilyn Ifill, Christina A. Swarns, Natasha M. Korgaonkar, and Ria Tabacco Mar, NAACP Legal Defense & Educational Fund, Inc., New York, New York, for

Amicus Curiae NAACP Legal Defense & Educational Fund, Inc.

Bruce A. Wessel, Moez M. Kaba, C. Mitchell Hendy, and Brian Eggleston, Irell & Manella LLP, Los Angeles, California, for Amici Curiae National and Western States Women's Rights Organizations

Marcia D. Greenberger and Emily J. Martin, National Women's Law Center, Washington, D.C., for Amici Curiae National Women's Law Center, Gender Justice, Legal Momentum, Legal Voice, National Association of Women Lawyers, National Partnership for Women & Families, Southwest Women's Law Center, Women Lawyers Association of Michigan, Women's Law Project, and Professors of Law Associated with the Williams Institute

Marcia D. Greenberger, Emily J. Martin, and Cortelyou C. Kenney, National Women's Law Center, Washington, D.C.; David C. Codell, Williams Institute, UCLA School of Law, Los Angeles, California, for Amici Curiae National Women's Law Center, Williams Institute Scholars of Sexual Orientation and Gender Law, and Women's Legal Groups

Abbe David Lowell and Christopher D. Man, Chadbourne & Parke LLP, Washington, D.C., for Amici Curiae Outserve - SLDN and American Military Partner Association

Kevin T. Snider, Pacific Justice Institute, Sacramento, California, for Amicus Curiae Pacific Justice Institute

Jiyun Cameron Lee and Andrew J. Davis, Folger Levin LLP, San Francisco, California, for Amicus Curiae Parents, Families and Friends of Lesbians and Gays, Inc.

Mark W. Mosier and Jennifer Schwartz, Covington & Burling LLP, Washington, D.C., for Amici Curiae Political Science Professors

Abram J. Pafford, Pafford Lawrence & Childress PLLC, Washington, D.C., for Amici Curiae Professors of Social Science

David Alan Robinson, North Haven, Connecticut, for Amicus Curiae David Alan

Robinson

Alexander Dushku, R. Shawn Gunnarson, and Justin W. Starr, Kifton & McConkie, Salt Lake City, Utah, for Amici Curiae United States Conference of Catholic Bishops, National Association of Evangelicals, Church of Jesus Christ of Latter-Day Saints, Ethics & Religious Liberty Commission of the Southern Baptist Convention, and Lutheran Church - Missouri Synod