Case Nos. 12-17668, 12-16995, and 12-16998

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BEVERLY SEVCIK, et al., *Plaintiffs-Appellants*,

v.

BRIAN SANDOVAL, et al., *Defendants-Appellees*, and

COALITION FOR THE PROTECTION OF MARRIAGE, *Intervenor-Defendant-Appellee*.

On Appeal from the United States District Court for the District of Nevada
Case No. 2:12-CV-00578-RCJ-PAL, The Hon. Robert C. Jones, District Judge.

NATASHA N. JACKSON, et al., *Plaintiffs-Appellants*,

v.

NEIL S. ABERCROMBIE, Governor, State of Hawai‘i, *Defendant-Appellant*,

LORETTA J. FUDDY, Director, Department of Health, State of Hawai‘i, *Defendant-Appellee*, and

HAWAI‘I FAMILY FORUM, *Intervenor-Defendant-Appellee*.

On Appeal from the United States District Court for the District of Hawai‘i
Case No. 1:11-cv-00734-ACK-KSC, The Hon. Alan C. Kay, Sr., District Judge.

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NEVADA AND THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF HAWAI‘I

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), *Amicus Curiae,* the ACLU Foundations of Nevada and Hawai‘i, state that they are nonprofit corporations; that they do not have any parent corporations; and that no publicly held company owns any stock in the *Amicus Curiae.*

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INTERESTS OF AMICI CURIAE

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization with more than 550,000 members dedicated to the defense and promotion of the guarantees of individual liberty secured by state and federal constitutions and civil rights statutes. The ACLU works around the country on behalf of lesbian, gay, bisexual and transgender people to win even-handed treatment by government; protection from discrimination in jobs, schools, housing, and public accommodations; and equal rights for same-sex couples and LGBT families. The American Civil Liberties Union Foundations of Nevada and Hawai‘i are state affiliates of the ACLU, and are similarly dedicated to protecting the rights of LGBT people and families in the states of Nevada and Hawai‘i.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici submit this single brief, per the Consent to Amici Curiae, docket 29, dated October 15, 2013, in both of the above-referenced cases to explain why the Nevada and Hawai‘i exclusions of same-sex couples from marriage violate the Equal Protection Clause of the Fourteenth Amendment under any level of constitutional scrutiny.

Amici agree with Plaintiffs-Appellants in both cases that the exclusion of same-sex couples from marriage should be subjected to heightened scrutiny for three reasons. Heightened scrutiny is warranted, first, because the exclusion burdens the fundamental right to marry. *Loving v. Virginia*, 388 U.S. 1 (1967). "'Fundamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights.'" *In re Marriage Cases*, 183 P.3d at 430 (quoting *Hernandez*, 855 N.E.2d at 23 (Kaye, C.J., dissenting) (brackets omitted)); *see Loving*, 388 U.S. 1 (exclusion of interracial couples from marriage violates Constitution); *Turner v. Safley*, 482 U.S. 78 (1987) (exclusion of prisoners from marriage violates the Constitution).

Second, heightened scrutiny is the appropriate standard because sexual orientation classifications have all of the indicia of a suspect or quasi-suspect classification: a) gay and lesbian people have been historically subjected to discrimination; b) they have a defining characteristic that bears no relation to

"ability to perform or contribute to society"; c) they exhibit "obvious, immutable, or distinguishing characteristics that define them as a discrete group"; and d) the class is "a minority or politically powerless." *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012) (quoting *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987)); *Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432, 440-41 (1985)). For this reason, numerous courts have recognized that classifications based on sexual orientation warrant heightened scrutiny. *Id.*; *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 333 (D. Conn. 2012); *Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 989 (N.D. Cal. 2012) ; *In re Balas*, 449 B.R. 567, 573-75 (Bankr. C.D. Cal. 2011); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010) ; *Varnum v. Brien*, 763 N.W.2d 862, 885-96 (Iowa 2009); *In re Marriage Cases*, 183 P.3d at 441-44; *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 425-31 (Conn. 2008)[1].

Third, heightened scrutiny should be applied because the exclusion of same-sex couples from marriage contains an explicit gender classification. *United States*

[1] This Court has not analyzed the level of scrutiny required for classifications based on sexual orientation since its decision over two decades ago in *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990). That decision, which concluded that rational basis review applied to such classifications, was premised upon then-controlling precedent in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which has been subsequently overruled by *Lawrence v. Texas*, 539 U.S. 558, 575 (2003). The Court should now re-examine the appropriate level of scrutiny for classifications based on sexual orientation and join the growing number of federal courts that have concluded that heightened scrutiny applies.

v. Virginia, 518 U.S. 515, 555 (1996). The Plaintiff couples would be permitted to marry but for their genders. *See Baehr v. Lewin*, 852 P.2d 44, 64 (Haw. 1993) (Hawaii marriage statute regulates access to marriage "on the basis of the applicants' sex."); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 971 (Mass. 2003) (Greaney, J. concurring) (finding it "self-evident" that marriage ban is a "sex based" classification).

In any event, the Nevada and Hawai'i marriage exclusions fail under even the lowest level of constitutional review. At a bare minimum, this Court must determine whether there are any independent, legitimate government interests that are rationally furthered by the exclusion of same-sex couples from marriage. Both district courts below imagined several hypothetical state interests that they concluded sufficed to justify the marriage bans under rational basis review. Yet those interests—maintaining the traditional definition of marriage, encouraging responsible procreation, and supporting "optimal childrearing"—are either not independent legitimate interests, or are not rationally furthered by the exclusion of same-sex couples from marriage.

Moreover, none of the rationales offered by the courts can overcome the unmistakable primary purpose and practical effect of the marriage bans to disparage and injure same-sex couples and satisfy the demands of equal protection. "A bare…desire to harm a politically unpopular group cannot constitute a

legitimate government objective." *Romer v. Evans,* 517 U.S. 620, 634-35 (1996), quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

The Court should therefore reverse the judgments of both district courts below.

ARGUMENT

I. Even Under the Lowest Level of Constitutional Scrutiny, a Classification Must Be Justified by an Independent and Legitimate Purpose That Is Rationally Advanced by the Classification.

"Even in the ordinary equal protection case calling for the most deferential of standards, [the Court] insist[s] on knowing the relation between the classification adopted and the object to be attained." *Romer v. Evans*, 517 U.S. 620, 632 (1996). "[S]ome objectives . . . are not legitimate state interests" and, even when a law is justified by an ostensibly legitimate purpose, "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446-47 (1985).

By requiring the justification of classifications through an independent and legitimate purpose, the Equal Protection Clause excludes the drawing of classifications for "the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633); *see also U.S. v. Windsor*, 133 S. Ct. 2675, 2693 (2013); *Cleburne*, 473 U.S. at 450; *U.S. Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534

(1973) . The Supreme Court has sometimes described this impermissible purpose as "animus" or a "bare … desire to harm a politically unpopular group." *Id.*; *Romer*, 517 U.S. at 633); *Cleburne*, 473 U.S. at 447; *Moreno*, 413 U.S. at 534. Notably, an impermissible motive need not always reflect "malicious ill will." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). It can also take the form of "negative attitudes," *Cleburne*, 473 U.S. at 448, "fear," *id.*, "irrational prejudice," *id.* at 450, or "some instinctive mechanism to guard against people who appear to be different in some respects from ourselves," *Garrett*, 531 U.S. at 374) (Kennedy, J., concurring).

The Supreme Court invoked this principle most recently in *Windsor* when it held that the principal provision of the federal Defense of Marriage Act ("DOMA") violated equal protection principles because the "purpose and practical effect of the law . . . [was] to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages." *Windsor*, 133 S. Ct. at 2693. The Court explained that the statute was not sufficiently connected to a legitimate governmental purpose because its "interference with the equal dignity of same-sex marriages . . . was more than an incidental effect of the federal statute. It was its essence." *Id*.

Even without direct evidence of discriminatory purpose, the absence of any logical connection to a legitimate purpose can lead to an inference of an

impermissible intent to discriminate. *See Romer*, 517 U.S. at 632) (reasoning that the law's "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects"); *Cleburne*, 473 U.S. at 448-50 (reasoning that because a home for developmentally disabled adults posed no threat to city's interests other than those also posed by permitted uses, requiring a special zoning permit in this case "appears to us to rest on an irrational prejudice").

Thus, even when the government offers an ostensibly legitimate purpose, the court must also examine the statute's connection to that purpose to assess whether it is too "attenuated" to rationally advance the asserted governmental interest. *Cleburne*, 473 U.S. at 446; *see also Moreno*, 413 U.S. at 535-36 (invalidating law on rational-basis review because "even if we were to accept as rational the Government's wholly unsubstantiated assumptions concerning [hippies] . . . we still could not agree with the Government's conclusion that the denial of essential federal food assistance . . . constitutes a rational effort to deal with these concerns"); *Eisenstadt v. Baird*, 405 U.S. 438, 448-49 (1972) (invalidating law on rational-basis review because, even if deterring premarital sex is a legitimate governmental interest, "the effect of the ban on distribution of contraceptives to unmarried persons has at best a marginal relation to the proffered objective"). This

search for a meaningful connection between a classification and the asserted governmental interest provides a safeguard against intentional discrimination.

The Supreme Court has been particularly likely to find a classification too attenuated to serve an asserted government interest when the law imposes a sweeping disadvantage on a group that is grossly out of proportion to accomplishing that purpose. For example, in *Romer*), the Court invalidated a Colorado constitutional amendment excluding gay people from eligibility for nondiscrimination protections because, the law "identifie[d] persons by a single trait and then denie[d] them protection across the board." 517 U.S. at 633). Similarly, in *Windsor* the Supreme Court invalidated the challenged section of DOMA as not sufficiently related to any legitimate governmental purpose in part because it was "a system-wide enactment with no identified connection" to any particular government program. *Windsor*, 133 S. Ct. at 2694. In such situations, the law's breadth may "outrun and belie any legitimate justifications that may be claimed for it." *Romer*, 517 U.S. at 635); *see also id*. ("The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them").

II. Nevada's and Hawai'i's Marriage Bans Do Not Rationally Advance Any Independent and Legitimate Purposes.

Nevada's and Hawai'i's marriage bans share all the hallmarks of irrational discrimination present in prior Supreme Court cases striking down laws for violating even the lowest level of equal protection scrutiny.

A. Nevada's and Hawai'i's Marriage Bans Cannot Be Justified by an Asserted Interest in Maintaining a Traditional Definition of Marriage.

In order to survive constitutional scrutiny, Nevada's and Hawai'i's marriage bans must be justified by some legitimate state interest other than simply maintaining a "traditional" definition of marriage, as suggested by the district courts below. *See Sevcik*, 911 F. Supp. 2d at 1014 ("The protection of the traditional institution of marriage . . . is a legitimate state interest."). "Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis." *Heller v. Doe by Doe*, 509 U.S. 312, 326-27 (1993). Indeed, the fact that a form of discrimination has been "traditional" is a reason to be *more* skeptical of its rationality. "The Court must be especially vigilant in evaluating the rationality of any classification involving a group that has been subjected to a tradition of disfavor for a traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification." *Cleburne*, 473 U.S. at 454 n.6 (Stevens, J., concurring) (alterations incorporated; internal quotation marks omitted); *see also Marsh v. Chambers*, 463 U.S. 183, 791-

92 (1983) (longstanding practice should not be "taken thoughtlessly, by force of long tradition and without regard to the problems posed by a pluralistic society"); *In re Marriage Cases*, 183 P.3d 384, 853-54 (Cal. 2008 ("[E]ven the most familiar and generally accepted of social practices and traditions often mask an unfairness and inequality that frequently is not recognized or appreciated by those not directly harmed by those practices or traditions."). As the Supreme Court has explained, "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Lawrence*, 539 U.S. at 579)

Regarding laws that exclude same-sex couples from marriage, "the justification of 'tradition' does not explain the classification; it merely repeats it. Simply put, a history or tradition of discrimination—no matter how entrenched—does not make the discrimination constitutional. . . ." *Kerrigan*, 957 A.2d at 478 (citation omitted); *accord Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961 n.23 (Mass. 2003) ("[I]t is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been."); *Varnum*, 763 N.W.2d at 898) (asking "whether restricting marriage to opposite-sex couples accomplishes the governmental objective of maintaining opposite-sex marriage" results in "empty analysis"); *see also Golinski*, 824 F. Supp. 2d at 993) ("Tradition alone . . . cannot form an adequate justification for a

law. . . . Instead, the government must have an interest separate and apart from the fact of tradition itself.") (citations omitted).

Ultimately, "'preserving the traditional institution of marriage' is just a disingenuous way of describing the [s]tate's *moral disapproval* of same-sex couples." *Lawrence*, 539 U.S. at 601) (Scalia, J., dissenting) (emphasis in original). That intent to discriminate is not a rational basis for perpetuating discrimination. *See Windsor,* 133 S. Ct. at 2692; *Romer*, 517 U.S. at 633; *Cleburne*, 473 U.S. at 450; *Moreno,* 413 U.S. at 534

B. Nevada's and Hawai'i's Marriage Bans Cannot Be Justified by an Asserted Interest in Encouraging Responsible Procreation by Heterosexual Couples.

There is no rational connection between Nevada's and Hawai'i's marriage bans and an asserted state interest in encouraging responsible procreation by heterosexual couples. Both district courts erred in concluding that any legitimate interest the states of Nevada and Hawai'i have in responsible procreation is in any way furthered by excluding same-sex couples from marriage.

If, as described by both district courts, the end goal of responsible procreation is to increase stability for children through the state's official recognition and protection of enduring family units, then it is simply wrong to conclude that a state's interest in responsible procreation somehow does not apply to gay people. *See Jackson*, 884 F. Supp. 2d. at 1111-1112; *Sevcik*, 911 F. Supp.

2d. at 1015-1016. Lesbian and gay couples have children through assisted reproduction and through adoption, and the government has just as strong an interest in encouraging such procreation and child-rearing take place in the stable context of marriage. *See Varnum v. Brien*, 763 N.W.2d 862, 902 (Iowa 2009) ("Conceptually, the promotion of procreation as an objective of marriage is compatible with the inclusion of gays and lesbians within the definition of marriage. Gay and lesbian persons are capable of procreation."); *In re Marriage Cases*, 183 P.3d at 433 ("[A] stable two-parent family relationship, supported by the state's official recognition and protection, is equally as important for the numerous children . . . who are being raised by same-sex couples as for those children being raised by opposite-sex couples (whether they are biological parents or adoptive parents)."); *Pedersen*, 881 F. Supp. 2d at 339 ("Assuming, as Congress has, that the marital context provides the optimal environment to rear children as opposed to non-marital circumstances, it is irrational to strive to incentivize the rearing of children within the marital context by affording benefits to one class of marital unions in which children may be reared while denying the very same benefits to another class of marriages in which children may also be reared.").

The district courts in *Sevcik* and *Jackson*, however, focused on the ability of heterosexual couples to procreate accidentally, and described as a legitimate state purpose decreasing the number of children accidentally born out of wedlock. *See*

Jackson, 884 F. Supp. 2d. at 1112; *Sevcik*, 911 F. Supp. 2d. at 1015-1016. But whether or not encouraging accidental procreation to take place in the context of a stable relationship might be considered by some people to be *one* of the purposes of marriage, it is indisputably not the *only* purpose that marriage serves for Nevada and Hawai‘i families today. "[M]arriage is more than a routine classification for purposes of certain statutory benefits" and is "a far-reaching legal acknowledgment of the intimate relationship between two people." *Windsor*, 133 S. Ct. at 2692. Marriage in both Nevada and Hawai‘i is tied a wide array of governmental programs and protections that have nothing to do with procreation (let alone, accidental procreation). *See In re Marriage Cases*, 183 P.3d at 432 ("[A]lthough promoting and facilitating a stable environment for the procreation and raising of children is unquestionably one of the vitally important purposes underlying the institution of marriage and the constitutional right to marry . . . this right is not confined to, or restrictively defined by, that purpose alone.").

The fact that same-sex couples cannot procreate by accident does not provide a rational basis for excluding those couples from a status that has purposes far beyond creating a stable environment for children accidentally conceived. As in *Romer*, "[t]he breadth of the [marriage bans] is so far removed from these particular justifications that [it is] impossible to credit them." *Romer*, 517 U.S. at 635); *see also Eisenstadt*, 405 U.S. at 449) (finding law discriminating between

married and unmarried individuals in access to contraceptives "so riddled with exceptions" that the interest claimed by the government "cannot reasonably be regarded as its aim").

In any event, Nevada's and Hawai'i's marriage bans simply do not classify based on the ability to accidentally procreate; they classify based on the sex of the partners regardless of their procreative abilities. *See Lawrence*, 539 U.S. at 604) (Scalia, J., dissenting) ("[W]hat justification could there possibly be for denying the benefits of marriage to homosexual couples exercising '[t]he liberty protected by the Constitution'? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry."). Because neither Nevada nor Hawai'i conditions the right to marry on procreative ability, they cannot selectively rely on accidental procreation only when it comes to same-sex couples. *Cf. Cleburne*, 473 U.S. at 450 ("[T]he expressed worry about fire hazards, the serenity of the neighborhood, and the avoidance of danger to other residents fail rationally to justify singling out a home [for people with disabilities] for the special use permit, yet imposing no such restrictions on the many other uses freely permitted in the neighborhood.").

Finally, there is simply no rational connection between excluding same-sex couples from marriage and encouraging heterosexual couples to have children within the institution of marriage. To the extent that the protections accompanying

marriage encourage heterosexual couples to marry before procreating, those incentives existed before Nevada and Hawai‘i passed their marriage bans. And those incentives will still exist if the marriage bans are stuck down. *See Varnum*, 763 N.W.2d at 901-02) ("While heterosexual marriage does lead to procreation, the argument by the County fails to address the real issue[:] . . . whether *exclusion* of gay and lesbian individuals from the institution of civil marriage will result in *more* procreation? If procreation is the true objective, then the proffered classification must work to achieve that objective."); *see also Windsor*, 699 F.3d at 188 ("DOMA does not provide any incremental reason for opposite-sex couples to engage in 'responsible procreation.' Incentives for opposite-sex couples to marry and procreate (or not) were the same after DOMA was enacted as they were before." (footnotes omitted)); *Golinski*, 824 F. Supp. 2d at 998) ("Denying federal benefits to same-sex married couples has no rational effect on the procreation and child-rearing practices of opposite-sex married (or unmarried) couples.").[2]

[2] The district court in *Jackson* said that the state need only show that a legitimate state interest be advanced by *including* heterosexual couples in marriage, as opposed to showing the legitimate interest is advanced by *excluding* same-sex couples. 884 F. Supp. 2d at 1106 (quoting *Johnson v. Robinson*, 415 U.S. 361, 382-83 (1974), for the proposition that a classification subject to rational basis review will be upheld if "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not."). But Nevada and Hawaii's marriage amendments were aimed at exclusion, not inclusion. Moreover, *Johnson* is inapposite because by the time the Court concluded that a statute could constitutionally provide benefits for veterans but not conscientious objectors, it had already deemed veterans and conscientious objectors dissimilarly

Despite the continuity of incentives for heterosexual couples to marry, the *Sevcik* court hypothesized that allowing same-sex couples to marry would discourage heterosexual couples from marrying because "it is conceivable that a meaningful percentage of heterosexual persons would cease to value the civil institution as highly as they previously had and enter into it less frequently." *Sevcik*, 911 F. Supp. 2d. at 1016; *see also Jackson*, 884 F. Supp. 2d at 1109 ("The legislature could rationally speculate that by reserving the name 'marriage' to opposite-sex couples, Hawai'i's marriage laws provide special promotion and encouragement . . . ."). But the hypothesis that some heterosexuals will devalue marriage if gay couples are included in the institution is premised on those individuals' dislike or disapproval of same-sex couples. But while "[p]rivate biases may be outside the reach of the law, . . . the law cannot, directly or indirectly, give them effect."*Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). Courts cannot justify exclusion of same-sex couples from marriage on the hypothesis that some heterosexuals' disapproval of such couples rises to the level that they would

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situated with respect to the need for assistance in readjusting to civilian life. *Johnson*, 415 U.S. at 378). Here, both Nevada and Hawai'i law deem same-sex couples no different than heterosexual couples with respect to all the protections and responsibilities of marriage, but continue to deny same-sex couples the designation of marriage.

rather forego marriage for themselves than join an institution that includes same-sex couples.

a. Nevada's and Hawai'i's Marriage Bans Cannot Be Justified by an Asserted Interest in "Optimal Childrearing."

The *Jackson* court concluded that a legitimate purpose of Hawai'i's discrimination against same-sex couples in marriage was to "promote the ideal that children be raised by both a mother and a father in a stable family unit." 884 F. Supp. 2d at 1114; *see also Sevcik*, 911 F. Supp. 2d at 1016 (finding the *Jackson* court's "conclusions concerning the rational bases for Hawai'i's marriage-civil union regime equally persuasive as applied to Nevada's marriage-domestic partnership regime"). But even if it were rational for legislators to speculate that children raised by heterosexual couples are better adjusted than children raised by gay and lesbian couples—and it is not—there is simply no rational connection between Nevada's and Hawai'i's marriage bans and the asserted goal.

First, Nevada's and Hawai'i's marriage bans do not prevent gay couples from having children. The only effect that Nevada's and Hawai'i's marriage bans have on children's well-being is that they *harm* the children of same-sex couples who are denied the protection and stability of having parents who are married. Like the DOMA statute invalidated in *Windsor*, Nevada's and Hawai'i's marriage bans serve only to "humiliate" the "children now being raised by same-sex couples" and "make[] it even more difficult for the children to understand the

integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, 133 S. Ct. at 2694. To the extent that Nevada's and Hawai'i's marriage bans visit these harms on children as a way to attempt (albeit irrationally) to deter other same-sex couples from having children, the Supreme Court has invalidated similar attempts to incentivize parents by punishing children as "'illogical and unjust.'" *Plyler v. Doe*, 457 U.S. 202, 220 (1982) (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)). "'Obviously, no child is responsible for his birth and penalizing the . . . child is an ineffectual—as well as unjust—way of deterring the parent.'" *Id.* (quoting *Weber*, 406 U.S. at 175).[3]

Second, excluding same-sex couples from marrying does nothing to prevent heterosexual couples from procreating out of wedlock or encourage them to procreate within marriage, biologically or otherwise. *See Windsor*, 699 F.3d at 188; *Golinski*, 824 F. Supp. 2d at 998; *Pedersen*, 881 F. Supp. 2d at 340-41; *Varnum*, 763 N.W.2d at 901). Although the district court in *Jackson* concluded that providing heterosexual couples with marriage "affirmatively encourage[s]" the parenthood of heterosexual couples, 844 F. Supp. 2d. at 1116, it only makes sense

[3] Any law adopted with the purpose of burdening gay people's ability to procreate would also demand strict scrutiny for implicating the fundamental right to decide "'whether to bear or beget a child.'" *Planned Parenthood of SE Penn. v. Casey*, 505 U.S. 833, 851 (1992) (quoting *Eisenstadt*, 405 U.S. at 453)); *see Pedersen*, 881 F. Supp. 2d at 341.

that this could not similarly be accomplished without excluding same-sex couples from marriage if one accepts the premise laid out earlier in *Jackson* that heterosexual couples will value marriage less if same-sex couples are able to marry. *Id.* at 1109. As discussed above, however, such an interest merely validates private prejudice and is not legitimate as a state interest under any level of constitutional scrutiny.

The lack of rational connection between the marriage bans and the asserted goals of encouraging children to be raised by heterosexual couples is sufficient to undermine the rationale as a rational basis, even without considering whether the government has a legitimate basis for preferring different-sex over same-sex parents. But there is no such legitimate basis—as Nevada and Hawai‘i have recognized. The suggestion that Nevada and Hawai‘i were trying to "promote the ideal that children be raised by both a mother and a father" cannot be squared with their extension, through domestic partnership and civil union laws, of all the protections and responsibilities of marriage to same-sex couples, including the parenting protections and responsibilities. The legislatures' equal treatment of different-sex and same-sex parents (with the exception of the designation of marriage), belies any purported interest of either state in a preference of different-sex over same-sex parents.

Moreover, the overwhelming scientific consensus, based on decades of peer-reviewed scientific research, shows unequivocally that children raised by same-sex couples are just as well adjusted as those raised by heterosexual couples. *See Perry*, 704 F. Supp. 2d at 980 (finding that the research supporting the conclusion that "[c]hildren raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted" is "accepted beyond serious debate in the field of developmental psychology"); *In re Adoption of Doe*, 2008 WL 5006172, at *20 (Fla. Cir. Ct. Nov. 25, 2008) ("[B]ased on the robust nature of the evidence available in the field, this Court is satisfied that the issue is so far beyond dispute that it would be irrational to hold otherwise; the best interests of children are not preserved by prohibiting homosexual adoption."), *aff'd sub nom. Fla. Dep't of Children & Families v. Adoption of X.X.G.*, 45 So.3d 79 (Fla. Dist. Ct. App. 2010); *Howard v. Child Welfare Agency Rev. Bd.*, Nos. 1999-9881, 2004 WL 3154530, at *9 and 2004 WL 3200916, at *3-4 (Ark. Cir. Ct. Dec. 29, 2004) (holding based on factual findings regarding the well-being of children of gay parents that "there was no rational relationship between the [exclusion of gay people as foster parents] and the health, safety, and welfare of the foster children."), *aff'd sub nom. Dep't of Human Servs. v. Howard*, 238 S.W.3d 1 (Ark. 2006); *Varnum*, 763 N.W.2d at 899) and n.26 (concluding, after reviewing "an abundance of evidence and research," that "opinions that dual-gender parenting is

the optimal environment for children . . . is based more on stereotype than anything else"); *Golinski*, 824 F. Supp. 2d at 991 ("More than thirty years of scholarship resulting in over fifty peer-reviewed empirical reports have overwhelmingly demonstrated that children raised by same-sex parents are as likely to be emotionally healthy, and educationally and socially successful as those raised by opposite-sex parents.").

C. No Legitimate Interest Overcomes the Primary Purpose and Practical Effect of Nevada's and Hawai'i's Marriage Bans to Disparage and Demean Same-Sex Couples and Their Families.

Because there is no rational connection between Nevada's and Hawai'i's marriage bans and any of the asserted state interests, this Court can conclude that the marriage bans violate equal protection even without considering whether they are motivated by an impermissible purpose. *See Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000) (allegations of irrational discrimination "quite apart from the Village's subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis"). In both cases, however, the lack of any connection between Nevada's and Hawai'i's marriage bans and any legitimate state interest also confirms the inescapable conclusion that they were passed because of, not in spite of, the harm they would inflict on same-sex couples. And, even if it were possible to hypothesize a rational connection between Nevada's and Hawai'i's marriage bans and some legitimate governmental interest—and there is

none—Nevada's and Hawai'i's marriage bans would still violate equal protection because no hypothetical justification can overcome the unmistakable primary purpose and practical effect of the marriage bans to disparage and injure same-sex couples.

The Supreme Court in *Windsor* recently reaffirmed that when the primary purpose and effect of a law is to harm an identifiable group, the fact that the law may also incidentally serve some other neutral governmental interest cannot save it from unconstitutionality. In defending the constitutionality of DOMA, the Bipartisan Legal Advisory Group ("BLAG") argued that the statute helped serve a variety of federal interests in promoting efficiency and uniformity, as well as the same purported state interests that Defendant Rainey relies upon in this case. According to BLAG's merits brief:

> Congress could rationally decide to retain the traditional definition for the same basic reasons that states adopted the traditional definition in the first place and that many continue to retain it: There is a unique relationship between marriage and procreation that stems from marriage's origins as a means to address the tendency of opposite-sex relationships to produce unintended and unplanned offspring. There is nothing irrational about declining to extend marriage to same-sex relationships that, whatever their other similarities to opposite-sex relationships, simply do not share that same tendency. Congress likewise could rationally decide to foster relationships in which children are raised by both of their biological parents.

See Merits Brief of Bipartisan Legal Advisory Group in *United States v. Windsor*, 2013 WL 267026, at *21 (2013) . But the Supreme Court held that none of BLAG's rationalizations could save the law. The Court explained that "[t]he

principal purpose [of DOMA] [was] to impose inequality, not for other reasons like governmental efficiency," and "no legitimate purpose overcomes the purpose and effect to disparage and injure" same-sex couples and their families. *Windsor*, 133 S. Ct at 2694, 2696; *see also Vance v. Bradley*, 440 U.S. 93, 97 (1979) (rational-basis review is deferential "absent some reason to infer antipathy"); *Lawrence*, 539 U.S. at 580) (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.").

The historical background of each of the marriage bans reflects a targeted attempt to exclude same-sex couples from marriage, not a mere side-effect of some broader public policy. *Cf. Windsor*, 133 S. Ct. at 2693 (examining historical context of DOMA); *Arlington Heights*, 429 U.S. at 266-67 (explaining "historical background of the decision" is relevant when determining legislative intent). The marriage bans were not enacted long ago at a time when "many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage." *Windsor*, 133 S. Ct. at 2689. They were enacted as specific responses to developments either in other jurisdictions (Nevada) or in their own jurisdiction (Hawai‘i), wherein same-sex couples were on the verge of obtaining the freedom

to marry. In each case, the marriage bans did not simply represent a failure to include same-sex couples within the broader public policies advanced by marriage; they were specific, targeted efforts to exclude same-sex couples.

In addition to all the other contemporaneous evidence of an impermissible purpose, the inescapable "practical effect" of Nevada's and Hawai'i's marriage bans is "to impose a disadvantage, a separate status, and so a stigma upon" same-sex couples in the eyes of the state and the broader community. *Windsor*, 133 S. Ct at 2693; *see also Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) ("[A]s we have repeatedly emphasized, 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 in the political community . . . can cause serious noneconomic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group.") (footnote and citations omitted). The marriage bans collectively "diminish[] the stability and predictability of basic personal relations" of gay people and "demeans the couple, whose moral and sexual choices the Constitution protects." *Windsor*, 133 S. Ct. at 2694 (citing *Lawrence*, 539 U.S. 558 (2003)). The marriage bans thus constitute an "official statement that the family relationship of same-sex couples is not of comparable stature or equal dignity to the family relationship of opposite-sex couples" and that "that it is

permissible, under the law, for society to treat gay individuals and same-sex couples differently from, and less favorably than, heterosexual individuals and opposite-sex couples." *In re Marriage Cases*, 183 P.3d 384 at 452. That official statement of inequality is "in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Lawrence*, 539 U.S. at 575)

The unmistakable intent of the marriage bans is to impose inequality on gay people and their intimate relationships. As noted above, Nevada's and Hawai'i's marriage bans are not rationally related to any legitimate purpose. But even if there were any plausible connection between the marriage bans and some legitimate purpose, that incidental connection could not "overcome[] the purpose and effect to disparage and to injure" same-sex couples and their families. *Windsor*, 133 S. Ct at 2696.

CONCLUSION

Plaintiffs-Appellants in both cases below seek from this Court vindication of their fundamental right to marry, as well as a conclusion that the Nevada and Hawai'i exclusions of same-sex couples from marriage constitutes unconstitutional discrimination based on sex and sexual orientation. *Amici curiae* also urge the Court to rule on these grounds. For the reasons discussed above, the Court should

conclude that Nevada's and Hawai'i's marriage bans violate Plaintiffs-Appellants' equal protection rights under any standard of constitutional scrutiny.

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CERTIFICATE OF COMPLIANCE

I certify that this brief is 5,882 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as applicable. Due to its size, this brief is accompanied by a motion for leave to file an oversize brief pursuant to Circuit Rule 32-2.

DATED this 25th day of October 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2013, I electronically filed the foregoing Brief of Amicus Curiae with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

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