Case No. 12-17668

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BEVERLY SEVCIK et al.,

Plaintiffs – Appellants,

BRIAN SANDOVAL et al.,

Defendants – Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
DISTRICT OF NEVADA
No. 2:12—CV—00578RCJ-PAL, The Honorable Robert C. Jones
United States District Court Judge

Brief of *Amici Curiae* United States Conference of Catholic Bishops; National Association of Evangelicals; The Church of Jesus Christ of Latter-Day Saints; The Ethics & Religious Liberty Commission of the Southern Baptist Convention; and Lutheran Church—Missouri Synod

In Support of Defendants-Appellees and Supporting Affirmance

Alexander Dushku
R. Shawn Gunnarson
Justin W Starr
KIRTON | MCCONKIE
60 East South Temple, 1800
Salt Lake City, UT 84111
(801) 328-3600

Attorneys for *Amici Curiae*
Religious Organizations

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned states that none of the religious organizations that join this brief issues stock or has a parent corporation that issues stock.

s/ Alexander Dushku
Alexander Dushku
Attorney for *Amici Curiae*
Religious Organizations

January 28, 2014

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Pursuant to Rule 29(c)(5), the undersigned states that counsel for the parties have not authored any part of this brief and no party or counsel for any party contributed money to fund any part of the preparation or submission of this brief. This brief is filed with the written consent of all parties.

IDENTITY AND INTEREST OF *AMICI*

The voices of millions of Americans are represented in the broad cross-section of faith communities that join in this brief. Our theological perspectives, though often differing, converge on a critical point: that the traditional, husband-wife definition of marriage is vital to the welfare of children, families, and society. Faith communities like ours are among the essential pillars of this Nation's marriage culture. With our teachings, rituals, traditions, and ministries, we sustain and nourish both individual marriages and a marriage culture that makes enduring marriages possible. We have the deepest interest in strengthening the time-honored institution of husband-wife marriage because of our religious beliefs and also because of the benefits it provides to children, families, and society. Our practical experience in this area is unequaled. In millions of ministry settings each day, we especially see the benefits that married mother-father parenting brings to children. And we deal daily with the devastating effects of out-of-wedlock births, failed marriages, and the general decline of the venerable husband-wife marriage institution.

We therefore seek to be heard in the democratic and judicial forums where the fate of that foundational institution will be decided. This brief is

submitted out of a shared conviction that the United States Constitution does not prohibit the People of Nevada from deciding—whether directly or through their elected representatives—to preserve the husband-wife definition of marriage. Statements of interest of the *amici* may be found in the Addendum to this brief.

INTRODUCTION

A common theme has arisen among advocates for redefining marriage to include same-sex couples: that those who oppose them must be irrational or even bigoted—that they are motivated by "anti-gay animus," whether in the form of unthinking ignorance or outright hostility. Such aspersions, which take various forms, are often cast at people and institutions of faith.

The accusation is false and offensive. It is designed to suppress rational dialogue and democratic conversation, to win by insult and intimidation rather than by the force of reason, experience, and fact. In truth, we support the husband-wife definition of marriage because we believe it is right and good for children, families, and society. Our respective faith traditions teach us that truth. So do reason, long experience, and social fact.

We are among the "many religions [that] recognize marriage as having spiritual significance," *Turner v. Safley*, 482 U.S. 78, 96 (1987), indeed as being truly "sacred," *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). Our respective religious doctrines hold that marriage between a man and a woman is sanctioned by God as the right and best setting for bearing and raising children. We believe that children, families, society, and our Nation thrive best when husband-wife marriage is upheld and strengthened as a cherished, primary social institution. The marital and family lives of millions of Americans are ordered around and given deep meaning and stability by these beliefs.

The value we place on traditional, husband-wife marriage is also influenced by rational judgments about human nature and the needs of individuals and society (especially children), and by our collective experience counseling and serving millions of followers over countless years. For these powerful reasons, as well, we hold that traditional marriage is indispensable to social welfare and our republican form of government.

As our faith communities seek to uphold the virtues of husband-wife marriage and family life, our teachings and rituals seldom focus on sexual

orientation or homosexuality. Our support for the established meaning of marriage arises from an affirmative vision of marriage, family, and ordered liberty, not animosity toward anyone's sexual orientation. As the Supreme Court has stated, it arises from "the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony." *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885).

In this brief we demonstrate that Nevada's traditional marriage laws should not be overturned based on spurious charges that those—like these *amici*—who support such laws do so out of animus. Again, our faith communities bear no ill will toward same-sex couples but rather have marriage-affirming religious beliefs that merge with both practical experience and sociological fact to convince us that retaining the husband-wife marriage definition is essential. We further demonstrate that under Supreme Court jurisprudence the notion of "animus" has very limited application—and none here. Finally, we refute the suggestion that the Establishment Clause limits the fundamental right of persons and institutions of faith to participate fully in the democratic process. The fact that religious believers support Nevada's marriage laws by no stretch undermines their constitutional validity.

ARGUMENT

I. Nevada's Marriage Amendment Should Not Be Invalidated or Subjected to Closer Judicial Scrutiny Based on False Accusations of Animus.

Plaintiffs suggest that Amendment 3 was based on "'a desire to harm a politically unpopular group.'" Aplt. Br. at 62 (quoting *Lawrence v. Texas*, 539 U.S. 558, 580 (2003)). Likewise, an amicus brief from a group of religious organizations supporting Plaintiffs argues that Amendment 3 has no rational purpose except "a bare desire by the interest groups sponsoring the Marriage Bans to express their moral- and religious-based condemnation of gay and lesbian people." Br. Amicus Curiae of Anti-Defamation League et al. at 20. Only a procrustean determination to force Amendment 3 into the framework of *Romer v. Evans*, 517 U.S. 620 (1996), could lead to such unfounded accusations.

We believe that husband-wife marriage—"an institution more basic in our civilization than any other," *Williams v. North Carolina*, 317 U.S. 287, 303 (1942)—is "the most important relation in life" and "ha[s] more to do with the morals and civilization of a people than any other institution," *Maynard v. Hill*, 125 U.S. 190, 205 (1888). Yet as explained next, our faiths also teach love and respect for every human person. To suggest that our

support for traditional marriage is based on hostility misrepresents our beliefs. That support predates by centuries the controversy over same-sex marriage and has nothing to do with disapproval of any group. Our support for traditional marriage stands on the positive belief that husband-wife marriage complements our fundamental natures as male and female, promotes responsible procreation, and provides the best environment for children.

Moreover, reducing religious support for traditional marriage to irrational bias requires ignoring rational and persuasive arguments for traditional marriage that have nothing to do with homosexuality. Obviously, "reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group." *Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring). We discuss many of these reasons below. They are arguments supported by eons of history, right reason, experience, common sense, and social science. They have been accepted by many courts, *see e.g.*, *Hernandez v. Robles*, 855 N.E. 2d 1 (N.Y. 2006), including the court below.

A. We Defend Traditional Marriage Out of Fidelity to Religious Beliefs That Include But Transcend Teachings About Human Sexuality, Not Out of Animus.

Let us first dispel the myth that hostility lies at the root of religious support for husband-wife marriage and Amendment 3. Jesus did not express disapproval or hostility when he taught, "'Have you not read that he who made them from the beginning made them male and female, and said, 'For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh?'" *Matthew* 19:4-5 (RSV). Nor were the ancient Jewish scriptural texts that Jesus referenced based on animosity toward anyone. *See Genesis* 1:27, 2:23 (RSV).

Indeed, faith communities and religious organizations have a long history of upholding traditional marriage for reasons that have nothing to do with homosexuality. Their support for husband-wife marriage precedes by centuries the very idea of same-sex marriage. Many of this Nation's prominent faith traditions have rich religious narratives that extol the personal, familial, and social virtues of traditional marriage while barely mentioning homosexuality.

The Catholic Tradition. With a tradition stretching back two millennia, the Catholic Church recognizes marriage as a permanent,

faithful, and fruitful covenant between a man and a woman that is indispensable to the common good.[1] Marriage has its origin, not in the will of any particular people, religion, or state, but rather, in the nature of the human person, created by God as male and female. When joined in marriage, a man and woman uniquely complement one another spiritually, emotionally, psychologically, and physically. This makes it possible for them to unite in a one-flesh union capable of participating in God's creative action through the generation of new human life. Without this unitive complementarity—and the corresponding capacity for procreation that is unique to such a union—there can be no marriage.[2] These fundamental Catholic teachings about marriage do not mention and have nothing to do with same-sex attraction.

The Evangelical Protestant Tradition. For five centuries the various denominational voices of Protestantism have taught marriage from a biblical view focused on uniting a man and woman in a divinely sanctioned companionship for the procreation and rearing of children and the benefit of society. One representative Bible commentary teaches:

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[1] *See* CATECHISM OF THE CATHOLIC CHURCH ¶ 1601 (2d ed. 1994).
[2] *See id.* at ¶¶ 371-72.

"Marriage . . . was established by God at creation, when God created the first human beings as 'male and female' (Gen. 1:27) and then said to them, 'Be fruitful and multiply and fill the earth' (Gen. 1:28). . . . Marriage begins with a commitment before God and other people to be husband and wife for life," with "[s]ome kind of public commitment" being important so that society can "know to treat a couple as married and not as single."[3] Homosexuality is far from central to Evangelical teachings on marriage.

The Latter-day Saint (Mormon) Tradition. Marriage is fundamental to the doctrine of The Church of Jesus Christ of Latter-day Saints. A formal doctrinal proclamation on marriage declares that "[m]arriage between a man and a woman is ordained of God," that "[c]hildren are entitled to birth within the bonds of matrimony, and to be reared by a father and a mother who honor marital vows with complete fidelity," and that "[h]usband and wife have a solemn responsibility to love and care for each other and for their children."[4] Strong families based on husband-wife marriage "serve as the fundamental institution for transmitting to future generations the

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[3] ESV STUDY BIBLE 2543-44 (2008).

[4] THE FIRST PRESIDENCY AND COUNCIL OF THE TWELVE APOSTLES OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, THE FAMILY: A PROCLAMATION TO THE WORLD (Sept. 23, 1995), *available at* http://www.lds.org/topics/family-proclamation.

moral strengths, traditions, and values that sustain civilization."[5] Here again, homosexuality is remote from teachings about marriage and family.

* * *

In sum, our religious understandings of marriage are rooted in beliefs about God's will concerning men, women, children, and society, rather than in the narrower issue of homosexuality. Religious teachings may indeed address homosexual conduct and other departures from the marriage norm, but such issues are a secondary and small part of religious discourse on marriage. Indeed, it is only the recent same-sex marriage movement that has made it more common for religious organizations to include discussions of homosexuality in their teachings on marriage. The suggestion that religious support for husband-wife marriage is rooted in anti-homosexual animus rests on a false portrayal of our most basic beliefs.

[5] The Church of Jesus Christ of Latter-day Saints, Newsroom, *The Divine Institution of Marriage* (Aug. 13, 2008), *available at* http://newsroom.lds.org/ldsnewsroom/eng/commentary/the-divine-institution-of-marriage.

B. We Defend Traditional Marriage to Advance and Preserve Vital Interests in the Welfare of Children, Families and Society.

The social benefits that husband-wife marriages and two-parent families provide are critical for the well-being of society and its children. Nevada has compelling interests in maintaining traditional marriage.

i. Procreation and Child Rearing Ideally Occur Within a Stable Male-Female Marriage.

Every child has a father and a mother. Procreation within a stable male-female marriage gives a child a uniquely full human context that accounts for both the child's biology and the deeper intentions and commitments of the child's parents. The male-female ideal in marriage and parenting also provides irreplaceable benefits to children.

1. Sex between men and women presents a social challenge. "'[A]n orderly society requires some mechanism for coping with the fact that sexual intercourse commonly results in pregnancy and childbirth.'" *Morrison v. Sadler*, 821 N.E.2d 15, 25-26 (Ind. App. 2005) (quoting *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 995 (Mass. 2003) (Cordy, J., dissenting)). Traditional marriage provides that mechanism and thereby enhances the welfare of children.

The principal way husband-wife marriage "protects child well-being . . . [is] by increasing the likelihood that the child's own mother and father will stay together in a harmonious household."[6] That is important because "[c]hildren in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes than do children in intact families headed by two biological parents."[7] Our extensive experience confirms the observations of Justice Robert Cordy in the Massachusetts same-sex marriage case regarding the essential role marriage plays in channeling procreation into an institution that legally binds fathers and mothers to their offspring and thereby serves the best interests of children:

> Paramount among its many important functions, the institution of marriage has systematically provided for the regulation of heterosexual behavior, brought order to the resulting procreation, and ensured a stable family structure in which children will be reared, educated, and socialized. . . .

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[6] Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage As a Social Institution: A Reply to Andrew Koppelman*, 2 U. ST. THOMAS L.J. 33, 50-51 (2004).

[7] KRISTIN ANDERSON MOORE ET AL., CHILD TRENDS, MARRIAGE FROM A CHILD'S PERSPECTIVE: HOW DOES FAMILY STRUCTURE AFFECT CHILDREN AND WHAT CAN WE DO ABOUT IT? 6 (June 2002), http://www.childtrends.org/files/MarriageRB602.pdf.

> The institution of marriage provides the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other. The partners in a marriage are expected to engage in exclusive sexual relations, with children the probable result and paternity presumed. Whereas the relationship between mother and child is demonstratively and predictably created and recognizable through the biological process of pregnancy and childbirth, there is no corresponding process for creating a relationship between father and child. . . . The institution of marriage fills this void by formally binding the husband-father to his wife and child, and imposing on him the responsibilities of fatherhood. The alternative, a society without the institution of marriage, in which heterosexual intercourse, procreation, and child care are largely disconnected processes, would be chaotic.

Goodridge, 798 N.E. 2d at 995-96 (Cordy, J., dissenting) (citations omitted).

2. Both social science and our own experience over many decades have taught that children thrive best when cared for by both of their biological parents. *Lofton v. Sec'y of Dep't of Children and Family Servs.*, 358 F.3d 804, 819 (11th Cir. 2004) ("[C]hildren benefit from the presence of both a father and mother in the home.").

"Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like." *Hernandez*, 855 N.E. 2d at 7. "Men and women are not

fungible in relation to child rearing. They have distinct contributions to make."[8]

Social science confirms the commonsense understanding that stable male-female marriages provide the optimal environment for the personal, moral, and social development of children:

> [R]esearch clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage. Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes . . . .[9]

Indeed, "[a] family headed by two married parents who are the biological mother and father of their children is the optimal arrangement for maintaining a socially stable fertility rate, rearing children, and inculcating in them the [values] required for politically liberal citizenship."[10]

While the critical role of mothers in child development has never been doubted, the importance of fathers is now much better understood. A

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[8] Eric G. Andersen, *Children, Parents, and Nonparents: Protected Interests and Legal Standards,* 1998 BYU L. REV. 935, 998.
[9] MOORE, *supra* note 7, at 1-2.
[10] Matthew B. O'Brien, *Why Liberal Neutrality Prohibits Same-Sex Marriage: Rawls, Political Liberalism, and the Family*, 2012 BRIT. J. AM. LEG. STUD. 411, 414.

large and growing body of research demonstrates that the contributions of fathers are critical to children's formation and well-being.[11] Paternal absence is associated with early sexual behavior of girls, even when other factors (such as stress and poverty) are accounted for.[12] Another study found that "[d]aughters whose fathers gave them little time and attention were more likely to seek out early sexual attention from male peers."[13] "The burden of social science evidence supports the idea that gender-

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[11] *See, e.g.*, W. BRADFORD WILCOX ET AL., WHY MARRIAGE MATTERS (2d ed. 2005); Cynthia C. Harper & Sara S. McLanahan, *Father Absence and Youth Incarceration*, 14 J. RES. ON ADOLESCENCE 369, 385-86 (2004) (Compared with all other family forms, "[y]outh who never had a father in the household had the highest incarceration odds."); SUZANNE LE MENESTREL, CHILD TRENDS, WHAT DO FATHERS CONTRIBUTE TO CHILDREN'S WELL-BEING? (May 1999), http://www.tapartnership.org/docs/callNotes/20110811_fatherhoodCallFathersContribute.pdf; DEBORAH J. JOHNSON, NATIONAL CENTER ON FATHERS AND FAMILIES, FATHER PRESENCE MATTERS: A REVIEW OF THE LITERATURE (1996), http://www.ncoff.gse.upenn.edu/sites/ncoff.messageagency.com/files/brief-fpm.pdf.

[12] Bruce J. Ellis et al., *Does Father Absence Place Daughters at Special Risk for Early Sexual Activity and Teenage Pregnancy?*, 74 CHILD DEV. 801, 801 (2003).

[13] Stephanie Weiland Bowling & Ronald J. Werner-Wilson, *Father-Daughter Relationships and Adolescent Female Sexuality: Paternal Qualities Associated with Responsible Sexual Behavior*, HIV/AIDS PREVENTION & EDUC. FOR ADOLESCENTS & CHILD., Nov. 2000, at 5, 13.

differentiated parenting is important for human development and that the contribution of fathers to childrearing is unique and irreplaceable."[14]

Traditional marriage provides children with father and mother role models and vital training in bridging the gender divide. Marriage sets a pattern for cooperation between the sexes. Our direct experience confirms the important role that husband-wife marriage plays in helping young men and women to appreciate and respect each other.

ii. Limiting Marriage to Male-Female Couples Furthers Powerful State Interests.

In light of the foregoing, the State has a profound interest in stable male-female marriages where children can be reared with a strong connection to their biological parents. Society and the State reap rich benefits when children are reared by their mother and father and, conversely, pay the price when children are not.

1. James Q. Wilson has detailed some of the overwhelming evidence that single and fatherless parenting, in particular, significantly increases the risk that the child will experience poverty, suicide, mental

[14] DAVID POPENOE, LIFE WITHOUT FATHER: COMPELLING NEW EVIDENCE THAT FATHERHOOD & MARRIAGE ARE INDISPENSABLE FOR THE GOOD OF CHILDREN & SOCIETY 146 (1996).

illness, physical illness, infant mortality, lower educational achievement, juvenile delinquency, adult criminality, unwed teen parenthood, lower life expectancy, and reduced intimacy with parents. The statistical correlation between numerous social pathologies and not being raised in a stable home with both biological parents is both daunting and sobering.[15]

To us, such consequences are more than impersonal statistics. Our faith communities are intimately familiar with the personal tragedies so often associated with unwed parenting and family breakdown. We have seen functionally fatherless boys, bereft of proper adult male role models, acting in violence, joining gangs, and engaging in other destructive social and sexual behaviors. We have cared for and mourned with victims left in their destructive wake. And we have ministered to those boys in prisons where too many are consigned to live out their ruined lives.

We have seen young girls, deprived of the love and affection of a father, engaging in a wide array of self-destructive behaviors. All too often the result is pregnancy and out-of-wedlock birth, thus repeating the cycle.

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[15] *See generally* Brief Amici Curiae of James Q. Wilson et al., Legal and Family Scholars In Support of Appellees at 41-43, In re Marriage Cases, 183 P.3d 384 (Cal. 2008) (No. S147999), *available at* http://www.courts.ca.gov/documents/Legal_ Family_Scholars_Amicus_Brief.pdf.

The inescapable truth is that only male-female relationships can create children, children need their mothers *and* fathers, and society needs mothers *and* fathers to co-parent their children. That, in a nutshell, is why society needs the institution of male-female marriage, and why Nevada is right to specially protect and support such marriages.

2. In this respect, as in so many others, the law plays an important educational function. "[L]aw is not just an ingenious collection of devices to avoid or adjust disputes and to advance this or that interest, but also a way that society makes sense of things."[16] In the case of marriage, the law encourages socially optimal behavior by creating a legal institution that supports and confirms the People's deep cultural understanding—and the sociological truth—that stable mother-father marital unions are best for children.

In short, marriage:

> reinforces the idea that the union of husband and wife is (as a rule and ideal) the most appropriate environment for the bearing and rearing of children. . . . If same-sex partnerships were recognized as marriages, however, that ideal would be abolished from our law: no civil institution would any longer reinforce the notion that children need both a mother and

[16] MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES 7-8 (1987).

> father; that men and women on average bring different gifts to the parenting enterprise; and that boys and girls need and tend to benefit from fathers and mothers in different ways.[17]

Redefining marriage to mean the union of any two adults in a committed relationship, without more, will alter the law's current emphasis on procreation and child welfare, refocusing it on affirming and facilitating adult relationship choices.[18] A gender-neutral marriage definition would unavoidably change the message, meaning, and function of marriage by altering it to serve the interests of adults. It would be a case of those in power (adults) using law to bring change that is self-serving. Whether or not one agrees with such changes, one cannot rationally pretend they won't occur:

One may see these kinds of social consequences of legal change as good, or as questionable, or as both. But to argue that these kinds of cultural effects of law do not exist, and need not be taken into account when contemplating major changes in family law, is to demonstrate a

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[17] Sherif Girgis, Robert P. George, & Ryan T. Anderson, *What is Marriage?*, 34 HARV. J.L. & PUB. POL'Y 245, 262-63 (2011).

[18] Supporters of same-sex marriage typically conceive of marriage primarily as a vehicle for advancing the autonomy interests of adults. *See, e.g.*, Ralph Wedgwood, *The Fundamental Argument for Same-Sex Marriage*, 7 J. POL. PHIL. 225, 225 (1999) ("The basic rationale for marriage lies in its serving certain legitimate and important interests of married couples.").

fundamental lack of intellectual seriousness about the power of law in American society.[19] Plaintiffs do not dispute this. Indeed, their lawsuit is based on it. "The government is a powerful teacher," they argue. Aplt. Br. at 25. Amendment 3, Plaintiffs assert, "encourages disrespect of committed same-sex couples" and, they claim, changing the meaning of marriage to include their unions would result in a cultural shift that would give dignity to their relationships. *See id.* at 25-27.

We disagree that the long-established understanding of marriage reflected in Amendment 3 "encourages disrespect" for committed same-sex relationships. That understanding predates by centuries the current debate over same-sex unions.[20] But we do agree that changing the legal definition

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[19] INSTITUTE FOR AMERICAN VALUES, MARRIAGE AND THE LAW: A STATEMENT OF PRINCIPLES 26 (2006).

[20] Vico described marriage as "the seed-plot of the family, as the family is the seed-plot of the commonwealth." GIAMBATTISTA VICO, THE NEW SCIENCE 7 (Thomas Goddard Bergin & Max Harold Fisch trans. 1948, 3d ed. 1744). Hume identified marriage as "the first and original principle of human society," grounded in "that natural appetite betwixt the sexes, which unites them together, and preserves their union, till a new tye [sic] take place in their concern for their common offspring." DAVID HUME, A TREATISE OF HUMAN NATURE 486 (L.A. Selby-Bigge ed., 1975). Locke depicted marriage as a "*Conjugal Society* . . . which unites Man and Wife in that Society, as far as may consist with Procreation and the bringing up of Children till they could shift for themselves . . . ." JOHN LOCKE, TWO TREATISES OF GOVERNMENT 322 (Peter Laslett ed., 1988). Nearer our own

of marriage would slowly alter the way society views marriage, making it adult-focused rather than child-focused, just as Plaintiffs suggest. That is, if the meaning of marriage is changed in concept, the cultural significance attached to marriage will also change in practice. The harmful cultural message of same-sex marriage is that marriage is primarily about adults and their life choices. We have already seen in the last half-century the devastating effects of devaluing marriage as a child-centered institution, as other of its defining characteristics have been eroded.

For all these reasons, society has the most compelling interest in keeping the focus of marriage where society needs it most: on legally uniting men and women so that the children they bear will have the best chance of being nurtured by both parents. This conclusion reflects not only venerable religious beliefs but reason, long experience, and sociological fact.

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time, Justice Holmes wrote that marriage—"some form of permanent association between the sexes"—qualified as one of the "necessary elements in any society that may spring from our own and that would seem to us to be civilized." Oliver Wendell Holmes, *Natural Law*, *in* COLLECTED LEGAL PAPERS 312 (1920).

C. We Promote Laws Protecting Traditional Marriage to Safeguard the Marriage Institution Against the Judicial Redefinition of Its Historic Meaning.

In the last two decades, there has been a democratic reaffirmation of the traditional definition of marriage through state constitutional amendments and other laws. At the same time, rights based on sexual orientation have also been expanded by legislation in most of these same states, including Nevada. The former cannot be explained by animus toward same-sex unions any more than the latter can be explained by animus toward religions with traditional beliefs about sexuality.

Rather, marriage amendments have mostly been a reaction to what many people perceive as overreach by State judges. That is, support for new laws reaffirming traditional marriage has not been motivated by a desire to express animus, but by a desire to preemptively protect traditional marriage against judicial redefinition and to reaffirm the importance of traditional marriage to society.

II. The Relevance of Allegations of "Animus" in Equal Protection Analysis Is Strictly Limited.

We have identified just a few of the reasons why we support traditional marriage, none of which are based on hostility or animus

toward homosexuals. These reasons alone are sufficient to survive this Court's scrutiny, especially given the limited role of allegations of "animus" in equal-protection analysis. It is not enough for a plaintiff to speculate that there is animosity lurking behind a law. Only laws evincing discrimination of an unusual character are subject to careful review to determine if they were motivated by animus. And only if animus is the sole motivation, after excluding all legitimate possibilities, can a law be declared unconstitutional because of improper animus. Additionally, the Supreme Court has never used the animus analysis to recognize a new right.

A. Nevada's Traditional Definition of Marriage Does Not Impose a Discrimination of an Unusual Character Calling for Careful Consideration.

"In determining whether a law is motived by an improper animus or purpose, 'discriminations of an unusual character' especially require careful consideration." *United States v. Windsor*, 133 S. Ct. 2675 (2013) (quoting *Romer*, 517 U.S. at 633). In *Windsor*, the Supreme Court decided that the Defense of Marriage Act ("DOMA") was such a law. Its purpose was to "impose restrictions and disabilities" on rights granted by those

States that, through a deliberative process, had chosen to recognize same-sex marriage. *Id.* at 2692. The Court explained:

> DOMA's unusual deviation from *the usual tradition of recognizing and accepting state definitions of marriage* here operates to deprive same-sex couples of the benefits and responsibilities of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class.

Id. at 2693 (emphasis added).

The Nevada laws being challenged here are different from DOMA in at least three ways. *First*, unlike DOMA, Amendment 3 is not a departure from but a reaffirmation of "the usual tradition of" States' defining marriage. *Id.* "By history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States." *Id.* at 2689-90.

Second, DOMA imposed a burden on marriages made lawful by States that had legalized same-sex marriage "[a]fter a statewide deliberative process" that "weigh[ed] arguments for and against same-sex marriage." *Id.* at 2689. Nevada engaged in the same statewide deliberative process and instead chose to reaffirm what had always been its definition of marriage. Justice Kennedy has explained that the equal protection guarantee requires a different analysis "when the accusation [of

discrimination] is based not on hostility" allegedly reflected in a newly enacted law, "but instead [is based] on the failure to act or the omission to remedy" what is perceived by some to be unjust discrimination. *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring). In compelling State courts to adhere to the age-old understanding of marriage, Amendment 3 did not create new law or impose any new burden on same-sex couples.

Third, striking down DOMA did not create a right to same-sex marriage; it merely reaffirmed the States' unencumbered authority to define marriage. In contrast, Plaintiffs ask this Court to not only strike down Amendment 3, but to declare that Nevada's historical definition of marriage is unconstitutional and that the Equal Protection Clause protects a free-standing right to same-sex marriage. The Supreme Court has rejected the idea that the Equal Protection Clause creates substantive rights. "It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973). Indeed, the Court has never used the animus analysis to create a new substantive right.

In sum, Nevada law has always defined marriage as the union of a man and a woman. This is anything but a "discrimination of an unusual character." To the contrary, "until recent years, many citizens had not even considered the possibility that two persons of the same sex" could get married, "[f]or marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." *Windsor*, 133 S. Ct. at 2689. Rather than being discrimination of an unusual character, "[t]he limitation of lawful marriage to heterosexual couples . . . for centuries had been deemed both necessary and fundamental." *Id.*

B. Allegations of "Animus" Are Relevant Only If a Law Can Be Explained Solely By Animus with No Other Possible Rationale.

The limited purpose of equal protection review in this context is to "ensure that classifications are not drawn *for the purpose of* disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633 (emphasis added). The plaintiff must show "that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

That a law, in the view of its opponents, suggests "'negative attitudes'" or "'fear'" toward a group is not a sufficient basis to strike it down. *Garrett*, 531 U.S. at 367. "Although such biases may often accompany irrational (and therefore unconstitutional) discrimination, their presence alone does not a constitutional violation make." *Id.* Only animus, "unsubstantiated by factors which are properly cognizable," may render legislation unconstitutional. *Id.* (internal quotation marks omitted).

In *Romer*, such animus was found only because "'all that the government c[ould] come up with in defense of the law is that the people who are hurt by it happen to be irrationally hated or irrationally feared.'" *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008) (quoting *Milner v. Apfel*, 148 F.3d 812, 817 (7th Cir. 1998)). The Court reasoned that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.'" *Romer*, 517 U.S. at 635 (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

In contrast with the unprecedented citizens' initiative in *Romer*, and the unprecedented federal intrusion into marriage laws represented by DOMA, State laws defining marriage as between a man and a woman were

long-standing and ubiquitous. And such laws remain the norm in the United States. There is simply no way to conclude that the sole purpose of the traditional definition of marriage was "to harm a politically unpopular group." *Id.*

III. Nevada's Marriage Amendment Is Not Invalid Under the Establishment Clause Because It Was Informed by Religious and Moral Viewpoints.

Provisions protecting traditional marriage typically receive support from religious organizations and people of faith. Some suggest this implicates the Establishment Clause.[21] But religious motivations are not constitutionally disqualifying in the least. It is well established that legislation is not judged by the private motivations of its supporters. *Bd. of Educ. of Westside Cnty. Schs. v. Mergens*, 496 U.S. 226, 249 (1990) ("[W]hat is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law."). The constitutional separation of church and State does not require the removal of religious values from public life or democratic deliberations.

Religion has been a key motivating factor for the most formative political movements in our Nation's history. From the founding of our

[21] *See, e.g.*, Br. of Amicus Curiae of Anti-Defamation League et al. at 10-16.

Nation[22] to the abolition of slavery,[23] the fight for women's suffrage,[24] and the civil rights movement,[25] American discourse, politics, and law have been enriched by and suffused with religious faith. Perhaps this is why in his campaign for President, Barack Obama recognized that "to say that men and women should not inject their 'personal morality' into public policy debates is a practical absurdity."[26]

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[22] "[T]he Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him." *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 212 (1963); *see* THE DECLARATION OF INDEPENDENCE para. 2 (1776). Accordingly, they amended the Constitution to secure religious liberty as America's first freedom. *See* U.S. CONST. amend. 1.

[23] Lincoln's presidential speeches, for example, were "suffused with" religious references that inspired and sustained the terrible fight to end slavery. WILLIAM LEE MILLER, LINCOLN'S VIRTUES 50 (2002).

[24] Susan B. Anthony argued that women's suffrage would bring moral and religious issues "into the political arena" because such issues were of special importance to women. Letter from Susan B. Anthony to Dr. George E. Vincent (Aug. 1904), *in* 3 IDA HUSTED HARPER, LIFE AND WORKS OF SUSAN B. ANTHONY, at 1294 (1908).

[25] Martin Luther King's best-known speeches relied on religious themes. *See* Martin Luther King, I Have a Dream (1963), *in* HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD, at 105-06 (James Melvin Washington ed., 1992); *see also id.* at 203 ("I See the Promised Land").

[26] Barack Obama, Call to Renewal Keynote Address (June 28, 2006), *available at* http://www.nytimes.com/2006/06/28/us/politics/2006obamaspeech.html?pagewanted=all&_r=0.

No principle of constitutional law, under the Establishment Clause or otherwise, prevents voters from supporting a constitutional amendment—or prohibits State legislators from enacting a law—reflecting moral judgments about what is best for society. *See Harris v. McRae*, 448 U.S. 297, 319-20 (1980) ("That the Judaeo-Chrstian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny."); *McGowan v. Maryland*, 366 U.S. 420, 422 (1961) (holding that a Sunday-closing law does not violate the Establishment Clause merely because it "happens to coincide or harmonize with the tenets of some or all religions"). To the contrary, the majority of State and congressional enactments reflect moral judgments, meaning judgments about what is right and best for society. From criminal laws, to business and labor regulations, environmental legislation, military spending, and universal health care—the law and public policy are constantly based on notions of morality. *See, e.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964) (collecting decisions upholding federal laws where "Congress was legislating against moral wrongs").

If all laws representing essentially moral choices were to be invalidated under the Establishment Clause, it would be the end of representative government as we know it, for "[c]onflicting claims of morality . . . are raised by opponents and proponents of almost every [legislative] measure." *Dandridge v. Williams*, 397 U.S. 471, 487 (1970).

Thus, it is axiomatic that no law is invalid when it "merely happens to coincide or harmonize with the tenets of some or all religions." *McGowan*, 366 U.S. at 442; *see also Harris*, 448 U.S. at 319. The Civil Rights Act of 1964—whose anniversary we celebrate—was no less valid because "Congress was also dealing with what it considered a moral problem." *Heart of Atlanta Motel*, 379 U.S. at 257. And courts "surely would not strike down a law providing money to feed the hungry or shelter the homeless if it could be demonstrated that, but for the religious beliefs of the legislators, the funds would not have been approved." *Edwards v. Aguillard*, 482 U.S. 578, 615 (1987) (Scalia, J., dissenting).

More fundamentally, declaring a law void because it adheres to traditional moral beliefs is contrary to the fundamental constitutional right of religious citizens to participate fully in the process of self-government *as believers*. "[The Constitution] does not license government to treat religion

and those who teach or practice it . . . as subversive of American ideals and therefore subject to unique disabilities." *Mergens*, 496 U.S. at 248; *see also In re Winship*, 397 U.S. 358, 385 (1970) (Black, J., dissenting) (describing the "right of each man to participate in the self-government of his society" as "perhaps the most fundamental liberty of our people"). "[N]o less than members of any other group, [religious Americans must] enjoy the full measure of protection afforded speech, association, and political activity generally." *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in the judgment). Voters cannot—and should not—be required to check their religious beliefs at the door when they enter the polls. *See id.* at 641 ("[G]overnment may not . . . fence out from political participation those . . . whom it regards as over-involved in religion.").

It follows that subjecting marriage laws and amendments to unusual constitutional scrutiny because they coincide with traditional morality would also raise grave First Amendment concerns. Increased scrutiny could be regarded as a "religious gerrymander," indirectly "regulat[ing] . . . [political participation] because it is undertaken for religious reasons." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (citations omitted). Though differing religious groups

may align on different sides of the issue, judges cannot pronounce the religious beliefs of one set of voters enlightened and another benighted. Such exclusion would disenfranchise religious voters who take one side of the debate while privileging those with the opposing view, effectively targeting traditional religious believers for unusual burdens.

"The Establishment Clause . . . may not be used as a sword to justify repression of religion or its adherents from any aspect of public life." *McDaniel*, 435 U.S. at 640-41 (Brennan, J., concurring in the judgment) (citations omitted). Citizens of faith are entitled to rely on their religious beliefs in debating and making decisions about important matters of public policy. And Nevada's marriage amendment and marriage law are entitled to be judged on their merits based on settled rules of law—not on a more demanding standard born of suspicion toward religion, religious believers, or their values.

CONCLUSION

Marriage, understood as the union of one man and one woman, remains a vital and foundational institution of civil society. The government's interests in continuing to encourage and support marriage are not merely legitimate but compelling. No other institution joins

together persons with the natural ability to have children for the purpose of maximizing the welfare of those children. No other institution strives to ensure that children have the opportunity of being raised in a stable household by the mother and father who brought them into the world. Undermining the husband-wife marital institution by redefining it to include same-sex couples will, in the long term, directly harm vital child-welfare interests that only the husband-wife definition can secure. The result will be more mothers and fathers concluding that the highest end of marriage is not the welfare of their children but the advancement of their own life choices. We know, from personal experience over numerous decades of ministering to families and children, that still more focus on adult relationships will not benefit vulnerable children. The societal ills caused by the deterioration of husband-wife marriage will only be aggravated if the State cannot reserve to marriage its historic and still cherished meaning.

DATED this 28th day of January, 2014.

KIRTON | MCCONKIE

By: *s/* Alexander Dushku
Alexander Dushku
R. Shawn Gunnarson
Justin W Starr
1800 Eagle Gate Tower
60 E. South Temple
Salt Lake City, Utah 84111
Telephone: (801)328-3600
Facsimile: (801)321-4893
e-mail: adushku@kmclaw.com

Attorneys for *Amici Curiae*
Religious Organizations

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Fed. R. App. P 32(a)(7)(B) and 29(b) because it contains 6948 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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KIRTON | MCCONKIE

By: *s/* Alexander Dushku
Alexander Dushku
R. Shawn Gunnarson
Justin W Starr
1800 Eagle Gate Tower
60 E. South Temple
Salt Lake City, Utah 84111
Telephone: (801)328-3600
Facsimile: (801)321-4893
e-mail: adushku@kmclaw.com

Attorneys for *Amici Curiae*
Religious Organizations

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 28, 2014.

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KIRTON | MCCONKIE

By: *s/* Alexander Dushku

Alexander Dushku
R. Shawn Gunnarson
Justin W Starr
1800 Eagle Gate Tower
60 E. South Temple
P.O. Box 45120
Salt Lake City, Utah 84145-0120
Telephone: (801)328-3600
Facsimile: (801)321-4893
e-mail: adushku@kmclaw.com

Attorneys for *Amici Curiae*
Religious Organizations

ADDENDUM—STATEMENTS OF INTEREST OF THE *AMICI*

The United States Conference of Catholic Bishops ("USCCB" or "Conference") is a nonprofit corporation, the members of which are the Catholic Bishops in the United States. The USCCB advocates and promotes the pastoral teaching of the U.S. Catholic Bishops in such diverse areas of the nation's life as the free expression of ideas, fair employment and equal opportunity for the underprivileged, protection of the rights of parents and children, the sanctity of life, and the nature of marriage. Values of particular importance to the Conference include the promotion and defense of marriage, the protection of the First Amendment rights of religious organizations and their adherents, and the proper development of the nation's jurisprudence on these issues.

The National Association of Evangelicals ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 41 member denominations, as well as numerous evangelical associations, missions, nonprofits, colleges, seminaries, and independent churches. NAE serves as the collective voice of evangelical churches, as well as other church-related and independent religious ministries.

The Church of Jesus Christ of Latter-day Saints ("LDS Church") is a Christian denomination with over 14 million members worldwide. Marriage and the family are central to the LDS Church and its members. The LDS Church teaches that marriage between a man and a woman is ordained of God, that the traditional family is the foundation of society, and that marriage and family supply the crucial relationships through which parents and children acquire private and public virtue. Out of support for these fundamental beliefs, the LDS Church appears in this case to defend the traditional, husband-wife definition of marriage.

The Ethics and Religious Liberty Commission (ERLC) is the moral concerns and public policy entity of the Southern Baptist Convention (SBC), the nation's largest Protestant denomination, with over 46,000 churches and 16 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as marriage and family, the sanctity of human life, ethics, and religious liberty. Marriage is a crucial social institution. As such, we seek to strengthen and protect it for the benefit of all.

The Lutheran Church-Missouri Synod is the second largest Lutheran denomination in North America, with approximately 6,150 member congregations which, in turn, have approximately 2,400,000 baptized members. The Synod believes that marriage is a sacred union of one man and one woman (Gen. 2:24-25), and that God gave marriage as a picture of the relationship between Christ and His bride the Church (Eph. 5:32). As a Christian body in this country, the Synod believes it has the duty and responsibility to speak publicly in support of traditional marriage and to protect marriage as a divinely created relationship between one man and one woman.