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, *Defendant-Appellant*,
LORETTA J. FUDDY, *Defendant-Appellee*, and
HAWAII 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

AMICI CURIAE BRIEF OF NATIONAL WOMEN'S LAW CENTER, WILLIAMS INSTITUTE SCHOLARS OF SEXUAL ORIENTATION AND GENDER LAW, AND WOMEN'S LEGAL GROUPS IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

[All Parties Have Consented. FRAP 29(a)]

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CORPORATE DISCLOSURE STATEMENT

None of the Amici has a parent corporation, and no corporation owns 10% or more of any of Amici's stock.

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I. INTEREST OF AMICI CURIAE[1]

Amici Curiae are the National Women's Law Center, other women's legal organizations, and professors of law associated with the Williams Institute, an academic research center at UCLA School of Law dedicated to the study of sexual orientation and gender identity law and public policy. These organizations and individuals have substantial expertise in constitutional issues related to equal protection of the laws, including with respect to discrimination based on sex, sexual orientation, and gender stereotypes. Their expertise thus bears directly on the issues before the Court in these cases. Descriptions of the individual Amici are set out in the Appendix.

II. SUMMARY OF ARGUMENT

Under the federal Constitution's equal protection guarantees, laws that discriminate based on gender stereotypes or expectations are subject to heightened judicial scrutiny, and such laws cannot stand unless the government can present an "exceedingly persuasive justification," showing that such laws substantially further important governmental interests.

[1] No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than the Amici Curiae, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief.

United States v. Virginia, 518 U.S. 515, 533 (1996) (hereinafter "*VMI*"). In particular, the government may not enforce gender-specific rules based on stereotypes about roles that women and men perform within the family, whether as caregivers, breadwinners, heads of households, or parents. Courts have recognized that such laws warrant heightened scrutiny because legal imposition of archaic and overbroad gender stereotypes arbitrarily harms women and men by limiting individuals' abilities to make decisions fundamental to their lives and their identities.

Laws that discriminate based on sexual orientation share with laws that discriminate based on sex a similar basis in overbroad gender stereotypes about the preferences and capacities of men and women.[2] Lesbians, gay men, and bisexual persons long have been harmed by legal enforcement of the expectation that an individual's most intimate relationship will be with a person of a different sex, not with a person of the same sex. Such presumptions underlie many laws that discriminate based on sexual orientation, including the state marriage laws at issue in the cases before this Court. Just as the Constitution has required close scrutiny of

[2] Although this brief focuses on the level of constitutional scrutiny that is appropriate for laws that discriminate based on sexual orientation, Amici note that laws that discriminate based on gender identity, including transgender status, are also premised on overbroad gender stereotypes and warrant heightened scrutiny.

laws that restrict the roles that men and women perform within marriage on the basis of gender stereotypes, so, too, the Constitution requires close scrutiny of laws based on gender stereotypes that restrict individuals' liberty to decide with whom they will enter such intimate relationships.

Applying heightened scrutiny, courts have played an important role in dismantling many laws that sought to enforce separate gender roles within marriage, based on the principle that such legally enforced roles do not properly reflect all individuals' abilities to participate in society and in family life. Nevertheless, many states, including Nevada and Hawai‘i, continue to enforce laws prohibiting same-sex couples from marrying even though such laws rest on overbroad gender stereotypes about the preferences, relationship roles, and capacities of men and women that do not reflect the realities of the lives of gay, lesbian, and bisexual persons. Such imposition by the state of gender-based expectations on the roles that men and women should play in the most intimate of relationships causes gay, lesbian, and bisexual persons to experience not only serious practical harms, but also dignitary harms of constitutional dimension. Such discrimination communicates to gay, lesbian, and bisexual persons and to the world in which they live that there is something wrong with a core part of their identity, that they do not measure up to what a man or a woman supposedly

should be, and that their most important relationships are "less worthy," *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013), than the relationships and marriages of different-sex couples.

This Court should hold that laws that discriminate based on sexual orientation warrant heightened judicial scrutiny and that the state marriage laws challenged in these lawsuits cannot withstand such scrutiny.

III. ARGUMENT

The Supreme Court recognized in *Lawrence v. Texas*, that "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." 539 U.S. 558, 579 (2003). Over the last four decades, application of heightened scrutiny to laws that discriminate based on sex has served as an important bulwark in protecting opportunities to seek fulfillment in family life, education, and work, free from the imposition by government of gender-based roles.

Gay men, lesbians, and bisexual persons, however, are still subject to laws that burden their liberty to enter into relationships, including marriage, with the person to whom they may feel closest—a person of the same sex. Those laws deny gay, lesbian, and bisexual persons full citizenship in profound ways. Rather than serving an important governmental interest, such discriminatory laws typically reflect

the gender-role expectation that women will form intimate relationships with men, not with other women, and that men will form such relationships with women, not with other men. The decisions whether and with whom to enter into intimate relationships, including marriage, are central to individual liberty under the Constitution, and the government has no authority to restrict those choices based on gender-based expectations, just as it has no authority to codify the roles that men and women fill within marriage on such bases. The Supreme Court repeatedly has held that the government may not justify sex discrimination by an asserted interest in perpetuating traditional gender roles in people's family and work lives. Neither may state actors justify sexual orientation discrimination based upon rigid and exclusionary definitions of the roles that men and women fill within relationships.

Under the federal Constitution's guarantees of equal protection, laws that deny rights or opportunities based on sexual orientation should be subject to heightened scrutiny. Heightened scrutiny for such laws follows straightforwardly from precedents identifying relevant factors in considering whether certain classifications warrant careful judicial scrutiny, rather than simple deference to majoritarian lawmaking. *See generally United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (noting several

considerations that "may call for . . . more searching judicial inquiry"); *San Antonio v. Rodriguez*, 411 U.S. 1, 28 (1973) (reciting "traditional indicia of suspectness").

Central among the reasons why close scrutiny is appropriate for laws that discriminate on the basis of sexual orientation is such laws' frequent reliance on inaccurate and often invidious stereotypes. In particular, laws that discriminate based on sexual orientation share a key feature with laws that discriminate on the basis of sex: Both forms of discrimination are frequently rooted in stereotypes about supposedly "natural," "moral," or "traditional" roles or conduct for women and men. Were this Court to apply to laws that discriminate based on sexual orientation the same standard of review that is applicable to sex discrimination, a law denying rights based on sexual orientation would be invalid unless the government could show an "exceedingly persuasive justification" for the law, including a showing "at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives" without "rely[ing] on overbroad generalizations about the different talents, capacities, or preferences of males and females." *VMI*, 518 U.S. at 533 (internal quotation marks and citations omitted; first alteration in original).

In *United States v. Windsor*, the Supreme Court noted that the question whether laws that discriminate based on sexual orientation warrant heightened scrutiny is "still being debated and considered in the courts." 133 S. Ct. at 2683. In affirming the judgment of the Second Circuit in that case, the Supreme Court let stand the Second Circuit's holding that the federal Constitution requires heightened scrutiny of laws that discriminate based on sexual orientation. *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012). In addition, the highest courts of California, Connecticut, and Iowa have held that, under their state constitutions, laws that classify based on sexual orientation are subject to heightened judicial scrutiny. *See Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa 2009); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 432-54 (Conn. 2008); *In re Marriage Cases*, 183 P.3d 384, 401 (Cal. 2008). As further explained below, this Court similarly should hold that laws that deny rights and opportunities based on sexual orientation warrant heightened judicial scrutiny. The particular measures challenged in these lawsuits—the discriminatory marriage laws of Nevada and Hawai'i—cannot withstand such scrutiny.

A. The Supreme Court Adopted Heightened Scrutiny For Laws That Discriminate Based On Sex Because Such Laws Are Frequently Based On Gender Stereotypes And Gender-Based Expectations.

Again and again, courts have recognized that laws that discriminate on the basis of sex typically rely on gender-based expectations about the roles or conduct that is supposedly natural, moral, or traditional for women and men, and that enforcement of these gender stereotypes is incompatible with equal opportunity. Indeed, a repeated refrain runs through modern case law addressing measures that deny rights or opportunities based on sex: Such laws warrant "skeptical scrutiny," *VMI*, 518 U.S. at 531, because "of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of archaic and overbroad generalizations about gender, or based on outdated misconceptions concerning the role of females in the home rather than in the marketplace and world of ideas." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135 (1994) (internal quotation marks omitted). As this Court has observed, "The Supreme Court has repeatedly condemned distinctions made between men and women based on 'archaic and overbroad generalizations,' 'old notions,' and 'role typing.'" *Moore v. City of San Jose*, 615 F.2d 1267, 1272 (9th Cir. 1980) (quoting *Califano v. Goldfarb*, 430 U.S. 199, 207, 211 (1977) (hereinafter "*Goldfarb*")).

In *Frontiero v. Richardson*, for example, a plurality of the Supreme Court recognized "that our Nation has had a long and unfortunate history of sex discrimination," and that the Supreme Court itself had played a role in that history. 411 U.S. 677, 684 (1973) (plurality). Justice Brennan's plurality opinion in *Frontiero* noted now-infamous language from an 1873 opinion that "'[m]an is, or should be, women's protector and defender'"; that women's "natural and proper timidity and delicacy" rendered women "unfit[]for many of the occupations of civil life"; and that "[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother." *Id.* at 684-85 (quoting *Bradwell v. Illinois*, 16 Wall. 130, 141 (1873) (Bradley, J., concurring)). The *Frontiero* plurality acknowledged that "[a]s a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes." 411 U.S. at 685.

Frontiero struck down a military benefits scheme premised on the gender-based expectation that women were financially dependent on their husbands. It directly rejected assumptions that the Supreme Court had relied on not only in that 1873 decision but through the 1950s and 1960s—assumptions that fundamental differences between women and men, rooted in women's traditional family roles, justified laws limiting opportunities for

women and reinforcing gender stereotypes. *See Hoyt v. Florida,* 368 U.S. 57, 62 (1961) (upholding state law that made jury duty registration optional for women because "woman [was] still regarded as the center of home and family life"); *Goesaert v. Cleary,* 335 U.S. 464, 466 (1948) (upholding statute prohibiting women from bartending unless they were a wife or a daughter of the bar owner because states were not precluded "from drawing a sharp line between the sexes" and "oversight . . . by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight"); *cf. Muller v. Oregon*, 208 U.S. 412, 421-22 (1908) (upholding legislation limiting women's work hours because "healthy mothers are essential to vigorous offspring, [and so] the physical well-being of woman becomes an object of public interest").

In *Weinberger v. Wiesenfeld*, the Supreme Court further illuminated how laws based on gender stereotypes arbitrarily harmed those who did not conform to those stereotypes. 420 U.S. 636 (1975) (hereinafter "*Wiesenfeld*"). *Wiesenfeld* held a provision of the Social Security Act that provided for payment of benefits to a deceased worker's *widow* and minor children, but not to a deceased worker's *widower*, violated the Constitution. *Id.* at 637-38. First, the Court explained that the challenged measure's reliance on the "gender-based generalization" that "men are more likely than

women to be the primary supporters of their spouses and children" devalued the employment of women, "depriv[ing] women of protection for their families which men receive as a result of their employment" while nevertheless requiring that women workers contribute through the Social Security system to the support of others' families. *Id.* at 645. Second, the challenged provision "was intended to permit women to elect not to work and to devote themselves to the care of children." *Id.* at 648. The measure thereby failed to contemplate fathers such as Stephen Wiesenfeld, a widower who wished to care for his child at home. Rejecting the statute's imposition of gender roles, the Court declared: "It is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female. And a father, no less than a mother, has a constitutionally protected right to the 'companionship, care, custody, and management' of 'the children he has . . . raised . . . .'" *Id.* at 652 (citation omitted); *see also Goldfarb*, 430 U.S. at 216-17 (finding unconstitutional a Social Security provision differentially treating nondependent widows and widowers "based simply on 'archaic and overbroad' generalizations").

As these and many other cases illustrate, laws that discriminate on the basis of sex are most typically premised on gender stereotypes—including particularly stereotypes of the family as necessarily constituted by a woman

assuming the role of homemaker and caretaker and a man assuming the role of breadwinner and protector.[3] In their failure to recognize that many men and women either do not wish to or are unable to conform to these roles, such laws arbitrarily limit individuals' ability to make fundamental decisions about how to live their lives. When the law enforces "assumptions about the proper roles of men and women," it closes opportunity, depriving individuals of their essential liberty to depart from gender-based expectations. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982) (hereinafter "*Hogan*"). Accordingly, "the test for determining the validity of a gender-based classification . . . must be applied free of fixed notions concerning the roles and abilities of males and females." *Id.* at 724-25.

This Court has recognized "the clear teachings of a long line of Supreme Court decisions that 'archaic and overbroad generalizations' cannot

[3] *See, e.g.*, *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (hereinafter "*Westcott*") (finding unconstitutional federal statute providing for support in event of father's unemployment, but not mother's unemployment; describing measure as based on stereotypes that father is principal provider "while the mother is the 'center of home and family life'"); *Orr v. Orr*, 440 U.S. 268, 283 (1979) (invalidating measure imposing alimony obligations on husbands, but not on wives, because it "carries with it the baggage of sexual stereotypes"); *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975) (finding unconstitutional state support statute assigning different age of majority to girls than to boys and stating, "[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas").

justify 'statutes employing gender as an inaccurate proxy for other, more germane bases of classification.'" *Blake v. City of Los Angeles*, 595 F.2d 1367, 1385 (9th Cir. 1979) (quoting *Craig v. Boren*, 429 U.S. 190, 198 (1976)). Such "loose-fitting characterizations" were determined to be "incapable of supporting . . . statutory schemes . . . premised upon their accuracy." *Craig*, 429 U.S. at 199. By requiring an "exceedingly persuasive" showing of a far closer relationship between a sex classification and a statutory scheme's objective, and by demanding that the objective be important, the Supreme Court rejected the "artificial constraints on an individual's opportunity" imposed by laws resting on imprecise gender stereotypes. *VMI*, 518 U.S. at 533.

B. Laws That Discriminate Based On Sexual Orientation Should Be Subject To Heightened Scrutiny Because Of Their Frequent Basis In Gender Stereotypes And Gender-Based Expectations.

Just as laws that classify based on sex frequently are based on gender stereotypes or expectations that do not hold true for all men and women, so are laws that discriminate based on sexual orientation. Central among those gender-based expectations are the presumptions that a woman will be attracted to and form an intimate relationship with a man, not with a woman, and that a man will be attracted to and form an intimate relationship with a woman, not with a man. Marriage laws that discriminate based on sexual

orientation rest on those gender-based expectations and also are expressly defended based on other presumptions about the preferences, relationship roles, and capacities of men and women that do not reflect the realities of the lives of gay men, lesbians, and bisexual persons. The courts have rejected such stereotypes as a proper basis for lawmaking with regard to sex. Courts similarly should view with skepticism such gender stereotypes and gender-based expectations when reviewing the constitutionality of laws that discriminate based on sexual orientation.

1. Laws That Discriminate Based On Sexual Orientation Are Rooted In Gender Stereotypes Or Gender-Based Expectations.

Laws that classify based on sexual orientation share with laws that discriminate based on sex a foundation in gender stereotypes or gender-based expectations. Many laws discriminating based on sexual orientation are founded on assumptions that men and women form (or should form) intimate, romantic, or sexual relationships with each other, rather than with persons of the same sex. Such laws have embodied expectations such as the following:

- that a woman will be attracted romantically and sexually to a man, and that a man will be attracted romantically and sexually to a woman;

- that a woman's usual (or preferred) role is to form a household and a family with a man, and that a man's usual (or preferred) role is to form a household and a family with a woman; and
- that women will not enter intimate relationships with each other, and that men will not enter intimate relationships with each other.

Such assumptions have been at the root of laws prohibiting same-sex intimate conduct and laws regarding family structure that discriminate on the basis of sexual orientation, such as the restrictive marriage laws of Nevada and Hawai'i that the present lawsuits challenge. Perhaps less apparent, but equally true is that such gender-based expectations underlie other forms of discrimination against gay, lesbian, and bisexual people, too.

The notion that stigma and discrimination against gay, lesbian, and bisexual persons are premised on gender-role assumptions is a matter of common experience in our society. "There is nothing esoteric or sociologically abstract in the claim that the homosexuality taboo enforces traditional sex roles. Everyone knows that it is so." Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 235 (1994); *id.* ("Most Americans learn no later than high school that one of the nastier sanctions that one will suffer if one deviates from the behavior traditionally deemed appropriate for one's sex is

the imputation of homosexuality. The two stigmas, sex-inappropriateness and homosexuality, are virtually interchangeable, and each is readily used as a metaphor for the other."); *see also Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) ("[S]tereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women."). Individuals who depart from gender-based expectations are often targeted with antigay animus and slurs, regardless of their actual sexual orientation. Gay, lesbian, and bisexual people regularly experience social disapproval and discrimination that is targeted at their nonconformity with gender-based expectations—because they are not acting as so-called "real men" or "real women" supposedly do.

Although the linkage between antigay stigma and gender-based expectations is apparent in ordinary life, courts have only recently recognized some of the implications of that linkage for the law. For example, in considering whether gay, lesbian, and bisexual people could find recourse in federal statutes prohibiting discrimination based on sex, courts initially focused on the absence of express mention of sexual orientation in such laws. *DeSantis v. Pac. Tel. & Tel. Co., Inc.*, 608 F.2d 327, 329-30 (9th Cir. 1979), *abrogated by Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 875 (9th Cir. 2001). More recently, however, courts have begun to

understand that much of the discrimination that gay, lesbian, and bisexual people experience in the workplace or in educational environments takes the form of hostility toward nonconformance with gender stereotypes—which the Supreme Court recognized twenty-four years ago constitutes discrimination based on sex. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1069 (9th Cir. 2002) (en banc) (Pregerson, J., concurring) (concluding that gay male employee stated a claim for sex discrimination under Title VII of the Civil Rights of 1964, 42 U.S.C. § 2000e *et seq.*, where there was evidence that he was mocked by male co-workers based on his non-conformance with "gender-based stereotypes"); *Nichols*, 256 F.3d at 874-75 (holding that harassment of male employee for failing to act "as a man should act," including being derided for not having sex with female colleague, constituted actionable sex discrimination under Title VII because plaintiff was discriminated against for not conforming to gender stereotypes); *Riccio v. New Haven Bd. of Educ.*, 467 F. Supp. 2d 219 (D. Conn. 2006) (explaining that harassment in the form of antigay epithets could be actionable under Title IX's prohibition of sex discrimination because such harassment could be based on plaintiff student's gender or failure to conform to gender stereotypes).

Federal agencies also have recently emphasized that much discrimination experienced by gay, lesbian, and bisexual people is discrimination based on nonconformity with gender stereotypes or gender-based expectations. For example, the Civil Rights Division of the United States Department of Justice recently issued guidance explaining that federal employment, housing, education, and other statutes that prohibit discrimination based on sex and that the Division enforces "protect[] all people (including [lesbian, gay, bisexual, transgender, and intersex] people) from . . . discrimination based on a person's failure to conform to stereotypes associated with [a] person's real or perceived gender." U.S. Dep't of Justice, Civil Rights Div., Protecting the Rights of Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Individuals, http://www.justice.gov/crt/publications/lgbtibrochure.pdf (last visited Oct. 24, 2013).[4] In addition, the U.S. Equal Employment Opportunity

[4] The United States Department of Education's Office for Civil Rights similarly has issued guidance explaining that harassment of students "on the basis of their [lesbian, gay, bisexual, or transgender] status," when such harassment is based on "sex-stereotyping," is prohibited by the proscription of sex discrimination contained in Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* U.S. Dep't of Educ. Office for Civil Rights, Dear Colleague Letter: Harassment and Bullying at 7-8 (Oct. 26, 2010), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf (last visited Oct. 24, 2013). The Department of Housing and Urban Development has similarly construed the sex discrimination prohibition in the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* *See* Equal

Commission recently issued an opinion explaining that Title VII's "broad prohibition of discrimination 'on the basis of . . . sex' will offer coverage to gay individuals in certain circumstances," including where an employee is discriminated against "based on the perception that he does not conform to gender stereotypes of masculinity." *David Couch*, Complainant, E.E.O.C. No. 0120131136, 2013 WL 4499198 at *7-9 (Aug. 13, 2013).

Just as courts and agencies have recognized in the context of *statutory* antidiscrimination protections that *Price Waterhouse*'s anti-stereotyping principle can serve as a basis for protecting gay, lesbian, and bisexual people from discrimination, so should courts give consideration to the question of what implications the Supreme Court's *constitutional* sex discrimination jurisprudence—based as it is on an anti-stereotyping principle—has for laws that discriminate based on sexual orientation. Laws that discriminate based on sexual orientation are, at their core, based on supposedly "'fixed notions'" about the roles, preferences, and capacities of women and men that

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Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5662-01 (Feb. 3, 2012) (to be codified at 24 C.F.R. Parts 5, 200, 203, 236, 400, 570, 574, 882, 891, and 982) ("[T]he Fair Housing Act's prohibition of discrimination on the basis of sex prohibits discrimination against LGBT persons in certain circumstances, such as those involving nonconformity with gender stereotypes.").

this Court has rejected in sex discrimination cases under the Equal Protection Clause. *VMI*, 518 U.S. at 541 (quoting *Hogan*, 458 U.S. at 725).

Because sexual orientation is defined in terms of relationships—that is, in terms of the sex of persons to whom one is attracted—many laws that classify based on sexual orientation do so by regulating the relationships formed by two persons. Such is the case with laws restricting marriage or marriage recognition to unions of a man and woman, including the Nevada and Hawai‘i measures here at issue. It is easy to see how gender-role assumptions lie behind such relationship-recognition laws. Equally important, however, is that enforcement of gender-role expectations lies at the heart of most, if not all, government discrimination based on sexual orientation, whether the discrimination takes the form of enactments targeting gay, lesbian, or bisexual people or instead appears in the form of discrimination by government officials in areas such as employment, housing, or education.[5] Such discrimination seeks to impose gender-based

[5] In addition to family-recognition laws that discriminate based on sexual orientation, other types of government enactments that classify based on sexual orientation include laws that regulate with respect to particular sexual orientations, *see, e.g.*, *Romer v. Evans*, 517 U.S. 620, 624-26 (1996) (invalidating Colorado state constitutional measure labeled “No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation”); laws that single out persons having or identifying as having a particular sexual orientation, *see e.g.*, 10 U.S.C. § 654(b) (1993) (“Don’t Ask, Don’t Tell” statute formerly providing for discharge of a member of the United States

expectations as to how men and women will or should structure their personal and family lives.

2. Government Action That Discriminates Based On Sexual Orientation Warrants Heightened Scrutiny.

Gay, lesbian, and bisexual people long have had important life opportunities foreclosed by improper efforts by the government to enforce gender-based stereotypes in connection with the most intimate of human relationships. Just as classifications based on sex "have traditionally been the touchstone for pervasive and often subtle discrimination," *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979), so, too, have classifications based on sexual orientation. As with measures seeking to enforce outdated gender stereotypes on the basis of sex, the courts should require at least "an exceedingly persuasive justification," *id.*, in order for classifications based on sexual orientation to withstand equal protection review. That is so because such measures frequently bear little or no relation to the actual abilities, capacities, or preferences of the persons that such measures constrain or burden.

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armed forces for "stat[ing] that he or she is a homosexual or bisexual"), *repealed by* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111–321, 124 Stat. 3515 (2010); and laws that target same-sex intimate conduct, *Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring in the judgment) ("While it is true that [Texas's anti-sodomy statute] applies only to conduct, . . . [i]t is . . . directed toward gay persons as a class.").

Heightened scrutiny is particularly appropriate in this context because laws that impose gender-role expectations in contravention of the actual preferences of individuals offend the central liberty interest on which the Supreme Court focused in *Lawrence* and acknowledged in *Windsor*. In *Lawrence*, the Court recognized that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution *allows homosexual persons the right to make this choice*." 539 U.S. at 567 (emphasis added); *Windsor*, 133 S. Ct. at 2675. In *Lawrence*, the Supreme Court reaffirmed that "'matters involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment,'" and that "'[b]eliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.'" 539 U.S. at 573 (quoting *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 851 (1992)). The Court in *Lawrence* was emphatic that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do," *id.* at 574, and in *Windsor*, the Court expressly noted that state marriage laws permitting same-sex couples to marry "reflect[] . . . evolving understanding of the

meaning of equality," 133 S. Ct. at 2692-93. The liberty principle so fundamental to the Court's analysis in *Lawrence* and the related equal opportunity principle that the Equal Protection Clause enshrines are incompatible with a system of laws that would presume as constitutional, rather than viewing with close scrutiny, the legally enforced expectation that men and women should enter into intimate relationships only with each other. Such laws arbitrarily deny opportunities and legal protections to individuals who are capable of fulfilling the responsibilities of marriage and who would benefit from legal protections accompanying marriage.

The courts should look with skepticism upon laws that rely on overbroad stereotypes rather than on the actual abilities of persons to engage in mutual care and protection, to share economic risks, and, if they choose, to raise children together—abilities that do not turn on sexual orientation. An essential component of the Constitution's equal protection guarantee is that the government cannot exclude individuals from important social statuses, institutions, relationships, or legal protections because of a characteristic that is irrelevant to participation in such statuses, institutions, relationships, or protections. Because legal enforcement of overbroad gender stereotypes arbitrarily constrains and determines individuals' most

fundamental and personal choices about their own lives, equal protection requires vigorous interrogation of any such government action.

C. Laws Excluding Same-Sex Couples From Marriage Cannot Survive Heightened Scrutiny.

Laws related to marriage were once a leading example of sex-based rules enforcing separate gender roles for men and women and depriving persons of equal opportunities. As the harm arising from laws requiring adherence to gender stereotypes has been recognized, sex-based marriage rules have been almost completely dismantled, with one glaring exception: many states' exclusion of same-sex couples from marriage. The Constitution's guarantee of equal protection promises gay, lesbian, and bisexual persons, as it promises all persons, "full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society." *VMI*, 518 U.S. at 532. Subjecting laws, including marriage laws, that discriminate based on sexual orientation to heightened scrutiny is appropriate so that each person may have equal opportunity to aspire to and to experience a relationship with the person with whom he or she most wishes to build a life.

1. Nearly All Sex-Specific Marriage Laws That Once Enforced Gender Stereotypes Have Been Dismantled, Including Through Application Of Heightened Scrutiny.

Historically, "the husband and wife [were] one person in law: . . the very being or legal existence of the woman [was] suspended . . . or at least [was] incorporated and consolidated into that of the husband." 1 William Blackstone, *Commentaries on the Laws of England* 442 (3d ed. 1768); Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* 11 (2000). For example, wives could not contract or dispose of their assets without their husbands' cooperation. Even after the Married Women's Property Acts and similar laws gave married women increased control over their property in the nineteenth century, many state and federal statutes continued to rely on the notion that marriage imposed separate (and unequal) roles on men and women. *See generally* Deborah A. Widiss, *Changing the Marriage Equation*, 89 Wash. U. L. Rev. 721, 735-39 (2012). Indeed, courts routinely invalidated efforts by spouses to "alter the 'essential' elements of marriage" through contractual arrangements seeking to modify its "gender-determined aspects." Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 Law & Sexuality 9, 15 & n.24 (1991).

An extensive legal framework continued to set out gender-specific rules relating to marriage well into the second half of the twentieth century.

In 1971, for example, an appendix to the appellant's brief submitted by then-attorney Ruth Bader Ginsburg in *Reed v. Reed* listed numerous areas of state law that disadvantaged married women, including: mandatory disqualification of married women from administering estates of the intestate; special qualifications on married women's right to engage in independent business; limitations on the capacity of married women to become sureties; differential marriageable ages; and domiciles of married women following that of their husbands. Brief for Appellant at 69-88 (App.), *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4) (collecting state laws in each area). Federal law also persisted in attaching different legal consequences to marriage for men and women. For example, across a variety of federal programs, benefits were provided to wives on the assumption that they were financially dependent on their husbands, but denied to husbands altogether or unless they could prove financial dependence on their wives. *See, e.g.*, *Goldfarb*, 430 U.S. at 201; *Wiesenfeld*, 420 U.S. at 643-44.

In the intervening years, courts applying heightened scrutiny have played a key role in dismantling the legal machinery enforcing separate gender roles within marriage, based on the principle that such legally enforced roles do not properly reflect individuals' "ability to perform or

contribute to society" and thus violate "'the basic concept of our system that legal burdens should bear some relationship to individual responsibility.'" *Frontiero*, 411 U.S. at 686 (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)); *see also, e.g.*, *Kirchberg v. Feenstra*, 450 U.S. 455, 458-60 (1981) (invalidating Louisiana statute giving the husband as "head and master" the right to sell marital property without his wife's consent); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 147-48 (1980) (rejecting stereotypes regarding wives' financial dependency in the context of differential workers' compensation benefits); *Westcott*, 443 U.S. at 89 (finding unconstitutional a statute's limitation of social security benefits to unemployed fathers, rather than to both fathers and mothers); *Orr*, 440 U.S. at 281-82 (rejecting stereotypes regarding wives' financial dependency in the context of alimony); *Goldfarb*, 430 U.S. at 206-07 (rejecting "'role-typing society has long imposed'" (citation omitted)). As a result, men and women entering into marriage today have the liberty under law to determine for themselves the responsibilities each will shoulder regardless of whether these roles conform to traditional arrangements.

2. Like Other Marriage Laws Enforcing Gender Stereotypes Or Gender-Based Expectations, Laws Excluding Same-Sex Couples From Marriage Cannot Survive Constitutional Scrutiny.

Although the law no longer expressly imposes separate roles on married men and women, marriage laws that discriminate based on sexual orientation continue to rest on—and now are expressly defended based on—gender stereotypes about the preferences, relationship roles, and capacities of men and women that do not reflect the realities of the lives of many couples. In this litigation, the exclusion of same-sex couples from marriage has been defended on the supposed ground that "[m]an-woman marriage is the only institution that can confer the status of *husband* and *wife*" because supposedly inherent differences between the sexes prescribe distinct roles for each with "distinct mode[s] of association and commitment that carr[y] centuries and volumes of social and personal meaning." Mot. for S.J. and Mem. in Support of Intervenor-Defendant Coalition for the Protection of Marriage at 24, *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012) (No. 2:12-cv-00578-RCJ-PAL), ECF No. 72, 2012 WL 5870998. Such arguments rest on supposedly universal, qualitative differences between the roles that men and women fill in relationships and between the unions of different-sex couples and the unions of same-sex couples. Such purported

justifications for differential treatment of different-sex and same-sex couples reflect gender stereotyping on which the courts must focus a skeptical eye.

The same is true for the contention that permitting same-sex couples to marry could have harmful effects on child welfare because children need to be raised by both a mother and a father. *See, e.g.*, *id.* at 21-22. Same-sex couples, of course, may become parents through adoption, assisted reproduction, or surrogacy, or may be raising children from prior relationships, and Nevada and Hawai‘i currently contemplate through their respective domestic partnership and civil union regimes that same-sex couples will have and raise children. Courts repeatedly have struck down laws that discriminate based on the assumption that mothers and fathers predictably play different roles as parents, rejecting "any universal difference between maternal and paternal relations at every phase of a child's development." *Caban v. Mohammed*, 441 U.S. 380, 389 (1979); *see also Wiesenfeld*, 420 U.S. at 652 (noting "that men with sole responsibility for children will encounter the same child-care related problems" "that women who work when they have sole responsibility for children encounter"); *Stanley v. Illinois*, 405 U.S. 645, 646-47 (1972) (finding unconstitutional a state's presumption that single fathers were unfit to raise

their children where single mothers were presumed fit to raise their children).

Generalizations about how mothers and how fathers typically parent are an insufficient basis for discriminatory laws even when these generalizations are "not entirely without empirical support." *Wiesenfeld*, 420 U.S. at 645. There is *no* empirical support, however, for any notion that different-sex couples are more effective in parenting than same-sex couples. *See, e.g.*, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 980 (N.D. Cal. 2010) (finding that 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"); Michael E. Lamb, *Mothers, Fathers, Families, and Circumstances: Factors Affecting Children's Adjustment*, 16 Applied Developmental Sci. 98, 104 (2012) (same).

The relegation of same-sex couples to statuses such as domestic partnerships and civil unions instead of marriage inflicts serious harms on same-sex couples and their children. Those harms include not only denial of federal marital benefits and responsibilities, but also serious dignitary harms, which, as the Supreme Court emphasized in *Windsor*, are of constitutional

dimension. 133 S. Ct. at 2694-95 (explaining how the refusal of the federal government to recognize the marriages of same-sex couples "demeans" the members of such couples and "humiliates" their children). *Windsor* instructs that, in evaluating for constitutional purposes the harms that discriminatory marriage laws inflict, dignitary harms are of great moment.

One of the most serious ways in which laws that exclude same-sex couples from marriage demean the members of those couples—and demean all gay, lesbian, and bisexual persons—is by the imposition of gender-based expectations on the roles that men and women should play in the most intimate of relationships. State enforcement of such gender stereotypes and gender-based expectations—through exclusionary marriage laws and through other discriminatory government action—communicates to gay, lesbian, and bisexual persons and to the community in which they live that there is something wrong with a core part of their identity and being. Such government action communicates that gay, lesbian, and bisexual persons do not measure up to what a man or a woman should be and that their most important relationships are "less worthy," *Windsor*, 133 U.S. at 2696, than the relationships and marriages of different-sex couples. Such discrimination cannot survive heightened scrutiny.

IV. CONCLUSION

For the foregoing reasons, Amici respectfully request that the Court hold that the challenged Nevada and Hawai‘i marriage laws must be subjected to heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment, that the challenged marriage laws cannot survive such scrutiny, and that the judgments of each District Court in these cases must be reversed.

Dated: October 25, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to FRAP 29(c)(7), FRAP 32(a)(7)(C), and Ninth Circuit Rule 32-1, the foregoing attached brief is proportionately spaced, has a typeface of 14 points, and contains 6,778 words.

DATED: October 25, 2013

Respectfully submitted,

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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, *Defendant-Appellant*,
LORETTA J. FUDDY, *Defendant-Appellee*, and
HAWAII 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

APPENDIX TO AMICI CURIAE BRIEF OF NATIONAL WOMEN'S LAW CENTER, WILLIAMS INSTITUTE SCHOLARS OF SEXUAL ORIENTATION AND GENDER LAW, AND WOMEN'S LEGAL GROUPS IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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APPENDIX

DESCRIPTIONS OF AMICI CURIAE

Williams Institute Scholars of Sexual Orientation and Gender Law

The Amici professors of law are associated with the Williams Institute, an academic research center at UCLA School of Law dedicated to the study of sexual orientation and gender identity law and public policy. These *Amici* have substantial expertise in constitutional law and equal protection jurisprudence, including with respect to discrimination based on sex, sexual orientation, and gender stereotypes. Their expertise thus bears directly on the constitutional issues before the Court in these cases. These *Amici* are listed below. Institutional affiliations are listed for identification purposes only.

Nancy Polikoff:

- Professor of Law, American University Washington College of Law;
- 2012 Visiting McDonald/Wright Chair of Law, UCLA School of Law;
- Faculty Chair, The Williams Institute.

Vicki Schultz:

- Ford Foundation Professor of Law and Social Sciences, Yale Law School;
- 2011 Visiting McDonald/Wright Chair of Law, UCLA School of Law;
- Former Faculty Chair & Faculty Advisory Committee Member, The Williams Institute.

Nan D. Hunter:

- Associate Dean for Graduate Programs and Professor of Law, Georgetown Law;
- Former Faculty Chair & Faculty Advisory Committee Member, The Williams Institute;
- Legal Scholarship Director, The Williams Institute.

Christine A. Littleton:

- Professor of Law, UCLA School of Law;
- Professor of Gender Studies, UCLA College.

Devon Carbado:

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Adam Winkler:

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David B. Cruz:

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Brad Sears:

- Assistant Dean of Academic Programs and Centers, UCLA School of Law;
- Roberta A Conroy Scholar of Law and Policy, The Williams Institute;
- Executive Director, The Williams Institute.

Women's Legal Groups

Equal Rights Advocates

Equal Rights Advocates ("ERA") is a national non-profit civil rights advocacy organization based in San Francisco that is dedicated to protecting and expanding economic justice and equal opportunities for women and girls. Since its founding in 1974, ERA has sought to end gender discrimination in employment and education and advance equal opportunity for all by litigating historically significant gender discrimination cases in both state and federal courts, and by engaging in other advocacy. ERA recognizes that women historically have been the targets of legally sanctioned discrimination and unequal treatment, which often have been justified by or based on stereotypes and biased assumptions about the roles that women (and men) can or should play in the public and private sphere, including within the institution of marriage. ERA believes that if restrictive marriage laws, such as that which Nevada and other states have adopted, are allowed to stand, millions of gay, lesbian, and bisexual persons in the United States will be deprived of the fundamental liberty to choose whether and whom they will marry—a deprivation that offends the core principle of equal treatment under the law.

National Partnership for Women & Families

The National Partnership for Women & Families is a nonprofit, nonpartisan organization that uses public education and advocacy to promote fairness in the workplace, quality health care for all, and policies that help women and men meet the dual demands of work and family. Founded in 1971 as the Women's Legal Defense Fund, the National Partnership has been instrumental in many of the major legal changes that have improved the lives of women and their families. The National Partnership has devoted significant resources to combating sex, race, and other forms of invidious discrimination and has filed numerous briefs amicus curiae in the United States Supreme Court and in the federal Courts of Appeals to protect constitutional and legal rights.

National Women's Law Center

The National Women's Law Center is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights and opportunities since its founding in 1972. The Center focuses on issues of key importance to women and their families, including economic security, employment, education, health, and reproductive rights, with special attention to the needs of low-income women, and has participated as counsel or amicus curiae in a range of cases

before the Supreme Court and federal Courts of Appeals to secure the equal treatment of women under the law, including numerous cases addressing the scope of the Constitution's guarantee of equal protection of the laws. The Center has long sought to ensure that rights and opportunities are not restricted for women or men on the basis of gender stereotypes and that all individuals enjoy the protection against such discrimination promised by the Constitution.

Southwest Women's Law Center

The Southwest Women's Law Center is a non-profit women's legal advocacy organization based in Albuquerque, New Mexico. Its mission is to create the opportunity for women to realize their full economic and personal potential, including by eliminating gender bias, discrimination, and harassment. These cases could help prevent discrimination in matters involving the most intimate and personal choices that people make during their lifetime. Personal intimate choices that individuals make for themselves are central to the liberty protected by the Fourteenth Amendment.

Women's Law Project

Founded in 1974, the Women's Law Project ("WLP") is a non-profit women's legal advocacy organization with offices in Philadelphia and

Pittsburgh, Pennsylvania. Its mission is to create a more just and equitable society by advancing the rights and status of all women throughout their lives. For nearly forty years, WLP has engaged in high-impact litigation, advocacy, and education challenging discrimination rooted in gender stereotypes. WLP represented the plaintiffs in *Planned Parenthood v. Casey*, 505 U.S. 833, 898 (1992), striking down the Pennsylvania Abortion Control Act's husband notification provision as "repugnant to this Court's present understanding of marriage and the nature of the rights secured by the Constitution." WLP served as counsel to *Amici Curiae* in *T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001), which conferred third-party standing on parents in same-sex relationships to sue for partial custody or visitation of the children they have raised; and *In re Adoption of R.B.F.*, 803 A.2d 1195 (Pa. 2002), which recognized that the Pennsylvania Adoption Act permits second-parent adoption in families headed by same-sex couples. Together with Legal Momentum, WLP represented women in non-traditional employment as *Amici Curiae* in *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009), in which the Court of Appeals reinstated a Title VII sex discrimination claim involving concurrent evidence of sexual orientation discrimination. Because harmful gender stereotypes often underlie bigotry

against lesbian and gay persons, it is appropriate to subject classifications based on sexual orientation to heightened judicial scrutiny.

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 October 25, 2013. 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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