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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BEVERLY SEVCIK, et al.,

Plaintiffs,

v.

BRIAN SANDOVAL, et al.,

Defendants,

and

COALITION FOR THE PROTECTION OF MARRIAGE,

Defendant-Intervenor.

No. 2:12-CV-00578-RCJ-PAL

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

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NOTICE OF MOTION AND MOTION

Plaintiffs Beverly Sevcik and Mary Baranovich; Antioco Carrillo and Theodore Small; Karen Goody and Karen Vibe; Fletcher Whitwell and Greg Flamer; Mikyla Miller and Katrina Miller; Adele Terranova and Tara Newberry; Caren Cafferata-Jenkins and Farrell Cafferata-Jenkins; and Megan Lanz and Sara Geiger ("Plaintiffs"), by and through their counsel, hereby move for summary judgment against the defendants and the intervenor pursuant to Rule 56 of the Federal Rules of Civil Procedure and Civil Local Rule 56-1. Plaintiffs' motion is based on this notice of motion and motion; the accompanying memorandum of points and authorities; the declarations of Plaintiffs, and the declarations of Nancy Cott, Letitia Anne Peplau, M.V. Lee Badgett, George Chauncey, Gary M. Segura, Michael Lamb, and Tara L. Borelli; the accompanying request for judicial notice; the pleadings and papers on file herein, and such other written and oral argument as may be presented to the Court.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

"The word 'marriage' is singular in connoting 'a harmony in living,' 'a bilateral loyalty,' and 'a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.'" *Perry v. Brown*, 671 F.3d 1052, 1078 (9th Cir. 2012) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)). Even though plaintiffs Beverly Sevcik and Mary Baranovich have shown this kind of loving devotion to each other for more than *four decades*, Defendants deny them and the other similarly-committed plaintiff couples the ability to marry solely because they are same-sex rather than different-sex couples.[1] There is no constitutionally adequate justification for denying same-sex couples the ability to shelter and protect their families through marriage. The Ninth Circuit's decision in *Perry*, analyzing a very similar question, provides binding guidance on how a broad domestic partnership system, such as the one to which same-sex couples are relegated in Nevada, exposes the absence of any rational connection

[1] Plaintiffs challenge Defendants' refusal both (i) to allow the unmarried Plaintiff couples to marry each other in Nevada, and (ii) to recognize the valid marriages the other Plaintiff couples have entered in other jurisdictions, solely as violations of equal protection. For ease of reference, Plaintiffs refer to both violations in terms of the denial of access to or exclusion from marriage.

between this unequal denial of access to marriage and any legitimate governmental interest.

The denial to same-sex couples of the ability to marry afforded to different-sex couples violates the U.S. Constitution's guarantee of equal protection. It discriminates against Plaintiffs based both on sexual orientation and sex and should be subjected to heightened judicial scrutiny. Sexual orientation-based discrimination bears all the indicia of a classification that warrants heightened scrutiny. As confirmed by case law and the expert testimony submitted herewith, lesbians and gay men have faced a history of invidious, ongoing discrimination, even though sexual orientation is unrelated to one's ability to contribute to society. Lesbians and gay men remain politically vulnerable, and their differential treatment is based on a core, immutable trait of sexual orientation. For these reasons, the discrimination based on their sexual orientation should be considered presumptively unconstitutional. In addition, because each Plaintiff could marry his or her partner in Nevada if that Plaintiff were of a different sex and because the denial to same-sex couples of access to marriage rests on sex stereotypes, the marriage exclusion must survive the heightened scrutiny due sex-based classifications. Nevada's marriage restriction, however, cannot survive even rational basis review. In light of the State's equal treatment of same-sex couples with respect to virtually every right and responsibility of spouses, their exclusion from marriage advances no valid government interest whatsoever. Instead, its only effect is to harm same-sex couples and their families and brand them as second-class citizens.

The questions before this Court are narrow and tailored to the particular legal landscape applicable to Nevada same-sex couples. While other cases may raise broader questions, this one asks a specific, limited question: whether, as a matter of equal protection, Defendants further any legitimate government interest by denying same-sex couples access to civil marriage, when Nevada recognizes that their families are worthy of the same rights and responsibilities as spouses through registered domestic partnership.[2] *Perry* and other cases that have confronted similar

[2] While this case raises questions related to those in *Jackson v. Abercrombie*, 2012 U.S. Dist. LEXIS 111376 (D. Haw. Aug. 8, 2012), *appeal docketed*, Nos. 12-16995, 12-16998 (9th Cir. Sept. 10, 2012), the issues presented are not identical. For example, *Jackson* did not view its plaintiffs' arguments as squarely relying on that state's civil union law, while Plaintiffs here expressly rely on that feature of Nevada law both to narrow this case and to test the credibility of possible state interests. *Jackson*, 2012 U.S. Dist. LEXIS 111376, at *117-18 n.31 (asserting that plaintiffs' counsel had "explicitly stated that [their] case did not depend on the civil unions law"). *See also id.* at *11, *19 (unlike Nevada, Hawaii's constitutional amendment allows the legislature

questions counsel restraint in framing and answering Plaintiffs' claims, and this Court should be guided by that precedent to decide only the narrow claims raised here. *See Perry*, 671 F.3d at 1064 (declining to "answer the broader question" of whether same-sex couples may ever be denied the right to marry because Proposition 8's "only effect was to take away [the] important and legally significant designation" of marriage, "while leaving in place all of its incidents") (citing *Sweatt v. Painter*, 339 U.S. 629, 631 (1950)) (reaffirming that the courts decide "constitutional questions only when necessary to the disposition of the case at hand" and that "such decisions will be drawn as narrowly as possible").

STATEMENT OF UNDISPUTED FACTS

I. THE PLAINTIFFS

Each Plaintiff wishes to marry his or her one irreplaceable love in life. Plaintiffs reflect the diversity of Nevada and are raising their families in communities from Las Vegas to Reno and Carson City. *See, e.g.*, Appendix To Plaintiffs' Motion For Summary Judgment ("App.") 7 ¶ 4, 22 ¶ 1, 47 ¶ 1. The Plaintiff couples include two proud grandmothers of four grandchildren, a non-profit executive director who advocates for adults and children with HIV and a school teacher, professionals in medical sales and financial advising, a social worker for abused children and an advertising executive, lawyers and graduate students, the executive director of the State's ethics commission and the founder of a sign language academy, and classical musicians. *Id.* 2 ¶ 5, 8-9 ¶ 9, 12 ¶ 3, 17 ¶ 3, 22 ¶ 3, 26 ¶ 3, 31 ¶ 5-6, 35 ¶ 4, 39 ¶ 3, 43 ¶ 3, 47 ¶ 3, 51 ¶ 3, 55 ¶ 3, 59 ¶ 5, 63 ¶ 4, 68 ¶ 4. All couples have devoted years of their lives to each other, with relationships ranging from six years to more than 40 years together. *See, e.g., id.* 2 ¶ 2, 12 ¶ 2. Six couples are raising or have raised children together, and others plan to adopt in the near future. *Id.* 8-9 ¶ 9, 13 ¶ 9, 32 ¶ 8, 40 ¶ 8, 48 ¶ 8, 59 ¶ 5, 67 ¶ 8. Aside from the fact that each Plaintiff couple is of the same sex, they each meet all the eligibility requirements for marriage in Nevada and all either wish to marry and have sought to do so, or wish to have their valid marriages from other jurisdictions recognized in Nevada. *Id.* 4-5 ¶ 14, 14 ¶ 12, 24 ¶ 11, 33 ¶ 12, 41 ¶ 10, 49 ¶ 13, 57 ¶ 9, 66 ¶ 17.

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to deny *or* provide marriage to same-sex couples).

Nevada's marriage restriction denies Plaintiffs access to the one universally recognized and celebrated hallmark of a couple's commitment to build a family life together – a denial that touches every aspect of their lives. Some have encountered medical professionals who tried to block them from their partner's bedside during medical emergencies, or made clear that one partner could be dismissed from the hospital room at staff whim. *Id.* 40 ¶ 6, 44 ¶ 10, 64 ¶ 11, 69 ¶ 8. Some Plaintiffs have struggled to obtain health insurance or equal treatment by government agencies and businesses because of the denial of access to marriage. *Id.* 40-41 ¶¶ 8-9, 44 ¶¶ 9, 11, 51-52 ¶¶ 7-9, 56-57 ¶¶ 7-8, 60 ¶ 10, 69-70 ¶¶ 10-11. Plaintiffs routinely struggle to correct confusion about the nature, depth, and permanence of their relationships in work, family, and doctor's office settings. *Id.* 4 ¶ 13, 14 ¶ 11, 19 ¶ 10, 23-24 ¶¶ 9-10, 28 ¶¶ 11, 13-14, 36 ¶ 9, 48-49 ¶¶ 10, 12. Because even children understand society's cherished status of marriage, some Plaintiffs worry that the state's consignment of same-sex couples to a second-class status will send profoundly hurtful messages to their children, teaching them that their families do not deserve the same societal status and respect as others. *Id.* 13-14 ¶ 9, 18 ¶ 8, 32-33 ¶ 11, 36 ¶ 8, 40 ¶ 8, 53 ¶ 11, 60 ¶ 10, 64-65 ¶ 12. Rather than repeat here the manifold financial, dignitary, and psychological harms inflicted by Plaintiffs' exclusion from marriage, Plaintiffs respectfully refer the Court to their own words in their attached declarations.

II. THE DEFENDANTS

Defendant Brian Sandoval is vested with the executive power as the State's Governor and has the duty to see that the State's laws are faithfully executed, including the laws that exclude same-sex couples from marriage. Nev. Const. art. 5, §§ 1, 7. Defendants Diana Alba and Amy Harvey are each the County Clerk and Commissioner of Civil Marriages for Clark County and Washoe County, respectively. Nev. Rev. Stat. § 122.173; Washoe County Code § 5.460; Dkt. 35 at ¶ 15. Their duties include issuing marriage licenses, solemnizing marriages, certifying other persons who may solemnize a marriage in the county, and maintaining records relating to marriage licenses. Nev. Rev. Stat. §§ 122.040, 122.064; Dkt. 34 at ¶ 3; Dkt. 35 at ¶ 15. As the Carson City Clerk-Recorder, Defendant Alan Glover oversees the city's Marriage Bureau operations and is responsible for issuing marriage licenses, certifying persons who may solemnize

a marriage, and maintaining marriage-related records. Pls.' Req. for Jud. Not. in Supp. of Pls.' Mot. for Summ. J. ("Req. Jud. Not.") Ex. A. Ms. Alba, Ms. Harvey, and Mr. Glover also must ensure compliance with Nevada laws, including those that exclude same-sex couples from marriage. *Id.* Ex. B; Dkt. 35 at ¶ 15; App. 4-5 ¶ 14, 9-10 ¶ 13.

III. NEVADA'S EXCLUSION OF SAME-SEX COUPLES FROM MARRIAGE AND CONSIGNMENT OF THOSE COUPLES TO THE LESSER STATUS OF DOMESTIC PARTNERSHIP

Defendants exclude same-sex couples from marriage both by statute and an amendment to the State's constitution. Nev. Rev. Stat. § 122.020(1); Nev. Const. art. 1, § 21. The amendment, which constitutionally codifies the statutory ban on marriage of same-sex couples, provides that "Only a marriage between a male and female person shall be recognized and given effect in this state." Nev. Const. art. 1, § 21. The amendment was enacted in 2002, after the state's voters in the 2000 and 2002 general elections approved the initiative known as "Question 2" biennially, as required to amend the state constitution. *See* Req. Jud. Not. Exs. C, D.

Defendant-Intervenor Coalition for the Protection of Marriage (the "Coalition") collected signatures to place the proposed amendment on the ballot and was the primary source of advertisements advocating its passage, as described in its motion to intervene. Dkt. 30-1. Many of the campaign messages used to persuade voters to amend the State's constitution relied on false, stigmatizing messages that same-sex couples are inferior to different-sex couples, and that both the institution of marriage and children need to be protected from same-sex couples. For example, one 2002 flyer urged voters to adopt the constitutional amendment by saying "Let's not experiment with Nevada's children." App. 72-74. The Coalition also claimed that allowing same-sex couples to marry would cause schools to teach "explicit homosexual sex acts" and that "we would be unable to stop the proliferation of teaching that promotes homosexuality in our schools." App. 72, 75-78.

At the same time, however, the State's public policy recognizes that committed same-sex couples should be treated equally with respect to virtually every state law right and responsibility afforded to spouses. The Nevada Domestic Partnership Act (the "Act") allows same-sex couples who have "chosen to share one another's lives in an intimate and committed relationship of

mutual caring" to register with the state as domestic partners. Nev. Rev. Stat. §§ 122A.100, 122A.010 *et seq.*[3] To be eligible, couples must satisfy requirements similar to those for marriage, including not being married to or registered as domestic partners with another person, and not being "related by blood in a way that would prevent them from being married to each other in this State." *Compare* Nev. Rev. Stat. § 122A.100(2) *with* § 122.020.

The Act provides that registered domestic partners "have the same rights, protections and benefits, and are subject to the same responsibilities, obligations and duties under law, whether derived from statutes, administrative regulations, court rules, government policies, common law or any other provisions or sources of law, as are granted to and imposed upon spouses." Nev. Rev. Stat. § 122A.200(1)(a). Registered domestic partners assume rights and responsibilities related to, for example, community property and community debt, Nev. Rev. Stat. § 123.220 *et seq.*; pre-marital agreements, Nev. Rev. Stat. § 123A.010 *et seq.*; postnuptial agreements, Nev. Rev. Stat. § 123.070 *et seq.*; dissolution of the relationship in family court, Nev. Rev. Stat. § 125.010 *et seq.*; and spousal support obligations, Nev. Rev. Stat. § 125.150 *et seq.*

The Act further expressly provides that the rights and responsibilities of registered domestic partners "with respect to a child of either of them are the same as those of spouses." Nev. Rev. Stat. § 122A.200(1)(d). The State thus treats registered same-sex domestic partners equally to different-sex spouses for the State's full spectrum of parental obligations and protections. For example, as is true for different-sex spouses, both members of a registered domestic partnership are presumed parents of a child born to a domestic partner during the domestic partnership, Nev. Rev. Stat. § 126.051. The State also treats registered domestic partners the same as spouses for allocating child custody and visitation, Nev. Rev. Stat. § 125.450 *et seq.* and Nev. Rev. Stat. § 125C.010 *et seq.*; child support, Nev. Rev. Stat. § 125B.020 *et seq.*; and access to joint and step-parent adoption, Nev. Rev. Stat. § 127.010 *et seq.*[4]

While there are only a few exceptions to the State's policy of equal treatment for

[3] Although different-sex couples also may register as domestic partners, Nev. Rev. Stat. § 122A.100, they also are provided the choice to marry – an option denied same-sex couples.

[4] The major provisions of Nevada's domestic partnership act are modeled closely, and in many instances word-for-word, on the California domestic partnership statutes considered by the Ninth Circuit in *Perry*. *Compare, e.g.*, Nev. Rev. Stat. § 122A.200 *with* Cal. Fam. Code § 297.5.

registered domestic partners, they are significant and demonstrate how domestic partnerships are afforded a lesser status than marriages. For example, unlike domestic partnerships, marriages must be solemnized pursuant to state law. Nev. Rev. Stat. § 122.010(1) ("Consent alone will not constitute marriage; it must be followed by solemnization"). In contrast, there is no state-approved mechanism to solemnize a registered domestic partnership, Nev. Rev. Stat. § 122A.110 (Nevada "do[es] not require the performance of any solemnization ceremony to enter into a binding domestic partnership contract."). Rather, same-sex couples must register as domestic partners by filing a notarized form with the Secretary of State, Nev. Rev. Stat. § 122A.100 – a process not unlike that required to license a business, Nev. Rev. Stat. § 76.100; to apply for appointment as a notary, Nev. Rev. Stat. § 240.010; or to register as an athlete's agent, Nev. Rev. Stat. § 398.452. *See* App. 47 ¶ 5. While marriage has dual public and private purposes, *id.* 82 ¶ 9, its cherished value as a civil institution depends significantly upon state solemnization of the relationship. Without the ability to solemnize, same-sex couples are deprived of the ability to have a state-sanctioned wedding ceremony, a celebration with loved ones that many view as among the most important in their lifetime. *See id.* 14 ¶ 11, 55 ¶ 6. Additionally, domestic partnerships may be summarily terminated through the Secretary of State, rather than the family court proceedings required to dissolve a marriage, signaling an official view that domestic partnerships are less significant and enduring. Nev. Rev. Stat. § 122A.300; App. 132-33 ¶ 36 (testimony of Dr. Peplau describing how barriers to ending a relationship increase couples' likelihood of staying together).[5]

Barring same-sex couples from marriage reflects and perpetuates social stigma against not only such couples but also against lesbians and gay men in general. App. 138-39 ¶¶ 53-55. Lesbians and gay men are frequent targets of prejudice and discrimination, and significant

[5] Other differences between domestic partnership and marriage can be found both in eligibility requirements and substantive rights and responsibilities. For example, in contrast to marriage, registered domestic partnership requires a common residence. Nev. Rev. Stat. § 122A.100. Unlike different-sex spouses, who can easily adopt a common surname, domestic partners must obtain a court-ordered name change by filing a petition testifying that they are neither a felon nor attempting to defraud creditors and publishing notice of the requested name change in a newspaper. App. 56 ¶ 7; Req. Jud. Not. Exs. E, F. Furthermore, many entities, including employers, defer to the State's bestowment of marital status in defining "family" for purposes of an array of important benefits, such as employer-provided health insurance. *See generally* App. 185 ¶ 65.

numbers of them are victims of harassment and violence. *Id.* Indeed, many in society view discrimination against them as acceptable. *Id.* The exclusion of same-sex couples from marriage brands them and their families as inferior and unworthy of equal dignity and encourages disrespect of them in workplaces, schools, businesses, and other major arenas of life.

LEGAL STANDARD

A court must grant summary judgment when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the initial burden of demonstrating to the court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The responding party must then present specific facts by affidavit or other admissible evidence showing that contradiction is possible. *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 950-52 (9th Cir. 1978). If that evidence is "merely colorable," or "not significantly probative," summary judgment may be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

ARGUMENT

I. *BAKER V. NELSON* IS NOT CONTROLLING.

Plaintiffs have previously briefed the multiple reasons that the summary dismissal in *Baker v. Nelson*, 409 U.S. 810 (1972) (mem.), is not controlling. *See* Dkt. 41, 53. Plaintiffs address here two newly-arisen points: first, *Jackson*'s flawed analysis of *Baker*, and second, the suggestion raised at the August 10, 2012 hearing that the "logical extension" of *Perry* is that *Baker* controls this case. Dkt. 68-1 at 23:24 - 24:3. *Jackson v. Abercrombie*, Civ. No. 11-00734 ACK-KSC, 2012 U.S. Dist. LEXIS 111376 (D. Haw. Aug. 8, 2012).

Jackson disregarded the well-settled standard for summary dismissals, incorrectly claiming that summary dismissals are binding in "all similar cases." 2012 U.S. Dist. LEXIS 111376, at *47. The standard cannot be that any two cases involving the same type of law are sufficiently similar for one case to bar the other. If this were enough, *Perry* could not be reconciled with *Baker* (given that both deal with state laws excluding same-sex couples from marriage), nor could *Mandel v. Bradley*, 432 U.S. 173 (1977), be reconciled with *Tucker v. Salera*, 424 U.S. 959 (1976) (mem.) (given that both deal with election laws requiring early

signature submission). Instead, the Supreme Court has made clear that even a slight change in the underlying facts will prevent a summary dismissal from barring a subsequent case. *See, e.g.*, *Mandel*, 432 U.S. at 176; *Socialist Workers Party v. Eu*, 591 F.2d 1252, 1258 (9th Cir. 1978) (finding that prior summary affirmance of one paragraph in a court judgment did not preclude review of a different paragraph in the same judgment). *Jackson*'s "all similar cases" standard has not been applied in *any* relevant Supreme Court decision, and the Hawaii court's reliance on an incorrect standard alone likely constitutes reversible error.[6]

Jackson acknowledged that "the facts in th[at] case [we]re not identical to those in *Baker*." 2012 U.S. Dist. LEXIS 111376 at *52-53. That is an understatement. The gulf between states like Hawaii and Nevada in 2012 (which provide same-sex couples with access to the rights and responsibilities of marriage through a second-class status) and states like Minnesota in 1972 (which afforded no relationship recognition whatsoever to same-sex couples) could hardly be greater. That gulf, in turn, narrows the question before this Court, and affects what rationales the government can plausibly assert for excluding same-sex couples from marriage.[7]

Jackson tried to dismiss Hawaii's civil union law as irrelevant because those plaintiffs were not challenging its constitutionality. *Id.* at *53. But that misses the point: the civil union law (and here, Nevada's domestic partnership law) holds great – and in some instances dispositive – significance for testing the government's interests in restricting marriage. It is a long-established principle that a law once thought valid at one time or under one set of circumstances, may after changing conditions become invalid under different circumstances. *Nashville, C. & St. L. Ry v. Walters*, 294 U.S. 405, 415 (1935); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) ("the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased

[6] *Jackson* cites *Bates v. Jones*, 131 F.3d 843, 848 (9th Cir. 1997), for its "all similar cases" standard, but does not even acknowledge that the quote came from a concurrence, and that the majority opinion did not even *discuss*, let alone rule, on summary dismissal grounds.

Jackson also quoted the "all similar cases" standard at *53, suggesting that this was the standard applied in *Wright v. Lane Cnty. Dist. Court*, 647 F.2d 940, 941 (9th Cir. 1981). This too is misleading. What *Jackson* quotes is the Ninth Circuit's paraphrasing in a parenthetical. This standard is applied *nowhere* in any of the Supreme Court's cases regarding summary dismissals.

[7] According to *Jackson*, the plaintiffs had supposedly disclaimed the relevance of a civil union law. 2012 U.S. Dist. LEXIS 111376, *117-118 n.31. That is not the case here, where Plaintiffs make clear that the domestic partnership law is central to their challenge.

to exist"). Accordingly, a summary dismissal of a case decided on grounds "peculiar to the situation that existed at the time of the … court's judgment" does not foreclose subsequent cases based on different situations. *Socialist Workers Party*, 591 F.2d at 1258; *see also Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 181 (1979) (holding that a prior equal protection challenge did not address the same "lines drawn" between two groups of individuals as in a subsequent case).

The question for this Court, therefore, is whether *Baker* "necessarily decided" the issue of marriage for same-sex couples in the situation where a state simultaneously provides the same rights and responsibilities through domestic partnership. *See Mandel*, 432 U.S. at 176. No such question could have been decided by *Baker*, because no such law existed in 1972 Minnesota, and it would be decades before such a law was first enacted, in Vermont. *See* 15 V.S.A. § 1201.

This Court also should decline to follow *Jackson*'s erroneous treatment of *Perry*. Indeed, *Jackson* repeatedly cites the *dissent* in *Perry*, as if that opinion – and not the majority – were controlling authority. *See, e.g.*, 2012 U.S. Dist. LEXIS 111376 at *48, 51, 54 n.18, 55. Although *Perry* examined a case with a factual difference from this one – the removal of an existing marriage right – *Perry*'s guidance about analyzing *Baker* is binding on district courts. Far from suggesting that there is no recourse for other cases, *Perry* reinforces the need to look carefully at each case's factual context, which shapes and differentiates the legal questions both in *Perry* and here from those in *Baker*. *See* 671 F.3d at 1082 n.14. Finally, *Jackson*'s analysis of *Baker*'s due process claim, 2012 U.S. Dist. LEXIS 111376 at *47-51, does not apply here, as Plaintiffs here have raised *only* an equal protection claim.

II. DEFENDANTS' EXCLUSION OF PLAINTIFFS FROM MARRIAGE VIOLATES EQUAL PROTECTION.

A. Plaintiffs Are Similarly Situated to Different-Sex Couples Who May Marry.

The Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Nevada's legal landscape establishes as a matter of law that Plaintiffs are similarly situated to different-sex couples who may marry. The State recognizes that same-

sex couples are similarly suited for all of "the *same* rights, protections and benefits" and "the *same* responsibilities, obligations and duties … as are granted to and imposed upon spouses" by affording these rights to registered same-sex domestic partners. Nev. Rev. Stat. § 122A.200(1)(a) (emphasis added).[8] The State's policy of recognizing same-sex couples' similarity to different-sex spouses is particularly manifest given that the rights of registered domestic partners do not merely approximate the rights of spouses, but instead are *defined* by the rights of spouses. *Id.* § 122A.200(1)(a). *See also Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 967 (N.D. Cal. 2010), *aff'd sub nom. Perry*, 671 F.3d at 1096 (finding on the basis of extensive trial testimony that, "Same-sex couples are identical to opposite-sex couples in the characteristics relevant to the ability to form successful marital unions."); App. 132-33 ¶¶ 33-37 (describing the research documenting the similarity of same-sex and different-sex couples' relationships).[9]

B. The Exclusion of Plaintiffs From Marriage Both Facially and Intentionally Discriminates Against Them.

A law that discriminates on its face obviates the need to demonstrate discriminatory intent. *Wayte v. United States*, 470 U.S. 598, 610, n.10 (1985). By its own terms, Nevada's constitutional amendment restricting marriage to "a male and a female person" facially and expressly excludes same-sex couples. Nev. Const. art. 1, § 21; *see also* Nev. Rev. Stat. § 122.020 (same). Even if this restriction were not recognized as facial discrimination, however, there can

[8] Many of the features of California law cited by the Ninth Circuit in *Perry* to illustrate broad rights and responsibilities available to same-sex couples, 671 F.3d at 1077, have direct parallels in Nevada, including, for example, laws that afford registered domestic partners the same rights and responsibilities as spouses with respect to children, Nev. Rev. Stat. § 122A.200(1)(d); the presumption of parentage for children born during the domestic partnership, *id.* § 126.051; the ability to adopt, *id.* § 127.030; the ability to build community property together, *id.* § 123.220 *et seq.*; the right to be treated the same as a widow or widower with respect to a deceased partner, *id.* § 122A.200(1)(c); and standing to sue for the wrongful death of a partner, *id.* §§ 41.085, 134.040.

[9] Plaintiffs' submission of expert testimony to support their claims is appropriate under federal jurisprudence. *Cf. Lamprecht v. FCC*, 958 F.2d 382, 392 n.2 (D.C. Cir. 1992) (Thomas, J.) ("We know of no support … for the proposition that if the constitutionality of a statute depends in part on the existence of certain facts, a court may not review a legislature's judgment that the facts exist. If a legislature could make a statute constitutional simply by 'finding' that black is white or freedom [is] slavery, judicial review would be an elaborate farce. At least since *Marbury v. Madison*, [5 U.S. 137] that has not been the law."). *See generally* Cott Decl. (addressing history of marriage), Peplau Decl. (addressing same-sex relationships and immutability), Chauncey Decl. (addressing history of sexual orientation discrimination), Segura Decl. (addressing political powerlessness), Lamb Decl. (addressing child welfare), and Badgett Decl. (addressing economic costs of marriage restriction).

be no dispute that the law was intended to treat the lesbians and gay men who form same-sex couples differently by denying them marriage.

Although Nevada's constitutional amendment may have been motivated at least in part by bias or misunderstanding, all that Plaintiffs must show to prove the "intent" element of their equal protection claim is an intent to treat same-sex couples differently and adversely. *See Perry*, 671 F.3d at 1093 (clarifying that the Court was not suggesting that California's constitutional amendment was "the result of ill will on the part of the voters of California," and holding that even the "disapproval" that led voters to eliminate the right to marry for same-sex couples sufficed to demonstrate intent). This showing of intent need *not* rise to the level of animus. *Cf. Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374-75 (2001) (Kennedy, J., concurring) (observing that prejudice "rises not from malice or hostile animus alone," but "may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves"). As in *Perry*, there can be no dispute here that Nevada's constitutional amendment was enacted intentionally to deny "gays and lesbians the right to use the official designation of 'marriage' – and the societal status that accompanies it." 671 F.3d at 1093. *See also* Affidavit of Richard Ziser, Dkt. 30-1, ¶ 2; Req. for Jud. Not. Exs. C, D.

C. Plaintiffs Are Harmed by the Exclusion From Marriage, and Registered Domestic Partnership Does Not Cure the Equal Protection Violation.

Defendants' exclusion of same-sex couples from marriage – despite the State's public policy of holding same-sex registered domestic partners accountable to their families in all of the same ways as heterosexual spouses – inflicts real and serious harms on their families. *See*, *e.g.*, Section I ("The Plaintiffs"), *supra*; App. 133-38 ¶¶ 38-52 (discussing the benefits associated with marriage), 138-39 ¶¶ 53-55 (explaining how the marriage exclusion perpetuates stigma against same-sex couples), and 177-86 ¶¶ 33-67 (describing economic harms to same-sex couples).

The Court need look no further, however, than the Ninth Circuit's binding decision that excluding same-sex couples from marriage, while relegating them to a parallel but less-respected status, is itself a distinction of constitutional dimension and not merely of nomenclature. *Perry*,

671 F.3d at 1078-79. This is because the "incidents of marriage, standing alone, do not, however, convey the same governmental and societal recognition as does the designation of 'marriage' … . It is the principal manner in which the State attaches respect and dignity to the highest form of a committed relationship and to the individuals who have entered into it." *See also id.* at 1078 ("emphasiz[ing] the extraordinary significance of the official designation of 'marriage'"). Marriage alone has been described by the United States Supreme Court as "one of the vital personal rights essential to the orderly pursuit of happiness" and "the most important relation in life." *Zablocki v. Redhail*, 434 U.S. 374, 383, 384 (1978) (internal quotation marks omitted). *See also Sweatt*, 339 U.S. at 634 (noting that what was even "*more* important" than the tangible differences between racially-segregated law schools was that the whites-only school "possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness") (emphasis added). *See also* App. 84 ¶ 12 (testimony of Dr. Cott that, "Having been enhanced by government recognition for centuries, the state of being married always has been, and remains, a privileged and unparalleled status.").

As the Ninth Circuit has recognized, a parallel but lesser registered domestic partnership status simply lacks the same "standing in the community, traditions and prestige" as marriage. *Sweatt*, 339 U.S. at 634; *Perry*, 671 F.3d at 1063 (eliminating same-sex couples' right to marry while leaving intact a parallel institution "serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians … and to officially reclassify their relationships and families as inferior to those of opposite-sex couples").[10] *See also* App. 82 ¶ 9 (testimony of Dr. Cott that, "Marriage has a unique meaning. Nothing has the same meaning,

[10] *See also In re Marriage Cases*, 43 Cal. 4th 757, 845 (2008) ("because of the long and celebrated history of the term 'marriage' and the widespread understanding that this term describes a union unreservedly approved and favored by the community, … it is apparent that affording access to this designation exclusively to opposite-sex couples, while providing same-sex couples access to only a novel alternative designation, realistically must be viewed as constituting significantly unequal treatment to same-sex couples"); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 417 (2008). For similar reasons, the Massachusetts Supreme Court advised the state senate in 2004 – after the court had ruled that same-sex couples must be allowed to marry – that the senate could not implement the court's ruling by merely providing civil unions to same-sex couples. *See Opinions of the Justices to the Senate*, 440 Mass. 1201, 1207-08 (2004) ("[t]he dissimilitude between the terms 'civil marriage' and 'civil union' is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex … couples to second-class status").

significance, obligations, rights and benefits as marriage except for marriage itself."); 180-81 ¶¶ 40-44 (research shows that domestic partnerships are widely viewed as less desirable than marriage). The difference in stature is also born out in different-sex couples' preferences: tens of thousands marry in Nevada each year, dwarfing the miniscule number who register as domestic partners. *Id.*

Having concluded that Proposition 8's effect was to "endors[e] the official statement that the family relationship of same-sex couples is not of comparable stature or equal dignity to the family relationship of opposite-sex couples," *Perry* recognized that the central question before it was whether this disparate treatment was supported by adequate governmental interests. 671 F.3d at 1079 (internal quotation marks omitted). That, too, is the question for this Court.

III. DEFENDANTS' CLASSIFICATION OF PLAINTIFFS BASED ON THEIR SEXUAL ORIENTATION AND SEX REQUIRES HEIGHTENED REVIEW.

The appropriate level of scrutiny for sexual orientation classifications remains unsettled under Ninth Circuit and Supreme Court jurisprudence. Although the Supreme Court has not yet ruled that sexual orientation classifications are suspect, that is because the Supreme Court has not yet found it necessary to resolve the question. *Romer v. Evans*, 517 U.S. 620 (1996), did not decide the issue, finding it unnecessary to look beyond rational basis review both because the state's attempt to strip gay people of all antidiscrimination protections was a "denial of equal protection of the laws in the most literal sense," and because the state's action "confound[ed]" and "defie[d]" rational basis review. *Id.* at 632, 633. *Perry* – the most recent Ninth Circuit decision to leave the question open – followed a similar approach, relying on *Romer* because rational basis could resolve the case in plaintiffs' favor. 671 F.3d at 1080 n.13.[11]

[11] Nor did the Ninth Circuit decide the issue in *Witt v. Department of Air Force*, 527 F.3d 806 (9th Cir. 2008), challenging discharge under the military's "Don't Ask, Don't Tell" ("DADT") policy. Instead, the court merely noted in a single sentence – in the context of the military, where judicial deference "is at its apogee" – that, if rational basis review were applied, DADT would survive that inquiry. *Id.* at 821; *see also id*. at 824 (Canby, J., concurring in part, dissenting in part).

While *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990), did address the issue, that precedent and any cases that have relied on it are no longer sound. *High Tech Gays* rested on the since-overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), and concluded that laws classifying lesbians and gay men for adverse treatment are not subject to heightened scrutiny "because homosexual conduct can … be criminalized." *Id.* at 571. *Lawrence v. Texas* renounced that premise ("*Bowers* was not correct when it was decided, and it

A. Defendants' Exclusion of Same-Sex Couples From Marriage Based on Their Sexual Orientation Is Subject to Heightened Scrutiny.

The Supreme Court consistently has applied heightened scrutiny where the classified group has suffered a history of discrimination, and the classification has no bearing on a person's ability to perform in society. *See, e.g.*, *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (heightened scrutiny is warranted where a classified group has "experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities"). In addition, the Supreme Court has occasionally, but not always, considered whether the group is a minority or relatively politically powerless, and whether the characteristic is defining or "immutable" in the sense of being beyond the group member's control or not one the government has a right to insist an individual try to change. *See, e.g.*, *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); *see also Kerrigan*, 957 A.2d at 426-30 (analyzing federal equal protection law to conclude that history of discrimination and ability to contribute to society are the two central considerations, and collecting authorities).

While not all considerations need point toward heightened scrutiny, *Golinski*, 824 F. Supp. 2d at 983, here all demonstrate that laws that discriminate based on sexual orientation should be subjected to heightened review. As a growing number of courts have recognized, any faithful application of these standards inexorably leads to the conclusion that sexual orientation discrimination must meet this higher standard of judicial review. *See, e.g.*, *Pedersen v. Office of Pers. Mgmt.*, 2012 U.S. Dist. LEXIS 106713, *52-110 (D. Conn. July 31, 2012); *Golinski*, 824 F. Supp. 2d at 985-90; *In re Balas*, 449 B.R. 567, 573-75 (Bankr. C.D. Cal. 2011); *Perry*, 704 F. Supp. 2d at 997. The President and the Department of Justice have reached the same conclusion. *See* Report from Attorney General to Speaker of House of Representatives, February 23, 2011, *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.

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is not correct today."). 539 U.S. 558, 578 (2003). Where an intervening decision of a higher court is clearly irreconcilable with a Ninth Circuit decision, "district courts should consider themselves bound by the intervening higher authority and reject the prior opinion of [the Ninth Circuit] as having been effectively overruled." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc); *see also Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 985 (N.D. Cal. 2012) (*High Tech Gays* "is no longer a binding precedent.").

1. Settled Law and Undisputed Evidence Demonstrate a History of Discrimination Against Lesbians and Gay Men.

The Ninth Circuit has recognized for at least two decades that lesbians and gay men "have suffered a history of discrimination." *High Tech Gays*, 895 F.2d at 573; *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 954 (9th Cir. 2009) (observing that defendants would be "hard pressed to deny that gays and lesbians have experienced discrimination in the past in light of the Ninth Circuit's ruling in *High Tech Gays*"); *Watkins v. U.S. Army*, 875 F.2d 699, 724 (9th Cir. 1989) (Norris, J., concurring) ("it is indisputable that homosexuals have historically been the object of pernicious and sustained hostility") (internal quotation marks omitted). *See also Golinski*, 824 F. Supp. 2d at 985-86; *Perry*, 704 F. Supp. 2d at 981-82; *In re Balas*, 449 B.R. at 576. This long and painful history of discrimination, which remains ongoing, also has been extensively documented by Plaintiffs' expert historian. *See* App. 210-244 ¶¶ 6-102.

2. Sexual Orientation Is Unrelated to the Ability to Contribute to Society.

Rather than resting on "meaningful considerations," *Cleburne*, 473 U.S. at 441, laws that discriminate based on sexual orientation, like laws that discriminate based on race, national origin, or sex, target a characteristic that "bears no relation to ability to perform or contribute to society." *Id.* Nevada's state public policy already recognizes that in every realm of life – from employment to family life, to daily transactions in public places – sexual orientation discrimination has no place. *See* Nev. Rev. Stat. § 613.330 (prohibiting sexual orientation-based discrimination in employment), § 122A.200 (affording all family law rights and responsibilities to same-sex registered domestic partners), § 651.070 (prohibiting public accommodations discrimination based on sexual orientation). This view has long been recognized by the federal courts, and is the consensus among mainstream social scientists. *See, e.g.*, *Watkins*, 875 F.2d at 725 ("Sexual orientation plainly has no relevance to a person's ability to perform or contribute to society.") (internal quotations omitted) (Norris, J., concurring); *Perry*, 704 F. Supp. 2d at 1002 ("[B]y every available metric … as partners, parents and citizens, opposite-sex couples and same-sex couples are equal."); App. 130-31 ¶¶ 29-31, 172 ¶ 14.

3. Sexual Orientation Is a Core, Defining, and Immutable Characteristic.

Although federal equal protection doctrine has never treated immutability of a personal trait as a prerequisite for determining whether a classification warrants strict scrutiny,[12] the Ninth Circuit already has recognized and reaffirmed that sexual orientation should be considered immutable – an understanding that conforms with the settled consensus of the major professional psychological and mental health organizations. *See, e.g.*, *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) ("Sexual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them."), *overruled in part on other grounds by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005); *Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005) (affirming that sexual orientation is "a fundamental aspect of ... human identity"); *see also* App. 129 ¶ 26 ("[s]exual orientation is highly resistant to change" and "there is no credible evidence that [sexual orientation change efforts] are … effective"); 129-30 ¶ 27 (no major mental health professional organization has approved interventions to try to change sexual orientation, and virtually all have adopted statements cautioning the public about these treatments); *see also generally* 127-30 ¶¶ 21-28.

Courts have considered a trait "immutable" when altering it would "involve great difficulty, such as requiring a major physical change or a traumatic change of identity," or when the trait is "so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change [it]." *Watkins*, 875 F.2d at 726 (Norris, J., concurring); *Perry*, 704 F. Supp. 2d at 966 ("No credible evidence supports a finding that an individual may … change his or her sexual orientation"). Sexual orientation classifications thus violate the fundamental principle that burdens should not be distributed – by a majority that would not inflict them upon itself – "upon groups disfavored by virtue of circumstances beyond their control." *Plyler v. Doe*, 457 U.S. 202, 218 n.14 (1982).[13]

[12] Laws that classify based on religion, alienage, and legitimacy all are subject to some form of heightened scrutiny, despite the fact that religious people may convert, undocumented people may naturalize, and illegitimate children may be adopted. *Golinski*, 824 F. Supp. 2d at 987 n.6.

[13] *See also* American Psychological Association, *Just the Facts About Sexual Orientation & Youth: A Primer for Principals, Educators and School Personnel* (2008) (the notion that lesbians' and gay men's sexual orientation can be changed or cured "has been rejected by all the major

4. Lesbians and Gay Men Remain a Politically Vulnerable Minority.

This prong of the analysis examines relative, not absolute, political powerlessness: whether the "discrimination is unlikely to be *soon rectified* by legislative means." *Cleburne*, 473 U.S. at 440 (emphasis added). The Supreme Court's analysis of race- and sex-based classifications clearly illustrates this point. *Korematsu v. United States*, 323 U.S. 214 (1944), applied heightened review to race-based classifications, even though race discrimination was prohibited by three federal constitutional amendments and federal civil rights enactments dating back to 1866. *Id.* at 378; *see also* App. 289-90 ¶¶ 85-86. When the Supreme Court applied heightened review to sex-based discrimination in *Frontiero v. Richardson*, 411 U.S. 677, 687 (1973), Congress had already "manifested an increasing sensitivity to sex-based classifications" by enacting protections under Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963, and by approving the federal Equal Rights Amendment for ratification by the states. *Id.* at 685, 686 n.17, 687; *see also* App. 288 ¶ 83. Moreover, the relevant inquiry is not just about the degree of current political powerlessness; as women and racial and religious minorities have achieved greater measures of equality, the constitutional scrutiny of such classifications has become no less searching. *See In re Marriage Cases*, 43 Cal. 4th 757, 843 (2008).

As was true for women at the time of *Frontiero*, lesbians and gay men remain "vastly under-represented in this Nation's decisionmaking councils." 411 U.S. at 686 n. 17 (noting that there never had been a female President, or member of the U.S. Supreme Court or U.S. Senate; only 14 women held seats in the U.S. House of Representatives; and under-representation was present throughout all levels of state and federal government). In comparison, only four members of Congress are openly gay, and no openly gay person has ever served as President, in a Cabinet-level office, on the U.S. Supreme Court, or in the U.S. Senate. App. 276 ¶ 47. Several systemic barriers contribute to this marked disparity in political power, including gay peoples' invisibility, *id.* 279-81 ¶¶ 57-64; their targeting for hostility, 281-84 ¶¶ 66-74; powerful and well-funded opposition, 286-88 ¶¶ 80-81; and relatively small minority numbers, 277 ¶ 50.

Rather than affording lesbians and gay men effective means to protect themselves from

health and mental health professions"; collecting position statements from the major mental and behavioral health organizations), *available at* www.apa.org/pi/lgbt/resources/just-the-facts.pdf.

discrimination, the legislative process has in some ways uniquely disadvantaged them. No other group has been stripped so persistently of basic antidiscrimination and family protections through the legislative and initiative process. *See, e.g.*, *id.* 275 ¶ 44 ("The initiative process has now been used specifically against gay men and lesbians more than against any other social group."). Ballot initiatives in no fewer than three-fifths of the states have sought to eliminate their right to marry, and at least 10 additional states expressly deny that right through statute. *Id.* 271 ¶ 35.[14] To this day, lesbians and gay men remain unprotected in a majority of states against discrimination in the most basic transactions of ordinary life, including in private employment, housing, and public accommodations. *Id.* 268-69 ¶ 30, 271 ¶ 34. Likewise, almost four decades after the first federal sexual orientation antidiscrimination legislation was introduced, no such federal legislation has succeeded in passing. *Id.* 268-69 ¶ 30, 236 ¶ 80.

B. Defendants' Denial of Marriage Based on Plaintiffs' Sex Also Requires Heightened Scrutiny.

Nevada's exclusion of same-sex couples from marriage requires heightened scrutiny for an additional reason: it denies Plaintiffs equal protection based on their sex in relation to the sex of their committed life partners. For example, if Plaintiff Karen Goody were man, she could marry her beloved partner, Plaintiff Karen Vibe. Simply because she is a woman, however, Defendants deny her this socially-cherished right.[15] Such sex-based classifications require heightened scrutiny. *See United States v. Virginia*, 518 U.S. 515, 524 (1996).

Courts have recognized that discrimination against gay people because they form a life partnership with a same-sex rather than a different-sex partner is sex discrimination. *See Golinski*, 824 F. Supp. 2d at 982 n.4; *In re Balas*, 449 B.R. at 577-78; *In re Levenson*, 560 F.3d 1145, 1147 (9th Cir. EDR Op. 2009); *Baehr v. Lewin*, 852 P.2d 44, 67-68 (Haw. 1993). Sex and sexual orientation "are necessarily interrelated," because entering into an intimate relationship

[14] *See also id.* 272-74 ¶¶ 37-41 (describing initiatives aimed at stripping gay people of right to be free of discrimination, to marry, and to adopt); 241-44 ¶ 97-102.

[15] When Karen Goody and Karen Vibe went to the Washoe County Marriage Bureau to obtain a marriage license, the security officer asked, "Do you have a man with you?" *Id.* 29 ¶ 16. When Karen Vibe said they did not, and explained that she wished to marry Karen Goody, she was told she could not even obtain or complete a marriage license application. *Id.* (stating that employee of Defendant Harvey told them "Two women can't apply" for a marriage license and the security guard added that marriage is "between a man and a woman").

with someone based on that person's sex "is a large part of what defines an individual's sexual orientation." *Perry*, 704 F. Supp. 2d at 996; *Golinksi*, 824 F. Supp. 2d at 982 n.4 ("Sexual orientation discrimination can take the form of sex discrimination."). A restriction like Nevada's arising because a lesbian or a gay man has a same-sex life partner thus constitutes "discrimination based on sex," as well as based on sexual orientation. *Perry*, 704 F. Supp. 2d at 996.

Nevada's restriction on marriage is no less invidious because it equally denies men and women the right to marry a same-sex life partner. *Loving v. Virginia*, 388 U.S. 1 (1967), discarded "the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations." *Id.* at 8; *see also McLaughlin v. Florida*, 379 U.S. 184, 191 (1964) (holding that equal protection analysis "does not end with a showing of equal application among the members of the class defined by the legislation") *and J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127 (1994) (holding that the government may not strike jurors based on sex, even though such a practice, as a whole, does not favor one sex over the other). Nor was the context of race central to *Loving*'s holding, which found that, even if race discrimination had not been at play and the Court presumed "an even-handed state purpose to protect the integrity of all races," Virginia's anti-miscegenation statute still was "repugnant to the Fourteenth Amendment." *Id.* at 12 n.11.

The Supreme Court has established that the Fourteenth Amendment prohibits discrimination not only against an individual, but also based upon one's committed relationship. For example, *Loving* explains that a classification prohibiting interracial *relationships* discriminates based on race. 388 U.S. at 2 (prosecution based on a marriage); *see also McLaughlin*, 379 U.S. at 184 (statute unconstitutionally prohibited cohabitation with a partner of another race). The same principles apply here. *See Frontiero*, 411 U.S. at 678 (overturning a statute that discriminated by virtue of female servicemember's marriage).

In addition, Nevada's restriction on marriage is a form of prohibited "sex stereotyping" based on the notion that a woman should form intimate relationships with a man, and vice-versa. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that a woman who was denied partnership because she did not meet sex stereotypes had an actionable claim for sex

discrimination); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874-75 (9th Cir. 2001) (finding impermissible sex discrimination where sexual harassment of gay man was the result of sex stereotyping – a gay man was harassed by his male co-workers because he "did not act as a man should act"). The impermissible sex stereotyping encompassed in Nevada's restriction of marriage is amply illustrated by the Coalition for the Protection of Marriage's previous intervention filings. Dkt. 30; Dkt. 30-1. Indeed, the Coalition's distinction between "man-woman marriage" and "genderless marriage" is based entirely upon sex stereotypes historically associated with what it means to be a "husband" or "wife" and "mother" or "father" and the "social goods" inherent in "man-woman marriage." Dkt. 30 at 7-11 (discussing the Coalition's so-called "Marriage Facts"); Dkt. 30-1 at ¶ 7(c)(iv) ("man-woman" marriage is "[s]ociety's primary and most effective means of bridging the male-female divide"); ¶ 7(c)(v) (the "valuable social goods" of marriage are unique to "man-woman" marriage and its transformation of individuals into a "husband-father" or "wife-mother"); ¶ 7(g) ("as an institution, man-woman marriage addresses the social problem that men and women are sexually attracted to each other"). Such sex-stereotyping is impermissible sex discrimination and warrants heightened scrutiny. As described below, Nevada's marriage restriction cannot survive even rational basis review, let alone heightened scrutiny.

IV. EVEN IF THE COURT APPLIES RATIONAL BASIS REVIEW, DEFENDANTS' EXCLUSION OF PLAINTIFFS FROM MARRIAGE CANNOT STAND.

While a classification must be rationally related to a legitimate government purpose to survive rational basis review, Defendants' class-based exclusion of Plaintiffs from marriage requires a particularly meaningful examination. *Lawrence v. Texas*, 539 U.S. at 580 (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."); *see also Kelo v. City of New London*, 545 U.S. 469, 490-91 (2005) (Kennedy, J., concurring) (distinguishing between the rational basis test applied to "economic regulation" versus classifications discriminating against a particular group of people); *Golinski*, 824 F. Supp. 2d at 996. Even were that not the case, the marriage exclusion cannot even meet the

most deferential form of rational basis review. A governmental interest must, at a minimum, "find some footing in the realities of the subject addressed by the legislation." *Heller v. Doe*, 509 U.S. 312, 321 (1993); *Mathews v. Lucas*, 427 U.S. 495, 510 (1976) (rational basis analysis is not "toothless"). *See also Perry*, 671 F.3d at 1086 (where Proposition 8 "did not further" a particular interest, the purported rationale "cannot have been rational [basis] for" Proposition 8).

Additionally, *Perry*'s application of rational basis – including its careful testing of government rationales in light of California's domestic partnership law – provides vital guidance here. *Perry* focused on California's elimination of an existing right to marry for same-sex couples. Although Nevada preemptively barred that right, the reasoning in *Perry* regarding various government interests still binds this Court. *See, e.g.*, *Miller*, 335 F.3d at 900 ("the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law") (internal quotation marks omitted); *United States v. Lindsey*, 634 F.3d 541, 550 (9th Cir. 2011) ("*Miller v. Gammie* … instructs us to focus on the *reasoning* and *analysis* in support of a holding, rather than the holding alone"). This Court is thus bound by *Perry*'s analysis of the ways in which a comprehensive domestic partnership scheme makes clear that many governmental interests are not credible or even rationally related to the State's restriction on marriage. *See, e.g.*, *Perry*, 671 F.3d at 1088 (noting that, because laws relating to child-rearing apply the same way to domestic partners and married couples, Proposition 8 is not even rationally related to such governmental interests).

A. The Exclusion Cannot Be Justified by an Interest in Maintaining "Traditional" Marriage or Proceeding with "Caution" in Ending Discrimination.

A law cannot be justified merely on the basis that it has existed for a number of years, or on the basis that, at some point in the future, a justification for the law may arise, even if one does not currently exist. Because "tradition alone is insufficient to justify *maintaining* a prohibition with a discriminatory effect," *Perry*, 671 F.3d at 1093, the length of time that Nevada has excluded same-sex couples from marriage cannot justify Nevada's perpetuation of that exclusion. *See Dragovich v. U.S. Dep't of Treasury*, 2012 U.S. Dist. LEXIS 72745, at *31-32 (N.D. Cal. May 24, 2012) ("the preservation of marriage as an institution that excludes gay men and lesbians

for the sake of tradition is not a legitimate governmental interest"); *see also Williams v. Illinois*, 399 U.S. 235, 239 (1970) (holding that a law failed rational basis scrutiny even where the custom at issue "date[d] back to medieval England and ha[d] long been practiced in this country"); *Heller*, 509 U.S. at 327 (the "ancient lineage" of a classification does not make it legitimate). The Supreme Court has not hesitated to strike down "historic" laws targeting gay people, recognizing that the antiquity of discrimination does not make it rational. *Lawrence*, 539 U.S. at 577-78 (noting that history and tradition could not justify sodomy prohibition). Instead, the government must demonstrate an interest separate and apart from the fact of tradition itself. *Golinski*, 824 F. Supp. 2d at 993. Moreover, far from adhering to "tradition for the sake of tradition," the institution of marriage has shed many inveterate discriminatory practices, including the doctrine of coverture (depriving wives of any separate legal or economic existence) and anti-miscegenation laws. *See generally* App. 99-101 ¶ 73-83 (describing how marriage has thrived precisely because of its ability to adapt to changing societal needs). Nevada's historical exclusion of same-sex couples from marriage thus is a basis for ending that practice, not upholding it.

Alternatively, Defendants may argue that the Court should "proceed with caution" in changing a law that has existed for many years,[16] because justifications for differential treatment may arise in the future – but a law that is unjustifiable today is not saved by conjecture that, someday in the future, a rational basis might materialize. Even if proceeding with caution were a legitimate interest, the State's constitutional ban on same-sex couples from marriage does not rationally advance that interest. The Ninth Circuit has held as a matter of law that there "[can] be no rational connection between the asserted purpose of '*proceeding* with caution' and the enactment of an absolute ban, unlimited in time, on same-sex marriage in the state constitution" because "[t]o enact a constitutional prohibition is to adopt a fundamental barrier." *Perry*, 671 F.3d at 1090. Question 2 clearly intended to erect such a fundamental barrier: its supporting ballot argument was that the existing statute failed to do enough to exclude same-sex couples from marriage. Req. Jud. Not. Exs. C, D. The fundamental barrier in Nevada is particularly high,

[16] Any supposed interest in proceeding with caution fails for the same reasons as a purported interest in tradition, and courts can "consider[] both of these interests together." *Windsor v. United States*, 833 F. Supp. 2d 394, 403 (S.D.N.Y. 2012).

given that a voter-initiated constitutional amendment to undo the law would need to be approved in not just one but two general elections. Nev. Const. art. 19, § 2. Indeed, it is difficult to imagine a more ironclad way in which a state could freeze same-sex couples out of marriage than Nevada's amendment.

B. Moral Disapproval of Same-Sex Relationships Fails as a Matter of Law to Justify Excluding Them From Marriage.

Moral disapproval of lesbians and gay men, standing alone, cannot justify their exclusion from marriage. The Supreme Court has "never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons." *Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring); *see also id.* at 577 ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.") (citation omitted). This is because such moral judgments often are the product of private views that, no matter how sincerely held, cannot be imposed "on the whole society through operation of the ... law." *Golinski*, 824 F. Supp. 2d at 994 (quoting *Lawrence*, 539 U.S. at 571); *see also Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."); *Lawrence*, 539 U.S. at 571 ("Our obligation is to define the liberty of all, not to mandate our own moral code"). Defendants "may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic." *Cleburne*, 473 U.S. at 448.

C. The Exclusion Does Not Promote "Responsible Procreation" or Interests in Child Welfare.

Nevada's exclusion of same-sex couples from marriage cannot be justified as an attempt to encourage "responsible procreation" by different-sex couples or to promote the best interests of children. Indeed, the Ninth Circuit expressly rejected those exact justifications in *Perry*, where, as here, the constitutional amendment excluding same-sex couples from marriage "had absolutely no effect on the ability of same-sex couples to become parents or the manner in which children are raised." 671 F.3d at 1086. As the Ninth Circuit explained, neither "responsible procreation"

nor encouraging childrearing by married different-sex biological parents are rationally related to a state's exclusion of same-sex couples from marriage where state laws relating to child-rearing and procreation "apply in the same way to same-sex couples in domestic partnerships and to married couples." *Id.* at 1088. While *Perry* examined these interests in the context of eliminating access to marriage, *Perry*'s reasoning about the effect of a comprehensive domestic partnership law makes clear that, as a matter of law, these interests cannot sustain Nevada's marriage ban.

The notion that excluding same-sex couples from the designation of "marriage" would somehow make different-sex couples less "likely to procreate accidentally or irresponsibly" is utterly implausible. *See Perry*, 671 F.3d at 1088 ("There is no rational reason to think that taking away the designation of 'marriage' from same-sex couples would advance the goal of encouraging California's opposite-sex couples to procreate more responsibly.").[17] Even though *Perry* considered this governmental interest in the context of removing same-sex couples' then-existing access to marriage, the result can be no different here. The notion that different-sex couples will be more likely to marry in the event of unplanned pregnancy if same-sex couples are barred from marriage has no greater footing in reality if same-sex couples are barred preemptively (as in Nevada) than if the right to marry is taken away from same-sex couples after six months (as happened in California). *See also* App. 125 ¶ 15 ("There is no scientific support for the notion that allowing same-sex couples to marry would harm different-sex relationships or marriages.").

Further, procreation is not now, nor has it ever been "the prime mover in states'

[17] *Jackson*'s reading of *Johnson v. Robison*, 415 U.S. 361 (1974), is wholly inconsistent with this controlling interpretation of the case by the Ninth Circuit, which requires a *connection* between excluding same-sex couples from marriage and encouraging procreation by heterosexuals within marriage. Additionally, as *Perry* noted, *Johnson* did not involve a dignitary benefit provided to one group but denied another, "such as an official and meaningful state designation that established the societal status of the members of the group; it concerned only a specific form of government assistance." 671 F.3d at 1087 n.21. Moreover, *Johnson* did not, as *Jackson* suggested, reformulate the equal protection inquiry by holding that rational basis review is satisfied where the inclusion of one group promotes a government interest and the addition of others would not. 2012 U.S. Dist. LEXIS 111376, at *9. Rather than merely asking whether certain educational benefits help military veterans and stopping there, *Johnson* carefully analyzed whether conscientious objectors were in fact similarly situated to military veterans *with regard to those benefits*, and found they were not. 671 F.3d. at 382. By, contrast, same-sex couples are similarly situated to different-sex couples *with regard to the benefits of marrying* since both same-sex and different-sex couples may have children inside or outside of marriage and both sets of couples – *and* their children – benefit in precisely the same ways when those couples marry.

structuring of the marriage institution in the United States." *Id.* 88 ¶ 26. Nevada law does not require married couples to procreate or prove fertility to obtain a marriage license, or to consummate their marriage to secure its validity. *See* Nev. Rev. Stat. Ch. 122. This is not merely because of practical difficulties associated with ascertaining which different-sex couples are capable of procreation. As Justice Scalia has said, "[W]hat justification could there possibly be for denying the benefits of marriage to homosexual couples exercising '[t]he liberty protected by the Constitution'? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry." *Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting).[18]

Nor is Nevada's marriage restriction even rationally related to an interest in child-rearing. As in *Perry*, Nevada's exclusion of same-sex couples from marriage "ha[s] absolutely no effect on the ability of same-sex couples to become parents or the manner in which children are raised" in Nevada. *See Perry*, 671 F.3d at 1086. Likewise, Question 2 does nothing to prevent unmarried individuals or couples – gay or heterosexual – from having children. Moreover, Question 2 did not disturb Nevada's longstanding public policy equally recognizing that "[t]he parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." Nev. Rev. Stat. § 126.031. Furthermore, in enacting the domestic partnership law, the State itself ensured that registered same-sex domestic partners are treated equally to different-sex spouses for the State's full spectrum of parental obligations and protections, including, as described above, the presumption of parenthood, child support, and child custody and visitation. Nev. Rev. Stat. § 122A.200(1)(d).[19] Any assertion that Nevada's

[18] The Supreme Court has made clear that even individuals unable to procreate cannot be excluded from marriage on that basis, *see Turner v. Safely*, 482 U.S. 78, 95 (1987) (striking down regulation under which prison inmate's marriage was generally only approved when a pregnancy or birth of a child was involved), and that individuals have the right to choose to procreate or not regardless of their marital status. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("It is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as a decision whether to bear or beget a child.").

[19] The fact that the Domestic Partnership Act was enacted *after* Question 2 only strengthens the analysis, since it proves that the State has disclaimed any interest in treating lesbians and gay men differently with respect to the rights and responsibilities of marriage. *See Eisenstadt*, 405 U.S. at 448 (recognizing that regardless of the governmental interest in a law when it is first passed, the government can "abandon[]" that interest through subsequent lawmaking). The effect and implications here are the same as they were in *Perry*: Nevada, as a matter of policy and law, recognizes that lesbians and gay men "'are fully capable of … responsibly caring for and raising children.'" *Perry*, 671 F.3d at 1087 (quoting *Marriage Cases*, 183 P.3d at 428). Question 2 had no impact on childrearing or procreation, and the State ensured this remained so by later enacting

marriage exclusion is an attempt to promote childrearing by married, different-sex biological parents thus is utterly inconsistent with Nevada law, and cannot be credited as rationally related to Nevada's marriage restriction. *Perry*, 671 F.3d at 1087 ("We will not credit a justification for Proposition 8 that is totally inconsistent with the measure's actual effect and with the operation of California's family laws both before and after its enactment").

Even if this Court does consider the research relating to the adjustment of children, an undeniable consensus has emerged among the leading authorities in pediatrics, psychology, and child welfare that the children of same-sex parents are equally likely to be well-adjusted as the children of different-sex parents. As Plaintiffs' expert Dr. Michael Lamb explains, decades of scholarship and empirical study overwhelmingly demonstrate that children raised by same-sex parents are as likely to be emotionally healthy and educationally and socially successful as those raised by different-sex parents. App. 324 ¶ 29 (describing approximately 30 years of scholarship of same-sex couples and their children, including more than 100 articles and 50 peer-reviewed empirical reports); *see also* 318 ¶ 14 (it is "beyond scientific dispute" that that the factors that account for the adjustment of children are the quality of the youths' relationships with their parents, the quality of the relationship between the parents or significant adults in the youths' lives, and the availability of resources – not the parents' sex or sexual orientation).

This consensus has been confirmed by the preeminent national medical, mental health, and child welfare authorities – many of which have issued statements affirming that same-sex parents are as effective as different-sex parents in raising well-adjusted children and should not face discrimination – including the American Psychological Association, the American Psychiatric Association, the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, the American Psychoanalytic Association, the National Association of Social Workers, and the Child Welfare League of America. *Id.* 326 ¶ 34. Courts across the country also have acknowledged this consensus. *See Perry*, 704 F. Supp. 2d at 1000 ("The

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the Domestic Partnership Act. Therefore, while *Perry* examined these government interests in the context of removing an existing right of marriage, there is no way in which preemptively denying the right to marry somehow improves the fit between the state's interest and the marriage restriction in a state that provides same-sex domestic partners the same parental rights and responsibilities as married different-sex couples.

evidence does not support a finding that California has an interest in preferring opposite-sex parents over same-sex parents. Indeed, the evidence shows beyond any doubt that parents' genders are irrelevant to children's developmental outcomes."); *Golinski*, 824 F. Supp. 2d at 991-92 (reviewing the evidence demonstrating that it is "beyond scientific dispute" that same-sex parents are equally capable parents as different-sex parents); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 388 (D. Mass. 2010); *Varnum v. Brien*, 763 N.W.2d 862, 899 n.26 (2009); *Marriage Cases*, 43 Cal. 4th at 782.

Additionally, the State already has recognized as a matter of public policy that Nevada's same-sex couples, including several of the Plaintiffs, are raising children and need legal security for their legal parent-child relationships. *See, e.g.*, App. 32 ¶ 8, 40 ¶ 8, 48 ¶ 8, 59 ¶ 5, 64-65 ¶ 8-12; *see also* 172 ¶ 13 (Dr. Badgett's expert testimony that 17% of same-sex couples in Nevada are raising a child under the age of 18). The State provides equally for the parental bonds of same-sex couples with their children by affording them the same methods of securing these legal relationships, but withholds the dignity and instant, assured recognition of those bonds that flow from marriage. Depriving the families of lesbian and gay Nevadans of that societal respect hurts, not helps, their children, and fails to benefit different-sex couples and their children. The State's marriage ban thus not only fails to further the State's interest in promoting its children's welfare, but instead hinders it. *See, e.g.*, *Golinski*, 824 F. Supp. 2d at 992 ("The denial of recognition and withholding of marital benefits to same-sex couples does nothing to support opposite-sex parenting, but rather merely serves to endanger children of same-sex parents by denying them the immeasurable advantages that flow from the assurance of a stable family structure, when afforded equal recognition under federal law.") (internal quotation marks omitted).

D. Affording Same-Sex Couples Access to Civil Marriage Will Have No Effect on Religious Liberties.

Allowing same-sex couples to marry does not affect the First Amendment rights of those opposed to it. *Perry* considered whether a state's interest in protecting religious liberty could support a ban on marriage for same-sex couples, soundly rejecting that proposition. The Ninth Circuit recognized that a *state's* equal provision of civil marriage to same-sex couples does not

require any religion to "change its religious policies or practices with regard to same-sex couples," and does not require any religious officiant "to solemnize a marriage in contravention of his or her religious beliefs." *Perry*, 671 F.3d at 1091 (internal quotation marks omitted). Same-sex couples' access to civil marriage imposes no requirement that religious institutions perform or recognize those marriages. Indeed, according same-sex couples the same right to marry threatens religious liberty "no more than lawful interfaith marriages can threaten the religious liberty of synagogues and rabbis, or of mosques and imams, that interpret their scripture and tradition to prohibit such unions." Eric Isaacson, *Are Same-Sex Marriages Really a Threat to Religious Liberty?*, 8 Stan. J. Civ. R. & Civ. Lib. 123, 124 (2012) (citing, *e.g.*, *Marriage Cases*, 183 P.3d at 451-52; *Varnum*, 763 N.W.2d at 906). Nor, the Ninth Circuit determined, would allowing same-sex couples to marry subject religious organizations to any greater antidiscrimination liability for refusing services to same-sex spouses. *Perry*, 671 F.3d at 1091. Rather, existing antidiscrimination laws would apply just the same. *Id.*

Because the government rationales discussed above cannot survive even rational basis review, they certainly cannot survive the close tailoring that heightened scrutiny requires.

V. THE UNDISPUTED EVIDENCE SHOWS THAT PLAINTIFFS SATISFY THE REQUIREMENTS FOR DECLARATORY AND INJUNCTIVE RELIEF.

The undisputed evidence establishes that Plaintiffs satisfy the requirements for declaratory relief. "In a case of actual controversy within its jurisdiction," this Court "may declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a). Defendants' ongoing violation of Plaintiffs' right to equal protection clearly poses a justiciable controversy.

Plaintiffs also satisfy the criteria for permanent injunctive relief. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Plaintiffs suffer irreparable harm through daily deprivations of their right to equal treatment. The courts have long recognized that "constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm." *Nelson v. Nat'l Aeronautics and Space Admin.*, 530 F.3d 865, 882 (9th Cir. 2008), *rev'd on other grounds*, 131 S. Ct. 746 (2011). Because no award of

damages can restore the loss of dignity accompanying a governmental badge of inferiority, "an alleged constitutional infringement will often alone constitute irreparable harm." *United States v. Arizona*, 641 F.3d 339, 366 (9th Cir. 2011) (internal quotations marks omitted).

The balance of hardships tips sharply in Plaintiffs' favor as well. In contrast to the concrete, dignitary, and irreparable harms visited upon the Plaintiffs, Defendants would only gain from affording equal treatment to same-sex couples. *See* App. 172-75 ¶¶ 15-25 (demonstrating that state and local governments lose approximately $23 to $52 million in business revenue and $1.8 to $4.2 million in tax revenue because of the marriage restriction). The State already has a well-functioning system for marrying couples, and Defendants' duties in that regard would not be made more complex simply because some prospective spouses would be of the same-sex. Nor would allowing Plaintiffs to access marriage disserve the public interest. Allowing Plaintiffs to secure their family relationships through the same family protection system as different-sex couples – marriage – will have no effect on the families or marriages of others. *Id.* 139-42 ¶¶ 56-63. Rather, the fabric of society is strengthened when all families are safeguarded through access to marriage.

CONCLUSION

For the forgoing reasons, Plaintiffs' motion for summary judgment should be granted and this Court should declare that Defendants' exclusion of Plaintiffs from marriage violates the U.S. Constitution's guarantee of equal protection and permanently enjoin Defendants from excluding Plaintiffs from civil marriage.

DATED: September 10, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed the foregoing with the Clerk of the Court for the United States District Court, District of Nevada by using the CM/ECF system on September 10, 2012. All participants in the case are registered CM/ECF users, and will be served by the CM/ECF system.

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