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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' COMBINED OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT BY DEFENDANT SANDOVAL, DEFENDANT GLOVER, AND DEFENDANT-INTERVENOR COALITION FOR THE PROTECTION OF MARRIAGE

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INTRODUCTION

All parties agree that this case is ready for decision. But contrary to the arguments of Defendant Governor Brian Sandoval ("Sandoval"), Defendant Carson City Clerk-Recorder Alan Glover ("Glover"), and Defendant-Intervenor the Coalition for the Protection of Marriage (the "Coalition"),[1] any fair application of controlling precedent requires that their motions for summary judgment be denied and, instead, that Plaintiffs' motion for summary judgment be granted.

The exclusion of same-sex couples from marriage in the State of Nevada (the "State" or "Nevada") cannot be shielded from judicial scrutiny merely because Plaintiffs challenge a domestic relations law.[2] Nor can *Baker v. Nelson*, 409 U.S. 810 (1972) (mem.), be relied on to avoid considering the validity of Plaintiffs' claims. These claims were not and could not have been presented in *Baker*, a decision that, in any event, no longer has any doctrinal force. On the merits, Defendants mischaracterize the analysis this Court must perform in evaluating Plaintiffs' claims under even rational basis review: Defendants cannot justify the marriage restriction simply by focusing on their desire to continue to encourage the favored heterosexual majority to marry, but rather must identify a governmental interest served by continuing to exclude same-sex couples from marriage. Moreover, the Supreme Court and Ninth Circuit have made clear that Plaintiffs must be permitted to introduce evidence showing that the marriage restriction – tested in light of the State's contemporary reality – is not supported by any conceivable, legitimate rationale. Defendants' arguments about tradition and caution, procreation and child welfare, and religious liberties are not only so implausible that they fail the test of being "conceivable," they do not even rationally relate to the exclusion of same-sex couples from marriage in Nevada. Furthermore, although the marriage restriction cannot survive even rational basis review, any faithful application of the test for heightened scrutiny demonstrates that it must apply to sexual orientation classifications, notwithstanding the inapposite and outdated legal authorities

[1] These three parties are collectively referred to herein as "Defendants."

[2] As explained in Plaintiffs' motion for summary judgment, Plaintiffs here challenge state officials' refusal to allow same-sex couples to marry and to recognize the marriages same-sex couples validly have entered in other jurisdictions. Plaintiffs refer to both of these forms of denial of equal treatment as the denial of access to or exclusion from marriage, or as the marriage restriction.

Defendants cite. Defendants also fail to rebut Plaintiffs' authorities demonstrating that they are entitled to heightened scrutiny on their sex discrimination claims. For these reasons, Defendants' summary judgment motions should be denied, and judgment should be entered in favor of Plaintiffs.

PROCEDURAL BACKGROUND

On April 10, 2012, Plaintiffs filed a complaint challenging their exclusion from marriage by certain government officials in Nevada as a violation of the federal Constitution's guarantee of equal protection. Dkt. 1. On May 17, 2012, Defendant Sandoval, joined by Defendant Glover, moved to dismiss Plaintiffs' complaint solely on the grounds that relief is allegedly precluded by the Supreme Court's summary disposition in *Baker v. Nelson*. Dkt. 32, 33. On August 10, 2012, all parties agreed that consideration of the motions to dismiss should be deferred, so that the parties could present the Court with merits arguments on cross-motions for summary judgment, and the Court could consider all issues together. Dkt. 67. On September 10, 2012, Plaintiffs and the Defendants moved for summary judgment. Dkt. 72, 74, 85, and 86. With the Court's permission, Plaintiffs respectfully respond in this combined opposition brief to Defendants' motions for summary judgment. Dkt. 94.

FACTUAL BACKGROUND

On several core points, the parties agree:

1) **Marriage Has a Profound Significance.** Defendant Sandoval, the Coalition, and Plaintiffs all concur that the designation of marriage carries extraordinary significance. *See* Dkt. 85 at 10 (Defendant Sandoval states that "the marriage institution is fundamentally important to society, and to the State"); *id.* at 9-10 (discussing authorities recognizing the unique significance of marriage in society); Dkt. 72 at 28 (the Coalition states that marriage is as "fundamental, influential, and consequential as any" other institution and carries "massive power"); Dkt. 86 at 12-13 (Plaintiffs describe the extraordinary significance of the designation of marriage).

2) **Solemnization by the State is a Core Part of the Status and Societal Respect Accorded Through Marriage.** Plaintiffs also have argued that denying same-sex couples the ability to solemnize their relationships in a State-sanctioned ceremony causes harm of

constitutional dimension. *See, e.g.*, Dkt. 86 at 7 ("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."). Defendant Sandoval agrees that the State's role in licensing and solemnizing marriage is a significant part of what makes marriage a venerated institution in society. As he acknowledges, "The solemnity of marriage comes in large part from the State sanction it receives by virtue of licensing, for which there is an extensive system." Dkt. 85 at 7; *id.* at 8 (describing the State's requirements for solemnization of marriages and noting that the "significance of the marriage institution in Nevada is also demonstrated by the State's system of redundant recordation").[3]

3) **Marriage and Domestic Partnership Are Not the Same.** Plaintiffs further demonstrated in their motion for summary judgment that access to registered domestic partnership does not cure the State's equal protection violation because domestic partnership lacks the uniquely cherished standing and prestige of marriage. Dkt. 86 at 12-14. Defendant Sandoval and the Coalition agree that the two institutions, by design, are not the same. *See* Dkt. 85 at 6 (Defendant Sandoval argues that "marriage is not equivalent to domestic partnership. They are different.") (citation omitted); Dkt. 72 at 5 (the Coalition acknowledges that Nevada's domestic partnership statute "expressly provides that a domestic partnership 'is not a marriage'") (quoting Nev. Rev. Stat. § 122A.510).

4) **No Factual Dispute Precludes Summary Judgment.** The parties additionally agree that there are no disputes of material fact, at least in part because many of the issues in the case may be viewed as questions of law. *See* Dkt. 72 at 7 (brief of the Coalition, arguing that summary judgment is appropriate); Dkt. 85 at 3 (Defendant Sandoval agrees that "there are no relevant factual issues to be decided"); *id.* at 4 ("There are no factual disputes, *i.e.* genuine issues of material fact, involved in this lawsuit. There is no factual case to try."); Dkt. 74 at 6 (Defendant Glover also urges the Court to decide "the merits" of the case). Further, Defendant

[3] The "redundant recordation" Defendant Sandoval describes – including recording of marriage certificates by county clerks, county recorders, and the State, along with criminal penalties for failing to satisfy certain of these duties – does not exist for registered domestic partnership. Instead, domestic partnership records are maintained only by the Secretary of State, and no criminal penalties attach for lapses in keeping those records. Nev. Rev. Stat. § 122A.100.

Sandoval accepts Plaintiffs' allegations about their mutual love, commitment, and devotion to each other, and the profound harms they experience from not being permitted to marry. Dkt. 85 at 11 ("These are not insignificant facts viewed on a personal level, because good and honest human life and experience deserve respect.… The State accepts them all as true, for purposes of deciding this motion for summary judgment.").

ARGUMENT

I. NO THRESHOLD ISSUES PRECLUDE THIS COURT FROM DECIDING THE MERITS OF PLAINTIFFS' CLAIMS.

A. State Marriage Laws Are Not Immune From Challenge Under the Federal Equal Protection Clause.

Defendant Sandoval claims that, because the State is a sovereign authority, the State's "laws defining marriage as being between a man and a woman are valid and *beyond constitutional challenge*." Dkt. 85 at 2 (emphasis added); *id.* (arguing that restricting marriage is "the people's decision" and for that reason, any attempt to "override" that decision "has no support in the law"); *id.* at 11 (arguing that the issue raised in this case "is for the people of the State to determine"). Defendant Glover and the Coalition similarly argue that Plaintiffs' constitutional claims to equal protection should not be permitted to be vindicated in the courts, and must instead be relegated to the mercy of the political process. *See* Dkt. 74 at 10 ("Glover prays the Court exercises appropriate restraint in this case to preserve the people's collective initiative voice"); Dkt. 72 at 3 (the Coalition asserts that Plaintiffs are "not entitled to have their views imposed by judicial fiat in the name of the United States Constitution"). These arguments contravene several fundamental principles of constitutional law.

First, all state laws – including marriage laws – are subject to the Fourteenth Amendment's mandate that states cannot violate individuals' rights of equal protection of the law. *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) struck down a state initiative barring same-sex couples from marrying ("Proposition 8") on equal protection grounds. That decision compels this Court to reject Defendants' argument that the Court should abdicate its responsibility to fairly judge whether challenged state action is constitutional or not. *Perry*, of course, is hardly the only case that requires all state laws, including marriage laws, to comply with the constitutional

imperative of equal protection. *See Loving v. Virginia*, 388 U.S. 1, 7 (1967) ("the State does not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment. Nor could it do so …"); *see also Zablocki v. Redhail*, 434 U.S. 374, 377 (1978) (striking down, on both equal protection and due process grounds, Wisconsin law excluding some individuals from marriage); *Means v. Navajo Nation*, 432 F.3d 924, 932 (9th Cir. 2005) ("the State of California, although 'sovereign,' nonetheless is bound by the Due Process and Equal Protection Clauses of the Fourteenth Amendment").

The cases Defendant Sandoval cites in purported support of this argument do not support it, but instead establish a wholly different point – irrelevant here – about *Congress*'s lack of power to make unwarranted incursions upon states' family law authority. Dkt. 85 at 9 n.5. This principle, generally referred to as federalism, has no bearing here. Unlike the cases Defendant Sandoval cites, this suit does not in any way involve *Congressional* authority. *See* Dkt. 85 at 9 n.5 (citing *In re Burrus*, 136 U.S. 586, 594 (1890) (recognizing that Congress does not have "any special jurisdiction" over the field of domestic relations); *Murphy v. Ramsey*, 114 U.S. 15, 43-44 (1885) (discussing a congressional act that disenfranchised people practicing bigamy or polygamy from the right to vote); *United States v. Yazell*, 382 U.S. 341, 342 (1966) ("This case presents an aspect of the continuing problem of the interaction of federal and state laws in our complex federal system."). Rather than claiming any conflict with a law passed by Congress, here Plaintiffs solely challenge Defendants' exclusion of same-sex couples from marriage as a violation of the federal Constitution. Contrary to Defendants' arguments, nothing grants Defendants permission to violate the essential guarantees of equality required by the Fourteenth Amendment, even in the context of marriage.[4]

Defendant Glover's federalism arguments repeat his prior claims that *Baker v. Nelson* is

[4] Nor can the state court cases cited by Defendant Sandoval grant the State special dispensation from conforming to federal constitutional guarantees. *See* U.S. Const. art. VI, cl. 2 (the federal "Constitution … shall be the supreme Law of the Land"); Dkt. 85 at 10 (citing *Merritt v. Merritt*, 40 Nev. 385 (1917), and *Tiedemann v. Tiedemann*, 36 Nev. 494 (1913), both discussing the unremarkable concept that the State is the governmental entity with authority to devise requirements for marriage and divorce, without even considering whether those requirements can violate the federal Constitution's equality guarantee, which was not at issue in those cases).

controlling, which Plaintiffs further discuss below – but he adds one new, startling assertion. Defendant Glover claims that the Supreme Court can render a judgment holding a law unconstitutional, but a District Court cannot do so without acting as a "superlegislature." Dkt. 74. at 11 ("While the U.S. Supreme Court might occasionally be moved … to venture into the marriage topic … a federal district court would need to act as a superlegislature" to do so); *id.* at 11-12 ("it is the province and constitutional role of the U.S. Supreme Court, not a federal district court" to determine when a marriage-related law is unconstitutional). This fanciful argument is unsupported, and indeed unsupportable. Almost two centuries ago the Supreme Court explained that in our system of governance "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Contrary to Defendant Glover's assertions, neither district court judges nor those on courts of appeal have any lesser a "constitutional role" in discharging those duties than the U.S. Supreme Court, even in cases challenging inequality in state marriage laws. Dkt. 74 at 12. *See, e.g.*, *Redhail v. Zablocki*, 418 F. Supp. 1061 (E.D. Wisc. 1976) (district court decision striking down state marriage restriction on equal protection and due process grounds), *aff'd*, 434 U.S. 374 (1978*); see also Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (same), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1012 (9th Cir. 2012).

In the system of checks and balances fundamental to our republic, the judiciary plays a singular role in ensuring that "the democratic majority … accept[s] for themselves and their loved ones what they impose on you and me." *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring). The judiciary's role in safeguarding the rights of minorities is perhaps never more critical than when examining the majority's selective application of a law to a small disfavored group, which raises concerns that majoritarian bias, stereotypes, or simple lack of concern about those different from them may have distorted the democratic process. *See Diaz v. Brewer*, 656 F.3d 1008, 1014 (9th Cir. 2011) ("The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.") (citations omitted).

Defendant Glover disregards the seminal role of the courts in our system by arguing that Plaintiffs' claims "constitutionalize" the question of marriage for same-sex couples. Dkt. 74 at 29-30 (quoting *Jackson v. Abercrombie*, 2012 U.S. Dist. LEXIS 111376, at *10 (D. Haw. Aug, 8. 2012). But Defendant Glover's argument is more a quarrel with our system of governance than anything else. To the extent that invoking one's right to equal protection under the Fourteenth Amendment "constitutionalizes" an issue, that is precisely the right conferred by the Amendment. The federal judiciary does not improperly intrude on the rights of the legislature or the electorate in deciding – as the courts are charged to do – whether a state's law violates the Equal Protection Clause. And, even when "[n]ationwide, citizens are engaging in a robust debate" over what some consider a "divisive social issue," *see* Dkt. 74 at 30 (quoting *Jackson*, 2012 U.S. Dist. LEXIS 111376, at *10), those whose constitutional rights are being violated now are not required to wait until a majority of the public changes their minds to have their rights vindicated. Indeed, if that logic prevailed, societal debates about desegregation, the appropriate role of pregnant women in the workplace, and the right of undocumented children to a public education would have barred the courts from deciding those questions in *Brown v. Board of Education*, 347 U.S. 483 (1954), *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), and *Plyler v. Doe*, 457 U.S. 202 (1982). *Cf. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012) (holding that, when a law is alleged unconstitutional, it is the province of the judiciary to decide that question, and that, even though that "duty will sometimes involve resolution of litigation challenging the constitutional authority of one of the three branches," "courts cannot avoid their responsibility merely because the issues have political implications") (internal quotation marks and brackets omitted).

B. *Baker v. Nelson* Does Not Govern This Case.

While Defendant Sandoval and the Coalition largely rest on their prior briefing regarding *Baker v. Nelson*, Dkt. 85 at 4, Dkt. 72 at 7-8, Defendant Glover devotes significant discussion in his summary judgment papers to *Baker*'s supposed relevance here. Dkt. 74 at 4-6, 10-21. Because Plaintiffs have addressed the majority of his arguments in responding to his and the Governor's motion to dismiss, Plaintiffs respectfully incorporate their previous briefing by reference, Dkt. 41, Dkt. 53, and address here only new points raised in Defendant Glover's

summary judgment motion.

To begin, contrary to Defendant Glover's suggestion, Plaintiffs' argument cannot be reduced merely to the fact that *Baker*'s jurisdictional statement raised only a claim based on sex discrimination, and not sexual orientation discrimination. Dkt. 74 at 4. While that is the proper way to read *Baker*'s jurisdictional statement – which renders *Baker* inapplicable to Plaintiffs' sexual orientation claim – Plaintiffs' core arguments also include that (i) *Baker* is inapplicable to *all* claims in this case given the extremely limited reach of Supreme Court summary decisions, and (ii) even if *Baker* were relevant, subsequent developments have extinguished any doctrinal force that summary dismissal may once have had. *See, e.g.*, Dkt. 41 at 5-11.

Addressing the first point about *Baker*'s precedential value, Defendant Glover now urges a brand new standard for determining the binding effect of a summary dismissal. Plucking a line from a footnote in *Hicks v. Miranda*, 422 U.S. 332 (1975), Defendant Glover reformulates the relevant test, suggesting that, if two cases can be described as "sufficiently the same," the prior summary decision is binding. Dkt. 74 at 12 (citing *Hicks v. Miranda*, 422 U.S. at 345 n.14). But *Hicks* did not invent a new lax standard for performing the relevant analysis, as Defendant Glover suggests, and this cherry-picked phrase is neither the beginning nor the end of the relevant test. Instead, because a summary decision is a "'rather slender reed' on which to rest future decisions," the Supreme Court has used exceptional care to define the relevant standard narrowly. *Morse v. Republican Party*, 517 U.S. 186, 203 n.21 (1996) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 784 n.5 (1983)). As the Supreme Court has confirmed time and again, a summary decision extends no further than "the *precise* issues presented and *necessarily* decided" by that action, and "no more may be read into [the Court's] action than was *essential* to sustain that judgment." *Anderson*, 460 U.S. at 786 n.5 (emphasis added; internal quotation marks omitted).[5] While

[5] Leaving no room for doubt, the Supreme Court has restated these standards consistently for well over three decades. *See, e.g., Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (summary dismissals bind lower courts on the "precise issues presented and necessarily decided by those actions"); *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 182 (1979) (same); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 499 (1981) (same). *See also Washington v. Confederated Bands & Tribes*, 439 U.S. 463, 478 n.20 (1979) (a summary dismissal "represents no more than a view that the judgment appealed from was correct as to those federal questions raised and necessary to the decision"); *Morse*, 517 U.S. at 203 n.21 ("no more may be read into our action than was essential to sustain that judgment") (internal quotation marks omitted); *Montana v. Crow Tribe of Indians*, 523 U.S. 696, 715 n.4 (1998) (same).

Plaintiffs do not argue, as Defendant Glover claims, that the two cases "must be identical in all respects," Dkt. 74 at 13, the Supreme Court has explained that even slight factual differences can distinguish a summary dismissal where they are relevant to the issues, Dkt. 41 at 5-6, and that a restrained reading of summary decisions is particularly appropriate given their limited nature. *Washington v. Confederated Bands & Tribes*, 439 U.S. 463, 478 n.20 (1979) (a summary dismissal does not "have the same precedential value … as does an opinion of this Court after briefing and oral argument on the merits").

The well-established standards for summary dismissals are entirely consistent with *Hicks* itself. In fact, *Hicks* recognized the extremely limited reach of summary dismissal decisions in the same footnote Defendant Glover cites. 422 U.S. at 345 n.14. *Hicks* explained that, to the extent the Supreme Court previously dismissed a question as insubstantial, that ruling's preclusive effect is so limited that even *considering* its scope "may itself present issues of real substance," meriting substantive analysis. *Id.*

Defendant Glover's *Baker* discussion also confuses the relevance of Nevada's domestic partnership law, which raises a very different set of questions for this Court than were presented in *Baker*. Defendant Glover relies on the faulty discussion of this point in *Jackson*, Dkt. 74 at 14, but as Plaintiffs previously have explained, *Jackson* misunderstood the role of Hawaii's civil union law in the analysis and should not be persuasive here. Dkt. 86 at 9-10. The relevant question is not, as *Jackson* framed it, whether Plaintiffs are challenging the constitutionality of Nevada's domestic partnership law. *Id.* Instead, the issue is whether the State's enactment of that law – a kind of state law that no state had even contemplated at the time *Baker* was decided – causes this case to present different questions about, for example, the State's governmental interests in excluding same-sex couples from marriage than were presented in *Baker*. In *Perry*, California's domestic partnership law not only shaped the Ninth Circuit's analysis, but in some instances dispositively answered questions about California's interests in Proposition 8, *see* 671 F.3d at 1063, 1086-88. The same is true here. Judge Reinhardt's majority opinion in *Perry* binds this Court to consider the impact of Nevada's domestic partnership law on the state interests that could conceivably be advanced to support the State's marriage restriction and makes clear

that Plaintiffs do not raise the "precise issues presented and necessarily decided" by *Baker*. *Mandel*, 432 U.S. at 176.

Defendant Glover also claims that the Supreme Court's landmark decisions over the last 40 years – heightening the constitutional scrutiny of sex-based classifications and sheltering lesbians and gay men from various forms of discrimination – do not alter whether that Court would see a question of federal substance in this case today. Dkt. 74 at 20-21 (discussing *Lawrence v. Texas* 539 U.S. 558 (2003), *Romer v. Evans* 517 U.S. 620 (1996), and *Frontiero v. Richardson*, 411 U.S. 677 (1973)). Defendant Glover attempts to dismiss these precedents by arguing that all are "unique to their facts," and do not have implications for other cases such as this one. Dkt. 74 at 21. This is incorrect, as confirmed by the most recent Court of Appeal to consider the question. *Windsor v. United States*, 2012 U.S. App. LEXIS 21785, at *16 (2d Cir. October 18, 2012) ("Even if *Baker* might have had resonance for [that plaintiff's] case in 1971, it does not today."). *Lawrence* itself recognized that its holding was about far more than the challenged criminal penalty Texas imposed on same-sex couples' intimate relationships. 539 U.S. at 567 ("[t]o say the issue [at stake] was simply the right to engage in certain sexual conduct demeans the claim the individual put forward," as same-sex couples' intimate relationships "can be but one element in a personal bond that is more enduring"). For this reason, the Ninth Circuit has recognized that *Lawrence* has far-reaching implications and has relied on it repeatedly in other contexts, including its consideration of marriage-related questions in *Perry*. *See Perry*, 671 F.3d at 1092-94 (relying on *Lawrence*'s instruction that neither tradition nor moral disapproval alone can sustain differential treatment of a minority group); *Witt v. Dep't of the Air Force*, 527 F.3d 806 (9th Cir. 2008) (applying *Lawrence* to find that heightened scrutiny must govern the military's suspension of a lesbian reservist); *see also Windsor*, 2012 U.S. App. LEXIS 21785, at *18 (discussing the significance of *Lawrence* as a post-*Baker* doctrinal development).[6]

In particular, Defendant Glover tries to dismiss *Romer* as a "unique [] circumstance" with

[6] Defendant Glover cites *Lawrence*'s observation that it did not involve whether the government must give formal recognition to same-sex couples' relationships, but that merely confirms that the question remains undecided. Dkt. 74 at 20 n.24 (citing *Lawrence*, 539 U.S. at 578). *Lawrence*'s statement would have been entirely unnecessary if *Baker* already had foreclosed the issue.

no relevance here. But that fails to acknowledge that *Perry* found *Romer* not only instructive, but *controlling* on the issues before it. *Perry*, 671 F.3d at 1081 ("*Romer* compels that we affirm the judgment of the district court"); *Windsor*, 2012 U.S. App. LEXIS 21785, at *17-18 (citing *Romer* as one of the "manifold changes to the Supreme Court's equal protection jurisprudence" in "the forty years after *Baker*," since at that time the Court had not yet ruled that "a classification of homosexuals undertaken for its own sake" actually lacked a rational basis) (internal quotation marks and brackets omitted). As other courts have recognized, in light of these doctrinal developments "it is not reasonable to conclude the questions presented in the *Baker* jurisdictional statement would still be viewed by the Supreme Court as 'unsubstantial.'" *Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861, 873 (C.D. Cal. 2005), *aff'd in part and vacated in part on other grounds by* 447 F.3d 673 (9th Cir. 2006); *see also In re Kandu*, 315 B.R. 123, 138 (Bankr. W.D. Wash. 2004) (in light of "the possible impact of recent Supreme Court decisions, particularly as articulated in *Lawrence*, this Court concludes that *Baker* is not binding precedent on the issues presented"). Nor does Defendant Glover say anything of substance about *Frontiero*. It is difficult to see how he could. *Frontiero*'s decision to heighten the scrutiny accorded sex-based classifications could hardly be a more significant doctrinal development, and Defendant Glover does not seriously argue to the contrary. *See Windsor*, 2012 U.S. App. LEXIS 21785, at *17 ("When *Baker* was decided in 1971, 'intermediate scrutiny' was not yet in the Court's vernacular.").

C. Defendants' Attempt to Inject Issues Not Relevant to This Case Should be Disregarded.

Defendants try to insert a series of issues into this case that are neither raised by nor relevant to Plaintiffs' claims, and these distractions should be disregarded by the Court. First, Plaintiffs have not raised a substantive due process claim, making Defendants' discussion of that issue also extraneous and irrelevant. *See* Dkt. 85 at 12 n.7 (arguing that rational basis is proper for Plaintiffs' *equal protection* claims by citing the *due process* holding in *Washington v. Glucksberg*, 521 U.S. 702 (1997)); *see also* Dkt. 85 at 14. Defendant Sandoval claims, without explanation, that Plaintiffs' heightened scrutiny theory necessarily "relies on the premise that

marriage is a fundamental right." *Id.* 14. This is simply not true. Plaintiffs raised no such claim in their complaint, Dkt. 1, nor have Plaintiffs relied on that theory in any brief or argument made to this Court. *See* Dkt. 86 at 2 ("While other cases may raise broader questions, this one asks a specific, limited question"). Defendant Sandoval appears to suggest that Plaintiffs cannot demonstrate that heightened scrutiny is appropriate solely as a matter of equal protection, but this fundamentally misapprehends constitutional doctrine. The tests for heightened scrutiny are distinct for substantive due process claims (which focuses on the scope and nature of the right at stake, and whether it is fundamental) and equal protection claims (which focuses on the excluded minority group, including the group's history of discrimination and ability to contribute to society). Laws that deny equal protection often receive heightened scrutiny even when the right that a group is denied is not fundamental. *See, e.g.*, *Orr v. Orr*, 440 U.S. 268, 278-83 (1979) (applying heightened scrutiny to deny state law providing that only wives, and not husbands, can be awarded alimony, even though no fundamental right claim was raised). As explained further below, in this case Plaintiffs' argument for heightened scrutiny is solely that the marriage restriction in Nevada fails heightened scrutiny (and even a lower standard of review) as a matter of equal protection.[7]

Second, Plaintiffs have not raised any claim under the federal Constitution's Full Faith and Credit Clause. *See* Dkt. 74 at 16, 19, 22, 27 (Defendant Glover's discussion of the Full Faith and Credit Clause).[8] Because the "plaintiff is generally free to be the master of his own complaint," Defendants' attempts to insert that issue into the case are unavailing, and do not affect the analysis of the claims Plaintiffs actually have raised. *Harper v. San Diego Transit*

[7] Accordingly, while Plaintiffs vigorously dispute Defendant Sandoval's claims that the fundamental right to marry excludes same-sex couples, they do not respond substantively here because the argument is superfluous to the equal protection arguments that are the actual basis of Plaintiffs' claims. Dkt. 85 at 14-16.

[8] Defendant Glover quotes at length from *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005), a case in which the plaintiffs expressly *did* raise a Full Faith and Credit Clause claim. *Id.* at 1302; Dkt. 74 at 16. Because that claim is not present here, none of *Wilson*'s concerns – ill-founded as they are – apply here. For example, *Wilson*'s discussion of those plaintiffs' claims as creating "a license for a single State to create national policy" plainly are irrelevant to this case. 354 F. Supp. 2d at 1303. Here, Plaintiffs' claims for recognition of the valid marriages some of them have entered in other jurisdictions are narrowly tailored to Nevada's specific circumstances, and contend only that, as a matter of *equal protection*, the State does not have even a legitimate, rational basis for disregarding their marriages when it affords them nearly all rights and responsibilities of spouses through registered domestic partnership.

Corp., 764 F.2d 663, 667 (9th Cir. 1985).

Finally, Plaintiffs wish to correct a misunderstanding that Defendant Glover repeats in his motion. Plaintiffs have not raised at any point in this litigation a claim that Nevada's constitutional amendment removed pre-existing access to marriage, as did California's Proposition 8.[9] As Plaintiffs previously have stated, they are not "confused" about the fact that – unlike this case – *Perry* involved the elimination of same-sex couples' pre-existing access to marriage. But as explained further below, this difference between the cases does not render *Perry*'s reasoning about what is common to California's and Nevada's treatment of same-sex couples any less controlling here.

II. NEVADA'S MARRIAGE RESTRICTION FAILS RATIONAL BASIS REVIEW.

A. Defendants Mischaracterize the Standard for Rational Basis Review.

Defendants' motions for summary judgment all share a central flaw: they urge a form of rational basis review that strips the standard of its core meaning. Even under the most deferential review, Defendants cannot satisfy rational basis by merely mouthing governmental interests that are provably incorrect or wholly unrelated to what the marriage restriction in Nevada actually does.

Defendants' analysis runs afoul of four key principles of rational basis review. First, a purported governmental interest must be conceivable when tested in light of existing reality. Courts "need not in equal protection cases accept at face value assertions of legislative purposes, when an examination" of the surrounding circumstances "demonstrates that the asserted purpose could not have been a goal of the legislation." *See Weinberger v. Wiesenfeld*, 420 U.S. 636, n.16 (1975). Moreover, as the authorities discussed below establish, parties are allowed to introduce evidence demonstrating that a proffered interest cannot conceivably support the challenged classification. Second, the governmental interest must rationally relate to the challenged

[9] Defendant Glover previously asserted that Plaintiffs were making such an argument, Dkt. 46 at 12-13, and Plaintiffs explained that they are not, Dkt. 53-1 at 3 (arguing that the Ninth Circuit's reasoning in *Perry* is binding regardless of whether a state "withdraws (as in *Perry*) or withholds (as here) the status of marriage" from same-sex couples). Puzzlingly, Defendant Glover repeats his misstatement in his motion for summary judgment. Dkt. 74 at 17-18 (describing Plaintiffs as "confused regarding the facts in our case and the facts in California's 'Proposition 8' case").

restriction. "[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632. As described further below, none of Defendants' proffered interests satisfy this standard, since the marriage restriction does not in any way further any of these purported interests. Third, the State's purported governmental interests must rationally relate to the challenged *exclusion* of the minority, not to the unchallenged *inclusion* of the empowered majority. *Johnson v. Robison*, 415 U.S. 361 (1974), the principal authority upon which Defendants rely to urge otherwise, does not hold to the contrary. Finally, despite Defendants' focus on the concept of animus, Plaintiffs need not make such a showing to demonstrate an equal protection violation under rational basis, or any other level of constitutional review.

1. Parties can rebut governmental interests by introducing facts showing that the purported interest cannot reasonably be conceived to be true in light of existing reality.

Defendants cite *FCC v. Beach Communications*'s statement that "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." 508 U.S. 307, 315 (1993). *See* Dkt. 85 at 12; Dkt. 72 at 6; Dkt. 74 at 25-30. But this observation provides no mooring for the purported governmental interests Defendants offer. While it is true that a governmental interest need not be proven to scientific certainty, rational basis does not require the Court to close its eyes when the purported interest contravenes reality. As the Ninth Circuit recently explained in *Perry*, "While deferential, the rational basis test "'is not a toothless one.'" 671 F.3d at 1089 (quoting *Matthews v. Lucas*, 427 U.S. 495, 510 (1976)). "'[E]ven the standard of rationality … must find some footing in the realities of the subject addressed by the legislation.'" *Perry*, 671 F.3d at 1089 (quoting *Heller v. Doe*, 509 U.S. 312, 321 (1993) (ellipses in original)).

Indeed, the law is clear that, even under the most deferential form of rational basis review, Plaintiffs "may introduce evidence supporting their claim that [the legislation] is irrational." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 465 (1981). *See also N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 17 (1988) (holding that a plaintiff may "submit[] evidence

to show that the asserted grounds for the legislative classification lack any reasonable support in fact"); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) ("we recognize that the constitutionality of a statute … may be assailed by proof of facts"); *Munoz v. Sullivan*, 930 F.2d 1400, 1407 (9th Cir. 1991) ("the actual legislative purpose is irrelevant *unless* [the court] is persuaded by [its] examination of the record that the asserted purpose could not have been the actual purpose") (emphasis added). In fact, the burden under rational basis review to negate every conceivable rationale for a state's differential treatment of two groups necessarily contemplates the ability to introduce contrary evidence.

In addition, *Beach Communications* clarified that its focus on deference is rooted in a subset of neutral "line-drawing" cases irrelevant here. 508 U.S. at 315 (explaining that the "restraints on judicial review" it described "have added force where the legislature must necessarily engage in a process of line-drawing") (internal quotation marks omitted). This, however, is not a case that involves a neutral line-drawing measure where "differences between the eligible and the ineligible are differences in degree rather than differences in the character of their respective claims." *Mathews v. Diaz*, 426 U.S. 67, 83-84 (1976) (rejecting a challenge to Congress's decision to require five years of continuous residency for Medicare eligibility, though the line could have been drawn at six or four years); *see also Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2081 (2012) (finding that the rationality of the city's system of assessing taxes "draws further support from the nature of the line-drawing choices that confronted it"). Rather, the State's exclusion of same-sex couples from marriage is intentionally drawn along the distinct lines of sexual orientation and sex.[10]

[10] Although the State's marriage exclusion cannot survive even the most glancing review, this selective exclusion is precisely the kind of targeted treatment of a disfavored minority that merits more searching rational review, for the reasons Plaintiffs previously explained. Dkt. 86 at 21. *Compare Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring) ("we have applied a more searching form of rational basis review" when a law "inhibits personal relationships" or exhibits "a desire to harm a politically unpopular group") *with Armour*, 132 S. Ct. at 2080 ("where 'ordinary commercial transactions' are at issue, rational basis review requires deference to reasonable underlying legislative judgments."). The cases Defendant Sandoval cites fall squarely within this latter category, recognizing that mere economic regulation requires no deference. *See, e.g.*, Dkt. 85 at 12 (citing *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1141 (9th Cir. 2004) (evaluating the constitutionality of economic legislation in the form of a living wage ordinance); *Merrifield v. Lockyer*, 547 F.3d 978, 989 (9th Cir. 2008) (recognizing the deference accorded to laws "that neither affect fundamental rights nor proceed along suspect lines").)

Federal equal protection jurisprudence makes clear that the consideration of these purported interests is not frozen in historical amber, but rather must be tested in light of contemporary reality, including the existence and impact of Nevada's domestic partnership law. *See* Dkt. 86 at 9-10, 26 n.19 (Plaintiffs' motion for summary judgment, collecting authorities). The Supreme Court repeatedly has affirmed that, even if a classification may once have been rational, changed circumstances can eliminate a previously existing interest in the differential treatment. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (finding that, although the University of Michigan's consideration of race in its admissions was then constitutional, "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."). Just as the State of Missouri could not justify differential treatment of widowers for death benefits in 1980 by "noting that in 1925 the state legislature thought widows to be more in need of prompt help than men," Nevada cannot justify its marriage restriction by ignoring its current treatment of same-sex registered domestic partners. *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151 (1980); *see also Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 442 (1934) ("a law depending upon the existence of a[] … certain state of facts to uphold it may cease to operate if the … facts change even though valid when passed.") (internal quotation marks omitted).

The requirement to examine a challenged exclusion based on contemporary reality is underscored by the fact that a state may relinquish a previously-existing interest through its own action. *See Eisenstadt v. Baird*, 405 U.S. 438, 448 (1972) (recognizing that, regardless of the governmental interest in a law when it is first passed, the government can "abandon[]" that interest through subsequent lawmaking); *cf. Gregg Dyeing Co. v. Query*, 286 U.S. 472, 476, 479-80 (1932) (stating that "the controlling test is found in the operation and effect of the statute as *applied and enforced* by the State" and holding that a law's constitutionality is not determined with respect to "its four corners" only, because state action may be taken through more than one enactment, and the question is whether "taken in its totality, [that action] is within the State's constitutional power").

The Coalition resists these principles, arguing that the domestic partnership law cannot

cede interests the State might previously have claimed because a statute is a lesser authority than a state constitutional amendment.[11] Dkt. 72 at 28. But if this logic controlled, *Perry* could not have been decided as it was. Instead *Perry* recognized that laws – including constitutional amendments – are evaluated based on their "actual and specific effects," and must be examined in context with the state's larger regulatory scheme. 671 F.3d at 1079. *Perry* thus tested Proposition 8 with reference to California's domestic partnership and other statutes, recognizing that these laws carried great and, in some instances, dispositive significance. *Id.* at 1086-87 (examining purported governmental interests in procreation and raising children vis-à-vis California's statutes related to marriage and parentage); *id.* at 1091 (analyzing an interest in religious liberty by referring to "California's [statutory] antidiscrimination laws" and their application "to various activities of religious organizations"); *id.* at 1091 (evaluating a purported state interest in school curriculum by referring to California's education statutes). It is *Perry*'s approach, not the one urged by the Coalition, that conforms to the Supreme Court guidance described above, and that this Court is bound to apply.

2. At minimum, a purported governmental interest must be rationally furthered by the challenged classification.

The requirement of a rational connection between a law's means and ends serves a foundational purpose in our system of governance, offering "substance to the Equal Protection Clause," as well as "guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and [] mark[ing] the limits of our own authority." *Romer*, 517 U.S. at

[11] The Coalition's argument has been tried and rejected in an analogous context. Under California law, voters are permitted to approve both statutes and constitutional amendments, and the legislature may not override such enactments without electorate permission. *Knight v. Superior Court*, 128 Cal. App. 4th 14, 17-18 (Cal. App. 2005). In 2000, California voters approved a statute known as "Proposition 22," which provided that "[o]nly marriage between a man and a woman is valid or recognized in California." *Id.* at 17. After the legislature enacted the state's broad domestic partnership law in 2003, the proponents of Proposition 22 filed suit, arguing that the domestic partnership law defied the voter-approved statute and was void. *Id.* at 17-18. Those proponents attempted to paint Proposition 22 as a sweeping law that precluded broad domestic partnerships for same-sex couples. But *Knight* held that Proposition 22's "plain and unambiguous language" made clear the measure's limited effect, and proponents could not attribute hidden objectives to the law that were neither disclosed to nor approved by the voters. *Id.* at 18. The same is true here. *See* Dkt. 87, Ex. C and D (Plaintiffs' request for judicial notice of ballot materials, which explain that the amendment seeks to eliminate marriage for same-sex couples, with no reference to domestic partnership or other policy objectives). The Coalition cannot project onto Nevada's narrow constitutional amendment far-reaching policy positions about other subjects, such as parenting, which were neither described to nor approved by voters.

632. This threshold requirement guards against the kind of arbitrary distinctions that cannot survive any level of review. "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633; *see also Plyler v. Doe*, 457 U.S. at, 227 ("The State must do more than justify its classification with a concise expression of an intention to discriminate."). As explained below with reference to specific purported governmental interests, Defendants' arguments cannot meet this minimum standard. Several of Defendants' proffered interests simply are not affected in any way – let alone advanced – by the State's marriage restriction. As the Supreme Court has explained, "even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632. Where the alleged state interest cannot rationally be seen to further the marriage restriction, that interest must fail as a matter of law. The Coalition claims that if any governmental interest is "at least debatable" it survives rational basis review, Dkt. 72 at 7, but fails to acknowledge that this point must be harmonized with the foundational rational basis principles described in this section. A claimed governmental interest is not even debatable if Plaintiffs have negated it by showing, as Plaintiffs are entitled to do, that the State has disclaimed an interest by enacting contrary laws, or that the marriage restriction does not even conceivably further the purported governmental interest.

3. The marriage restriction can only be sustained by a valid governmental interest in *excluding* same-sex couples, not merely a desire to *include* different-sex couples.

It is not enough, as Defendants claim, to justify the exclusion of a disfavored minority group by pointing to reasons the government would like to continue encouraging different-sex couples to marry. Dkt. 74 at 28. *Johnson*, 415 U.S. 361, the lynchpin of Defendants' argument on this point, does not actually help them. *See Perry*, 671 F.3d at 1087 n.21 (observing that *Johnson* did not involve "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"). Defendant Glover cites *Jackson*'s faulty reading of *Johnson*, but that analysis distorts *Johnson* in

two fundamental ways. It should not persuade this Court.

First, *Jackson* misreads *Johnson* as suggesting that an interest in advantaging the majority, standing on its own, excuses the State from justifying the minority's exclusion. 2012 U.S. Dist. LEXIS 111376, at *9. But as Plaintiffs previously have explained, this is not *Johnson*'s holding, Dkt. 86 at 25 n.17; *see also Windsor*, 2012 U.S. App. LEXIS 21785, at *42-43 (describing as the "defect" in defendants' arguments that they were only "cast as incentives for heterosexual couples," which were not advanced by the federal Defense of Marriage Act ("DOMA") in any way). In fact, more than two decades after *Johnson*, the Supreme Court discussed – and rejected – the same flawed mode of analysis employed in *Jackson*. In *United States v. Virginia*, 518 U.S. 515 (1996), which involved a challenge to the Virginia Military Institute's refusal to admit women, Virginia argued that its desire to exclude women could be justified by a goal that focused solely on the perceived needs of men, *i.e.*, a goal of providing men with single-gender education. *Id.* at 529. The Court rejected that argument, acknowledging that – under the analysis suggested by Virginia, as here – "means merged into end, and the merger risked bypassing any equal protection scrutiny." *Id.* (internal quotation marks omitted). The Court went on to find that "a plan to afford a unique educational benefit only to males" – which parallels Defendants' goal here to provide only heterosexuals access to marriage – "is not *equal* protection." *Id.* at 540 (internal quotation marks omitted) (emphasis in original). Instead, the Court found that Virginia had to produce some valid interest in *refusing* admission to women. *Id.* at 545-46 (finding that the school's objective of producing "citizen-soldiers" is not "advanced by women's categorical exclusion").

This principle has been applied repeatedly in other cases as well. *See Eisenstadt*, 405 U.S. at 448-53 (requiring a state interest in the *exclusion* of unmarried couples from lawful access to contraception, not merely an interest in continuing to allow married couples access); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 535-38 (1973) (testing the federal government's interest in *excluding* unrelated households from food stamp benefits, not in maintaining food stamps for related households); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448-50 (1985) (examining the city's interests in *denying* housing for people with developmental disabilities, not

in continuing to allow residence for others). By analogy, the question has never been whether there is sufficient reason to provide education to white students, but whether there is sufficient reason to exclude students of other races from that education. Accordingly, the obligation falling on this Court is to determine whether the State advances any interest in marriage by barring same-sex couples from it, rather than whether there are valid state interests to continue to allow different-sex couples to marry.[12]

Jackson's second fundamental error is to read *Johnson* as suggesting that the relevant inquiry is whether one can identify *any* difference between same-sex couples and different-sex couples, no matter how untethered that difference may be to the purposes of marriage. *Jackson*, 2012 U.S. Dist. LEXIS 111376, at *9 (focusing on the fact that "opposite-sex couples can naturally procreate and same-sex couples cannot"). A discriminatory classification "must rest upon some ground of difference having a fair and substantial relation to the *object* of the legislation, so that all persons similarly circumstanced shall be treated alike." *Eisenstadt*, 405 U.S. at 447 (internal quotation marks omitted) (emphasis added); *see also Varnum v. Brien*, 763 N.W.2d 862, 883 (Iowa 2009) ("No two people or groups of people are the same in every way, and nearly every equal protection claim" would fail "if the two groups needed to be a mirror image of one another."). As described further below, federal jurisprudence already has settled as a matter of law that the ability to "naturally procreate" is not a ground upon which access to marriage can be restricted, belying *Jackson*'s heavy reliance on this point.[13]

[12] The Coalition's argument that married couples are healthier, wealthier, and happier than those who are not underscores the irrationality of the State's marriage exclusion. Dkt. 72 at 25. The State cannot justify its distinction merely by pointing to all of the advantages it offers different-sex couples; instead, there must be a conceivable rationale for denying these same important protections to same-sex couples and their families. *See generally* Dkt. 86-2, App. 170-86 (Dr. Badgett's testimony that exclusion from marriage has significant social and economic costs for same-sex couples).

[13] As the Supreme Court has made clear, individuals have the right to choose to procreate or not regardless of their marital status. *See Eisenstadt*, 405 U.S. at 453 ("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."); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (recognizing the right of married couples to access contraception); *Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting) ("[W]hat justification could there possibly be for denying the benefits of marriage to homosexual couples exercising '[t]he liberty protected by the Constitution'? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.").

Nor has the Supreme Court allowed marriage to be denied to those who could not procreate when they married, such as prisoners. *Turner v. Safley*, 482 U.S. 78 (1987). In fact,

4. Animus is not required to prove an equal protection violation under any level of review.

Defendants also place great emphasis in their briefs on the concept of animus, but this focus is misplaced. Dkt. 74 at 5, 18-19, 24, 26-27; Dkt. 85 at 13 n.8. Defendant Glover, for example, distorts the doctrinal significance of *Romer*, claiming that the decision only informs the analysis here if Plaintiffs can demonstrate that animus motivated the marriage exclusion. Dkt. 74 at 18-19. This is wrong for two reasons. First, the Ninth Circuit found in *Perry* that *Romer* governed the questions before the Court, even though the Ninth Circuit declined to find that animus motivated the passage of Proposition 8. *Perry*, 671 F.3d at 1093 ("We do not mean to suggest that Proposition 8 is the result of ill will on the part of the voters of California."); *id.* at 1081 (the "differences" between California's Proposition 8 and the constitutional amendment considered in *Romer* "do not render *Romer* less applicable").[14]

Second, animus is not now, nor has it ever been, required to prove an equal protection violation. Instead, Plaintiffs must simply show that the State's distinction between different-sex and same-sex couples is intentional. *See Wayte v. United States*, 470 U.S. 598, 610 n.10 (1985) (a prima facie equal protection claim requires only that a plaintiff demonstrate either a facially discriminatory classification or an intent to discriminate); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (discriminatory intent exists where a decisionmaker "selected or reaffirmed a particular course of action at least in part 'because of,' … its adverse effects upon an identifiable group"). Here, Defendants admit that the exclusion was intentional. *See, e.g.*, Dkt. 85 at 15 (stating that the domestic partnership law was intended to "accentuate[] the distinction" between different-sex couples who may marry and same-sex couples who may not); *id.* at 16 (referring to this distinction as the State's "deliberate legislative purpose").

Turner discussed "[m]any [of the] important attributes of marriage," all of which apply equally to same-sex couples. *Id.* at 95-96 (describing the significant qualities of marriage as including "expressions of emotional support and public commitment," "spiritual significance," "consummation," "receipt of government benefits," "property rights," and "legitimation of children," all of which same-sex couples may benefit from through marriage).

[14] Despite Defendant Glover's urging to the contrary, Dkt. 74 at 18-19, it is the Ninth Circuit's construction of *Romer* that binds this Court, not the Eighth Circuit's inapposite decision in *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006). *Id.* at 865 (examining different legal claims challenging a state constitutional amendment than the ones Plaintiffs raise here).

Though proof of prejudice is not required, the Supreme Court has clarified that bias "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." *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring); *see also Cleburne.*, 473 U.S. at 440 (defining prejudice and antipathy as the view that "those in the burdened class are not as worthy or deserving as others"). Even an intent thought to be benign, or "beneficent" as Defendants claim, may give rise to an equal protection violation. *See* Dkt. 74 at 5 n.2; Dkt. 85 at 16. That is why "a well-meaning … belief that the races would be better off apart" could not save racial segregation, *Locke v. Davey*, 540 U.S. 712, 732 (2004) (Scalia, J., dissenting), nor could notions of "romantic paternalism" save sex-based classifications, *Frontiero*, 411 U.S. at 684. The Equal Protection Clause exists precisely so that the rights of a minority are not at the mercy of the "beneficence" of a majority.[15]

[15] In fact, Defendants' moving papers are rife with examples of stereotyped views about lesbians and gay men as threatening, socially-disruptive radicals, when all that is sought in this case by Plaintiffs is the ability to take responsibility for their loved ones through marriage, just as heterosexuals are allowed to do. For example, Defendants claim that same-sex couples are destructive to marriage, which must be protected from them. *See, e.g.*, Dkt. 72 at 2, 4 (referring to the marriage restriction as providing "the strongest available protection" and "the highest level of protection" from same-sex couples); *id.* at 11-12, 12 n.16 (characterizing Plaintiffs' claims as an effort to "end the man-woman marriage institution" and "replace it with a radically different genderless marriage regime," which will lead to "no normative marriage institutional at all"); *id.* at 15 (marriage by same-sex couples is "inimical" to and puts "in real and imminent danger" the social value of marriage); Dkt. 85 at 9 (invoking Nevada case law about protecting the "purity" of marriage).

As elaborated further in Section II(B)(1) below, the idea that allowing same-sex couples to marry will work a profound harm to the institution of marriage is simply unsupported. *See Perry*, 671 F.3d at 1089 ("To the extent that it has been argued that withdrawing from same-sex couples access to the designation of 'marriage' … will encourage heterosexual couples to enter into matrimony, or will strengthen their matrimonial bonds," that simply is not conceivably true; it "is implausible to think that denying two men or two women the right to call themselves married could somehow bolster the stability of families headed by one man and one woman."); *cf. Virginia*, 518 U.S. at 528, 540 (describing, and ultimately rejecting, Virginia's argument that allowing women to enter the Virginia Military Institute "would destroy … any sense of decency that still permeates the relationship between the sexes," and would be so "radical" and "drastic" as to "destroy" the program) (internal quotation marks omitted).

B. None of the Defendants' Purported Justifications Satisfy Rational Basis Review.

1. Preserving "traditional marriage" is not an adequate justification for the State's exclusion of same-sex couples.

Defendants assert a right to preserve "the heritage of traditional marriage," which supposedly needs "protection" from same-sex couples. Dkt. 74 at 22; Dkt. 85 at 13. It is well-settled, however, that simply adhering to tradition for its own sake is not a legitimate government interest. *See* Dkt. 86 at 22-24; *see also Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) ("no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it") (internal quotation marks omitted); *Williams v. Illinois*, 399 U.S. 235, 239 (1970) ("[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack."); *Varnum*, 763 N.W.2d at 898 ("A specific tradition sought to be maintained cannot be an important governmental objective for equal protection purposes, however, when the tradition is nothing more than the historical classification currently expressed in the statute being challenged."). If the law were to the contrary, this nation's long "heritage" of banning interracial marriage would have justified miscegenation laws.[16] The illegitimacy of continuing a tradition of exclusion for its own sake is not cured by the creation of a separate (and inferior) status for the historically excluded group. *See Virginia*, 518 U.S. at 524; *Sweatt v. Painter*, 339 U.S. 629, 631 (1950); *Brown v. Bd. of Educ.*, 347 U.S. at 495.

The State also cannot credibly claim an interest in preserving "traditional marriage" because marriage, by design, has functioned as a dynamic institution, including with respect to the legal significance of gender. Dkt. 86-2, Appendix to Plaintiffs' Motion For Summary Judgment ("App.") 88-90 ¶¶ 29-34 (testimony of Dr. Cott). While there was once a time when wives retained no separate legal or economic identities apart from their husbands, that practice has been discarded. Dkt. 86-2, App. 90-93 ¶¶ 35-46. Nevada, like California, "has eliminated all

[16] It was also a tradition that women could not serve on juries, be executors of estates, or pay alimony before those sex-based distinctions were held unconstitutional. *See Taylor v. Louisiana*, 419 U.S. 522, 531 (1975) (invalidating a Louisiana law that disproportionately disqualified women from jury service); *Reed v. Reed*, 404 U.S. 71, 77 (1971) (holding unconstitutional Idaho statute conferring preference for men over women as executors); *Orr*, 440 U.S. at 283 (holding unconstitutional Alabama statute requiring husbands but not wives to pay alimony).

legally mandated gender roles" in marriage "except the requirement that a marriage consist of one man and one woman." *Perry v. Schwarzenegger*, 704 F. Supp. 2d at 998. That gender restriction is "nothing more than an artifact of a foregone notion that men and women fulfill different roles in civic life" and therefore there are no longer any gender-related reasons for excluding same-sex couples from marriage. *Id.* Likewise, there have been major changes with respect to eligibility criteria for entering and ending a marriage. Racial restrictions on who could marry, once justified as preserving "natural" marriages between individuals of the same race, have now been entirely eliminated. Dkt. 86-2, App. 94-95 ¶ 53. Many earlier barriers to divorce fell away when states embraced no-fault divorce. Dkt. 86-2, App. 98 ¶ 70.[17] However, the core purposes of marriage, which include the creation of stable households in which adults are committed to one another by their own consent, have remained the same. Dkt. 86-2, App. 86-87 ¶¶ 20-23. Allowing same-sex couples to marry would not change that.

2. Proceeding "cautiously" by continuing to deny equal treatment to an unpopular group is not a legitimate state interest.

Defendant Glover asserts that "[i]t is in society's best interest to deal cautiously with socially controversial same-sex relationships through legislative experiment." Dkt. 74 at 22, 29. But the fact that some in society may view same-sex couples as controversial, a view that frequently rests on moral disapproval or other private views (see Dkt. 72 at 26-27), does not authorize the writing of those views into a "moral code" for the State. *Lawrence*, 539 U.S. at 571 (internal quotation marks omitted). As both the majority and dissent in *Perry* recognized, moral disapproval alone is not a legitimate government interest. *See Perry*, 671 F.2d at 1093 (holding that the governing majority's view about what is moral or not "is not a sufficient reason for upholding the law prohibiting the practice") (internal quotation marks omitted); *id.* at 1103 ("moral disapproval[] alone will not support the constitutionality of a measure") (Smith, J., dissenting); Dkt. 86 at 24 (collecting cases). Likewise, acceding to certain individuals' moral

[17] In fact, Nevada was at the forefront of this national trend, adopting laws in 1931 that made it the easiest venue in the nation to obtain a divorce by virtue of its six week residency requirement and expanded grounds for divorce. Dkt. 86-2, App. 97-98 ¶¶ 68-69. "Reno and Las Vegas fueled the state's economy by marketing nation-wide the availability there of quick and easy divorce, as well as quick and easy marriage." *Id.* at ¶ 68.

disapproval by acting "cautiously" so as not to afford minorities their constitutional rights to equal treatment is never a legitimate government interest. *See 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."). The judiciary's oath is to the Constitution, not to public polls.

Furthermore, Defendants make the surprising assertion that a judgment for Plaintiffs in this case would actually be harmful for same-sex couples. They claim that that it would be "illogical and unwise" to conclude that the "pro-homosexual" domestic partnership law renders Nevada's existing marriage laws unconstitutional. Dkt. 74 at 5 n.2 (quoting *Jackson*); Dkt. 85 at 16. Notably, this strain of argument was attempted in *Perry*. See Defendant-Intervenor-Appellants' Reply Br., No. 10-16696, at 80 (9th Cir. Nov. 1, 2010) ("Plaintiffs' claim is belied by the fact that California's domestic partnership legislation was authored, sponsored, supported, and hailed by leading advocates of gay and lesbian rights."). But it was necessarily rejected in that case, and should be here as well, with good reason: No court can fashion an exception to the Equal Protection Clause simply because it believes that incremental half-measures would somehow better serve the ultimate goal of equality than providing equality itself. Otherwise, this same argument could have been levied to defeat school integration by reasoning that it is preferable for racial minorities to have access to *some* education, even if inferior, rather than none whatsoever. The argument confuses political reality, which may require bargain and compromise, with the strictures of the Constitution, which "'neither knows nor tolerates classes among citizens.'" *Romer*, 517 U.S. at 623 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

3. The marriage restriction is not rationally related to interests surrounding procreation and child-rearing, and contradicts the scientific consensus.

As noted above, Defendants miss the mark by trying to answer the wrong question: whether it is rational for the State to encourage heterosexual couples to marry in order to promote childrearing. *See, e.g.*, Dkt. 74 at 28; Dkt. 72 at 19-20. That absolutely is not the question posed by this case, as Plaintiffs plainly do not seek to enjoin Defendants from issuing marriage licenses to heterosexual couples. Rather, the question here is whether there is a rational connection

between the State's *exclusion* of same-sex couples from marriage, on the one hand, and its goal of encouraging heterosexual couples to marry in order to promote childrearing, on the other. That is why *Perry* analyzed the constitutionality of Proposition 8, and its exclusion of same-sex couples from marriage, rather than simply the constitutionality of the laws creating a marital regime in the first instance.

Defendants cannot articulate the necessary rational connection between the exclusion of same-sex couples from marriage and the promotion of childrearing, and as Judge Reinhardt's majority opinion in *Perry* instructs, none exists in a state that provides same-sex couples with access to the rights and responsibilities of marriage. Through domestic partnerships, same-sex couples in Nevada have access to identical parentage rights as married couples, including the same right to the presumption of parenthood for any child born into the relationship, the same right to adopt, and the same right to rear children together in a legally recognized parent-child relationship. *See* Nev. Rev. Stat. § 122A.200(1)(d). The exclusion of same-sex couples from marriage "has absolutely no effect on the ability of same-sex couples to become parents or the manner in which children are raised" in Nevada. *Perry*, 671 F.2d at 1086; *cf. Windsor*, 2012 U.S. App. LEXIS 21785, at *43 ("Incentives for opposite-sex couples to marry and procreate (or not) were the same after DOMA was enacted as they were before"). Like Proposition 8, the exclusion of same-sex couples from marriage in Nevada "in no way modifie[s] the state's laws governing parentage." *Id.* But "[i]n order to be rationally related to the purpose of funneling more children into families led by two biological parents, Proposition 8 *would have had to modify these laws in some way*. It did not do so." *Perry*, 671 F.2d at 1086-87 (emphasis added). The same is true here. In order for Nevada's marriage exclusion to be premised on keeping same-sex couples from having and rearing children, Nevada would have needed to bar same-sex couples from doing that; instead, Nevada affords same-sex registered domestic partners the same parenting rights as spouses. *Perry* thus forbids acceptance of this purported government interest as a justification for the marriage exclusion.[18] Indeed, this is likely why Governor Sandoval does not even attempt to

[18] *Jackson* rebels against the Ninth Circuit's instruction on this point, citing instead to the dissenting opinion in a state court decision. 2012 U.S. Dist. LEXIS 111376, at *142 ("Although Hawaii has given same-sex couples all rights given to married couples regarding raising children, this does not discredit the rationale" (citing only the dissenting opinion of a Massachusetts high

advance an interest relating to children. Dkt. 85.

It simply is not conceivable that keeping same-sex couples from marrying causes more heterosexual couples to marry or fewer heterosexual couples to divorce. To be clear, that idea is necessarily what Defendants mean when they assert that excluding same-sex couples from marriage somehow "channels" the procreative capabilities of different-sex couples into marriage; otherwise, these assertions would be irrelevant in a case that does not seek to keep different-sex couples from marrying, but challenges Nevada's exclusion of same-sex couples from marriage. *See*, *e.g.*, Dkt. 72 at 3 ("channeling procreative heterosexual passions"); *id.* at 20 ("'[M]arriage protects children to the extent that it succeeds in getting men and women to have and raise their children together'"); Dkt. 74 at 22 ("Marriage is an inducement to opposite-sex couples to engage in responsible procreation").

The notion that a heterosexual person – otherwise on bended knee and poised to propose lifelong matrimony – will abandon marriage or flee the institution simply because same-sex couples are allowed to marry is preposterous. If this is not "irrational," it is difficult to conceive what would be. *See Perry*, 671 F.3d at 1089 (holding that, to the extent it was argued that Proposition 8 would "encourage heterosexual couples to enter into matrimony … the People of California 'could not reasonably' have 'conceived' such an argument 'to be true'"); *Perry v. Schwarzenegger*, 704 F. Supp. 2d at 972 ("Permitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, [or] divorce").[19]

The argument that preventing same-sex couples from marrying causes more heterosexual couples to marry is not only not conceivable, it is disproven by the evidence. Allowing same-sex couples to marry would not negatively affect the institution of marriage in any way.

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court justice)). A district court does not have the freedom to flout the instruction of the Court of Appeals governing it.

[19] *Cf. Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 993 (N.D. Cal. 2012) (holding that the federal government's denial of recognition to married same-sex couples under Section 3 of the federal Defense of Marriage Act ("DOMA") does nothing "to encourage opposite-sex couples to get married"); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 389 (D. Mass. 2010) ("denying marriage-based benefits to same-sex spouses certainly bears no reasonable relation to any interest the government might have in making heterosexual marriages more secure"), *aff'd sub nom. Massachusetts v. U.S. Dep't of Health and Human Servs.*, 682 F.3d 1, 14 (1st Cir. 2012) ("DOMA does not increase benefits to opposite-sex couples – whose marriages may in any event be childless, unstable or both – or explain how denying benefits to same-sex couples will reinforce heterosexual marriage").

Supplemental Declaration of Letitia Anne Peplau, Ph.D. in Support of Plaintiffs' Combined Opposition to Motions for Summary Judgment by Defendant Sandoval, Defendant Glover and Defendant-Intervenor Coalition for the Protection of Marriage ("Supp. Peplau Decl.") ¶ 4-7. The factors that contribute to the stability or instability of different-sex relationships (such as communication styles and ways of handing conflict) or that contribute to divorce (such as age at marriage) are well-understood, and they function independently of whether same-sex couples may marry. Dkt. 86-2, App. 140 ¶ 59; Supp. Peplau Decl. ¶ 6. Allowing same-sex couples to marry, as six states and the District of Columbia currently do, certainly has not caused the institution of marriage to cease to exist or to be adversely affected. *Id.* ¶ 5. In addition, to the extent that the Coalition's argument is that allowing lesbian and gay couples to marry would deter heterosexual couples from marrying because the inclusion of the former would somehow taint marriage itself and devalue its appeal to heterosexual couples, giving legal effect to that bias would violate equal protection. *Palmore v. Sidoti*, 466 U.S. at 433.

Likewise, banning same-sex couples from marriage in no way contributes to "orderly reproduction" in society, as the Coalition contends. Dkt. 72 at 22-24 (citing Def. Coalition's App. T46, which defines "orderly reproduction" as a sustainable birth rate and effective childrearing). It defies rationality to think that, simply because lesbians and gay men cannot marry their partners, they will end their same-sex relationships and then marry different-sex partners.[20] It will come as no surprise that marriages mismatched in sexual orientation frequently end in divorce and cause harm to all people involved. Dkt. 86-2, App. 128 ¶ 24; *Alaska*, 122 P.3d at 793 (holding that, even if denying family health benefits to same-sex couples were to cause

[20] Numerous courts have rejected the similarly ill-conceived argument that denying federal or state benefits to same-sex couples might cause lesbians and gay men to marry someone of a different sex. *See Gill*, 699 F. Supp. 2d at 389 ("this court cannot discern a means by which the federal government's denial of benefits to same-sex spouses might encourage homosexual people to marry members of the opposite sex"), *aff'd sub nom. Massachusetts*, 682 F.3d 1, 14-15 (1st Cir. 2012) ("Certainly, the denial [of benefits under DOMA] will not affect the gender choices of those seeking marriage."); *In the Matter of Brad Levenson*, 587 F.3d 925, 932 (9th Cir. 2009) (Reinhardt, J., decision following EDR proceeding) ("gays and lesbians will not be encouraged to enter into marriages with members of the opposite sex by the government's denial of benefits to same-sex spouses"); *Alaska Civil Liberties Union v. Alaska*, 122 P.3d 781, 793 (Alaska 2005) (finding that there was no indication that Alaska's denial of health benefits to employees' domestic partners would cause them to "seek opposite-sex partners with an intention of marrying them").

them to enter "sham or unstable marriages" with a person of the other sex, that "would not seem to advance any valid reasons for promoting marriage"). Also, as the Supreme Court recognized almost a decade ago, the government simply does not have any valid interest in coercing Plaintiffs to negate the enduring personal bond each has formed with his or her life partner by encouraging them to enter such sham marriages with a different-sex partner. *Lawrence*, 539 U.S. at 567.[21]

The Coalition's suggestion that allowing same-sex couples to marry would signal that the purpose of marriage is to satisfy the wants and needs of adults, and not to promote the welfare of children, is also unfounded. Dkt. 72 at 13-14. First, because marriage itself creates many duties and responsibilities, including parental obligations, there is no conceivable basis for the insinuation that same-sex couples who wish to marry are motivated by a desire to avoid such duties and obligations. Supp. Peplau Dec. ¶ 8. To the contrary, as many of the Plaintiffs have testified, much of their desire to marry stems from an eagerness to care for their children and to protect their families. See Dkt. 86 at 12. Second, there is no conceivable reason to believe that heterosexual individuals are somehow less focused on their own love for the one they wish to marry than are lesbian and gay individuals. Supp. Peplau Dec. ¶ 9. Finally, allowing same-sex couples to marry would mean that more children in Nevada – including the six minor children of various Plaintiff couples, ranging from three months old to eight years old, whose lives will be directly impacted by the outcome of this action – will grow up in married households. It is implausible to think that *more* children growing up in married households somehow reifies the

[21] For this reason, the Coalition's disturbing argument about "heteronormativity" also fails. *See, e.g.*, Dkt. 72 at 13 ("man-woman marriage advances … heteronormativity in general"); *id*. at 29 ("the use of the 'mere word' *marriage*, will determine the fate of heteronomativity in general"). The claim that heterosexuality is a norm that can be encouraged as somehow superior to homosexuality has been definitively rejected by federal courts. *See Lawrence*, 539 U.S. at 567 (lesbians and gay men have a constitutionally protected liberty interest in forming enduring family relationships); *Perry*, 671 F.3d at 1094 (a law that "enacts nothing more or less than a judgment about the worth and dignity of gays and lesbians as a class" is invalid). Indeed, the very argument reveals that, at bottom, the Coalition's support for the marriage restriction is premised on anti-gay animus and seeks to deprive gay people of equal rights simply in order to stigmatize them as less worthy members of society than heterosexuals. Premising the marriage restriction on such a government goal could not more strongly violate *Romer*'s command that "the Constitution neither knows nor tolerates classes among citizens" (quoting Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. at 559), and instead must "rest[] on a commitment to neutrality when the rights of persons are at stake." 517 U.S. at 623.

"selfishness" of same-sex couples, or would deter different-sex couples from marriage. *See id.* ("There is also no support for the notion that same-sex couples have less concern than different-sex couples for providing a positive, stable environment in which to raise and provide for children.").

Because the State's interest in child welfare is in not conceivably furthered by the marriage exclusion, that ends the inquiry and Defendants' arguments fail as a matter of law. But even if the Court were to examine the issues on the merits, Defendants' position manifestly cannot prevail. Defendants' substantive arguments about procreation and child welfare involve two primary claims. First, Defendants claim that different-sex parents are better for children than same-sex parents. Dkt. 72 at 16-19, 21-22; Dkt. 74 at 22. Second, Defendants argue that children do best when raised by their biological parents. Dkt. 72 at 16-19. As explained further below, neither of these purported interests can sustain the State's marriage restriction.[22]

On the first point, Plaintiffs demonstrated in their motion for summary judgment that the consensus among child development experts and the preeminent national medical, mental health, and child welfare organizations leaves no room for debate: the science shows beyond dispute that children are equally likely to thrive with same-sex parents and different-sex parents. Dkt. 86 at 27-28; *see generally* Dkt. 86-3, App. 318-330. The Coalition fails to introduce even a single

[22] The Coalition includes a brief reference in its motion to the possibility of marriage for same-sex couples being mentioned "in schools." Dkt. 72 at 15. To the extent the Coalition argues that this should defeat Plaintiffs' claims, the same rationale was rejected in *Perry* on grounds that control here as a matter of law. Plaintiffs are aware of no law in Nevada that would require schools to teach students about marriage for same-sex couples, and thus "[b]oth before and after" Nevada's marriage restriction "schools have not been required to teach anything about [] marriage" for same-sex couples. *Perry*, 671 F.3d at 1091. Also like California, Nevada prohibits discrimination based on sexual orientation in schools, such that schools cannot teach students that either same-sex or different-sex relationships are inferior to the other. Nev. Rev. Stat. § 651.050(3)(k); § 651.070. The marriage restriction has no effect on "the rights of schools to control their curricula," and thus is not even rationally related to such a purported state interest. *Perry*, 671 F.3d at 1091. Nor can the Coalition object that students might become aware of married same-sex couples merely because schools may refer to "empirical facts of the world around them." *Id.* at 1091-92. "The prospect of children learning about the laws of the State and society's assessment of the legal rights of its members does not provide an *independent* reason" to strip same-sex couples of an existing right, as *Perry* found in California, *id*. at 1092, or to eliminate the right preemptively, as here. Rather, it is simply an argument that same-sex couples should not have the right – particularly given that the "empirical facts of the world around them" currently include six states and our nation's capital, as well as more than a dozen other countries, that already allow same-sex couples to marry (*see* fn. 31, *infra*), facts that children learn about simply by reading the newspaper, turning on the television, or looking at the web.

piece of admissible evidence to the contrary. Instead the Coalition relies entirely on secondary sources which suffer from key flaws, including that (1) many "cite research showing the risk of maladjustment associated" with family stressors that are wholly unrelated to sexual orientation, such as "divorce, transitions to single-parent or step-family life, or being raised in one-parent families," and thus "do[] not allow for any conclusions to be reached about the adjustment of children with same-sex parents;" (2) others are "taken out of context [and] do not support the point the Coalition ascribes to them," or "are not reports of scientific research, but rather are commentaries written by advocates in other professions, such as philosophy and political science." *See* Supplemental Declaration of Michael Lamb, Ph.D. in Support of Plaintiffs' Combined Opposition to Motions for Summary Judgment by Defendant Sandoval, Defendant Glover and Defendant-Intervenor Coalition for the Protection of Marriage ("Supp. Lamb Decl.") ¶¶ 8, 12. Accordingly, none of the Coalition's "sources provide any basis for questioning the robust research in the field that consistently shows equally good outcomes for children of gay and heterosexual parents." *Id.* ¶ 6.

Defendants' arguments that the marriage exclusion can be justified because of a belief that biological parents are superior to others is neither supported by the social science research, nor reflected in Nevada law. As Plaintiffs' expert, Dr. Lamb explains, the sources the Coalition cites simply do not support this proposition, and the Coalition ignores entirely the relevant body of research demonstrating that children fare well and develop normally whether or not they are genetically linked to the parents who raise them. Supp. Lamb Decl. ¶ 10. As support for its claim that the ideal family structure comprises a married mother and father raising their biological children, the Coalition "cites certain publications reporting that children raised in continuously intact households fare better on average than children raised in single-parent households, divorced households, and step-families," but those sources simply do not "support conclusions either that parents who are genetically linked to their children are inherently superior to other parents, or about the parenting abilities of same-sex couples." Supp. Lamb Decl. ¶ 7.

There is in fact a body of "well-designed, high quality research that is directly relevant to the issue of genetic relatedness," which the Coalition ignores in favor of the inapposite sources

described above. *Id.* at ¶ 10. In fact, the authoritative research in this field "clearly shows that children may thrive psychologically whether or not they are genetically linked to the parents who rear them." *Id.* (research has consistently shown that children conceived through assisted reproductive technology "develop well" and "function well throughout the lifespan, including adolescence and adulthood") (footnotes omitted).

In complete disregard of this scientific research, the Coalition instead relies heavily on a piece called "My Daddy's Name is Donor," issued by an advocacy organization. Dkt. 72 at 17; Supp. Lamb Decl. ¶ 11. As that piece acknowledges, however, the vast majority of children conceived through assisted reproductive technology are born into families with heterosexual parents. Supp. Lamb Decl. ¶ 11. While the piece was not published in a scientific journal after being subjected to the peer-review process, and has serious flaws, *id.*, there simply is no rational link between the use of assisted reproductive technologies and the State's targeted exclusion of same-sex couples from marriage. Both before and after the State's constitutional amendment, all couples have remained free to use these technologies. Nevada law makes no distinction between the ability of married heterosexual spouses and state registered domestic partners to secure their parental relationships to these children. *See* Nev. Rev. Stat. § 122A.200(d).

Moreover, since at least 1953, Nevada law has afforded equal parenting rights to legal parents of their children regardless of biological connection. *See* Nev. Rev. Stat. § 127.160 (providing that, upon entry of an adoption decree, "the child shall become the legal child of the persons adopting the child, and they shall become the child's legal parents with all the rights and duties between them of natural parents and legitimate child"). Nevada law also defines the "parent child relationship" in a manner that places biological and adoptive parents on equal footing. *See* Nev. Rev. Stat. § 126.021(3) (defining "parent child relationship" as "the legal relationship existing between a child and his or her natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties and obligations"). Similarly, Nevada's parentage statute does not prefer biological parents over others who have held a child out as their own. *See* Nev. Rev. Stat. § 126.051. To the contrary, the statute affords a presumption of paternity if, for example, a parent received the child into his home during the age of minority and

held the child out as his natural child, regardless of their biological relationship. Nev. Rev. Stat. § 126.051(1)(d). Additionally, if conflicting presumptions arise under the parenting statute, the presumption that controls is the one "founded on the weightier considerations of policy and logic," not biology. *See* Nev. Rev. Stat. § 126.051(3); *see also Love v. Love*, 114 Nev. 572, 578 n.2 (Nev. 1998) (describing the legislative history of Nev. Rev. Stat. § 126.051 as "show[ing] that the legislature's primary interest was in ensuring that children are supported by their parents, and not by welfare," without reference to biology).[23] As *Perry* demands, this Court should "not credit a justification" for the marriage amendment that "is totally inconsistent with the measure's actual effect and with the operation of [the State's] family laws." 671 F.3d at 1088.

4. Permitting same-sex couples to marry does not affect religious liberties.

The Coalition also asserts a purported governmental interest in protecting religious liberties, but is noticeably silent on the fact that the Ninth Circuit explicitly rejected its position in *Perry*, based on reasoning that applies equally here. In *Perry*, the Ninth Circuit considered the Becket Fund's argument that a State's interest in protecting religious liberty could provide a rationale for banning marriage by same-sex couples, and soundly dismissed the proposition. The Court recognized that permitting marriage for same-sex couples did not require any religion to "change its religious policies or practices with regard to same-sex couples, and no religious officiant [was] required to solemnize a marriage in contravention of his or her religious beliefs." *Perry*, 671 F.3d at 1091 (quoting *In re Marriage Cases*, 183 P.3d 384, 451-52 (Cal. 2008)). As the District Court in *Perry* found, affording marriage to same-sex couples does not affect the First Amendment rights of religious organizations. *Perry v. Schwarzenegger*, 704 F. Supp. 2d at 976-77, *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012). This is no less true in Nevada. *See also Windsor*, 2012 U.S. App. LEXIS 21785, at *44 (law "is not concerned with holy matrimony. Government deals with marriage as a civil status").[24]

[23] *See also* Nev. Rev. Stat. § 126.061 (providing for a husband to be considered the "natural father" of a child conceived by assisted reproductive technology with his consent, though he has no biological connection to the child), and Nev. Rev. Stat. § 122A.200(1)(i) ("gender-specific terms referring to spouses must be construed to include domestic partners").

[24] The Coalition inaccurately implies that there is a consensus among those who both oppose and support marriage for same-sex couples that such equality poses a threat to religious liberties.

The Coalition further asserts that allowing same-sex couples to marry will result in a parade of horribles, including liability due to anti-discrimination lawsuits and the loss of tax-exempt status. But, as the Ninth Circuit has ruled, Proposition 8 "did nothing" to "decrease the likelihood that religious organizations would be penalized, under California's antidiscrimination laws and other government policies concerning sexual orientation, for refusing to provide services to families headed by same-sex spouses" because those laws protected same-sex couples against discrimination both before and after Proposition 8. *Perry*, 671 F.3d at 1091. The same is true of Nevada. *See, e.g.*, Nev. Rev. Stat. § 651.050(3)(k); § 651.070 (prohibiting sexual orientation discrimination in public accommodations).

Nor do the Coalition's allegations have any footing in reality. No church has ever lost its tax exempt status for refusing to perform marriages it does not sanction. Civil recognition of marriage for same-sex couples imposes no requirement that religious institutions perform or recognize these marriages. Indeed, as Plaintiffs previously explained, Dkt. 86 at 29, according same-sex couples the same right to marry that different-sex couples enjoy 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." Isaacson, 8 Stan. J. Civ. R. & Civ. Lib. at 124 (citing, e.g., *In re Marriage Cases*, 183 P.3d at 451-52, *Varnum*, 763 N.W. 2d at 906). Indeed, the fact that no churches lost their tax exempt status for refusing to marry interracial couples after the Supreme Court's decision in

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In support of this proposition, the Coalition refers to an amicus brief the Becket Fund filed in *Perry*. But, there is no such consensus; nor, as the Coalition suggests, is the Becket Fund in any way neutral on the question of marriage equality. Rather, the Becket Fund has filed *amicus curiae* briefs arguing strenuously against marriage for same-sex couples in *Perry* and numerous other cases across the country. *See* Matthew J. Murray, *Gay Equality, Religious Liberty, and the First Amendment*, 1 L.A. Pub. Int. L.J. 124, 135-41 & n.33, 34, 28, 45, 46, 51 & 56 (2009) (describing and refuting arguments advanced in various Becket Fund amicus briefs). Indeed, other scholars have characterized the Becket Fund as having "done much to feed th[e] hysteria" of an alleged backlash against churches that refuse to solemnize same-sex marriages. Eric Isaacson, *Are Same-Sex Marriages Really a Threat to Religious Liberty?*, 8 Stan. J. Civ. R. & Civ. Lib. 123, 127 (2012); Murray at 124, 135-41. Moreover, many churches and religious organizations support marriage equality for same-sex couples. *See* Amicus Brief of Amici Curiae California Faith for Equality, et al., *available at* www.ca9.uscourts.gov/datastore/general/2010/10/27/amicus41.pdf (explaining that marriage equality for same-sex couples poses no threat to religious freedom, but that denying such equality does impinge on the religious liberties of churches that wish to solemnize equally the marriages of their congregants regardless of sexual orientation).

Loving v. Virginia illustrates the fallacy of the Coalition's arguments. Likewise, the Supreme Court's recent decision upholding the Westboro Baptist Church's right to picket military funerals with crass anti-gay messages without any legal liability shows that the First Amendment remains a bulwark of protection for religious expression. *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

III. ALTHOUGH THE MARRIAGE RESTRICTION CANNOT WITHSTAND EVEN RATIONAL BASIS REVIEW, HEIGHTENED SCRUTINY SHOULD BE APPLIED IN THIS CASE.

Heightened constitutional scrutiny of the State's marriage restriction is warranted for all the reasons explained in Plaintiffs' motion for summary judgment. Dkt. 86 at 14-19. Defendants argue that that this Court's hands are tied by *High Tech Gays v. Def. Ind. Security Clearance Office*, 895 F.2d 563 (9th Cir. 1990) and other Ninth Circuit authorities, claiming that they bar this Court from applying heightened judicial scrutiny. *See* Dkt. 74 at 17, 22 (citing *Witt*, *High Tech Gays*, and *Philips v. Perry*, 106 F.3d 1420 (9th Cir. 1997)). As explained below, none of those cases controls here.

First, with respect to *Witt*, Defendant Glover's characterization of the decision is mysterious. Defendant Glover describes *Witt* as holding that "there is no equal protection fundamental right to same-sex marriage." Dkt. 74 at 17. In fact, *Witt* made no such pronouncement because it did not involve marriage. *Witt* was instead a challenge by a lesbian Air Force Major to her suspension from military service under the now-defunct "Don't Ask, Don't Tell" ("DADT") policy. 527 F.3d at 809. Nor did *Witt* settle the still-open question about the proper level of review for sexual orientation classifications. As Plaintiffs previously explained, *Witt* 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; Dkt. 86 at 14 n.11. That special deference has no application here.

Moreover, the Ninth Circuit in *Witt* was not even asked to rule on the type of equal protection claim presented here. Instead, Major Witt challenged the propriety of a classification that treated gay soldiers worse than "child molesters," or other individuals whose sexual behavior might be found "offensive." 527 F.3d at 824 n.4 (Canby, J., concurring in part, dissenting in part); *see also id.* at 821. *Witt* undertook no analysis of the traditional hallmarks that warrant

heightened judicial scrutiny – and instead presumed that rational review applied. Where a court assumes a legal principle without expressly addressing it, subsequent courts remain free to address the merits of the issue in a subsequent case. *Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993) *superseded by statute on other grounds, as stated in Gutierrez v. McGinnis*, 389 F.3d 300, 304 (2d Cir. 2004); *see also Serv. Employees Int'l Union, Local 102 v. Cnty. of San Diego*, 60 F.3d 1346, 1354 (9th Cir. 1994).

Second, while *High Tech Gays* addressed the appropriate level of review, it has been so undercut by intervening authority in the last 22 years that it can no longer be considered binding. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) *abrogated in part on other grounds by Fossen v. Blue Cross & Blue Shield of Mont.*, 660 F.3d 1102 (9th Cir. 2011). *High Tech Gays* relied in significant part on *Bowers v. Hardwick*, 478 U.S. 186 (1986), concluding that laws classifying lesbians and gay men for adverse treatment are not subject to heightened scrutiny "because homosexual conduct can … be criminalized." *High Tech Gays*, 895 F.2d at 571. *Lawrence* expressly renounced that premise. 539 U.S. 558, 578 (2003) ("*Bowers* was not correct when it was decided and it is not correct today. It ought not remain binding precedent. *Bowers* should be and now is overruled."). *High Tech Gays* also relied on the mistaken assumption – now authoritatively rejected by the Supreme Court – that sexual orientation is merely "behavioral," rather than a deeply rooted, immutable characteristic warranting heightened judicial protection. 895 F.2d at 573-74. The Supreme Court has rejected this artificial distinction, noting that its "decisions have declined to distinguish between status and conduct in th[e] context" of sexual orientation. *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2990 (2010).[25]

The other justification on which *High Tech Gays* relied – that lesbians and gay men are

[25] Contrary to *Jackson*'s claim, 2012 U.S. Dist. LEXIS 111376, at *96-97, neither *Christian Legal Society*'s discussion of sexual orientation, nor the authorities it cited on that point, were cabined to the First Amendment context. *See* 130 S. Ct. at 2990. *Jackson* offers no support for its speculation that the Ninth Circuit – having twice since *High Tech Gays* found sexual orientation to be "immutable" and a "fundamental aspect of … human identity" – would regard it as an entirely different phenomenon for Equal Protection purposes. Moreover, federal jurisprudence makes clear that immutability simply is not required for heightened scrutiny. *See Golinski*, 824 F. Supp. 2d at 987 n.6 (collecting authorities). To the extent this Court examines immutability, however, the Ninth Circuit now has settled that sexual orientation is indeed such a trait. *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000), *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).

too politically powerful to warrant heightened protection – is irreconcilable with the Supreme Court's treatment of race- and sex-based classifications, and was so even when *High Tech Gays* was decided. Since then, however, the nation has seen a widespread political backlash against lesbians and gay men – with the Hawaii Supreme Court's 1993 decision about marriage for same-sex couples spawning a reaction that would lead to the adoption of the federal DOMA and state constitutional amendments barring marriage equality in three-fifths of the 50 states. Dkt. 86-3, App. 275 ¶ 45.

In fact, the initiative process currently has been used to eliminate rights for lesbians and gay men more than any other group in history. Dkt. 86-3, App. 275 ¶ 44. Considering the constitutionality of just such a measure in *Romer*, the Supreme Court observed that lesbians and gay men constitute a "politically unpopular group." 517 U.S. at 634 (internal quotation marks omitted). Also, the Supreme Court has since reaffirmed application of heightened scrutiny to race- and sex-based classifications despite still further political progress by racial minorities and women. *See Virginia*, 518 U.S. at 524; *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).[26]

Third, *Philips* did not breathe new life into *High Tech Gays*. *Philips* pre-dated much of the intervening authority above, including *Lawrence*'s overruling of *Bowers*, and thus relied uncritically on *High Tech Gays* based on a different legal landscape that no longer exists. 106

[26] Defendant Glover distorts the analysis by arguing that lesbians and gay men are not "unpopular" within Nevada, invoking Nevada's domestic partnership law and other examples. Dkt. 74 at 23. But the examination of a *federal* equal protection claim looks to the relative political powerless of a group nationally, not just in one particular state. To perform the analysis differently might lead to varying conclusions state-by-state, which plainly is not consistent with federal equal protection jurisprudence. *See, e.g.*, *Frontiero*, 411 U.S. at 685-88 (examining the relative political powerlessness of women generally, without regard to the fact that the suit arose in Alabama).

Moreover, as Plaintiffs' political science expert testified, the existence of a domestic partnership law is better regarded as an example of political weakness rather than power, as it relegates same-sex couples to a second-class status, and highlights the majority's vote to bar them from equality in marriage. Dkt. 86-3; *see also id.* at 6 (recounting that a supermajority of voters opted to bar marriage from same-sex couples by amending the State constitution in 2000 and 2002); App. 271-72 ¶ 36. The proper test is not absolute political powerlessness, as Defendant Glover suggests, but whether the "discrimination is unlikely to be *soon rectified* by legislative means." *Cleburne*, 473 U.S. at 440 (emphasis added). Plaintiffs' showing that lesbians and gay men lack the political power to redress societal discrimination against them expeditiously is not defeated by pointing to geographically isolated successes, many of which remain subject to possible future reversal by the majority. Dkt. 86 at 18-19; *see generally* Dkt. 86-3, App. 263-290.

F.3d at 1425. *Philips* also made clear that its analysis was profoundly shaped by deference to Congressional authority over military affairs, acknowledging that such deference would approve even measures that otherwise "might infringe constitutional rights in other contexts." *Id.* (internal quotation marks omitted). Such deference has no place here.[27] *Philips* also relied on the distinction between conduct and status that the Supreme Court since has eschewed, analyzing the military's policy as an exclusion of those who engage in "homosexual conduct," rather than as a class-based exclusion, as *Christian Legal Society* now requires. *Philips*, 106 F.3d at 1425-26.

The Coalition also cites *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130 (9th Cir. 2003), although that decision did not affirm *High Tech Gays* as the Coalition suggests. Dkt. 72 at 5. Instead, *Flores*, issued a few months before the Supreme Court decided *Lawrence*, merely recites the now unsound holding of *High Tech Gays* in a discussion about a different issue – whether a gay student's right to be protected from peer harassment was clearly established law at a particular point in time (concluding that it was). *Flores*, 324 F.3d at 1136-1137.

Defendant Sandoval also references other Court of Appeals decisions on the level of constitutional scrutiny, Dkt. 85 at 14, but all of the cited cases rest on the same few key errors: (1) several decisions mistakenly concluded that *Romer* had decided that rational basis is the governing test, *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008), *Massachusetts*, 682 F.3d at 9 (deferring to *Cook*), *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006), and *Veney v. Wyche*, 293 F.3d 726, 732 (4th Cir. 2002);[28] (2) others, without considering the issue, rested on the ability to criminalize intimate same-sex relationships pursuant to *Bowers*, *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-65 (7th Cir. 1989), *Nabozny v. Podlesny*, 92 F.3d 446, 458 (7th Cir. 1996) (deferring to *Ben-Shalom*), or on the fact that the Supreme Court had not yet held a higher level of scrutiny was required, *Citizens*, 455 F.3d at 866, *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); (3) others uncritically followed other cases making these errors

[27] Defendant Glover's attempt to import a similarly deferential level of review into this case by invoking federalism, Dkt. 74 at 24, likewise must be rejected, since Plaintiffs are not challenging any federal legislative action.

[28] As Plaintiffs previously explained, Dkt. 86 at 14, *Romer* found it unnecessary to decide the issue because the state's action defied even rational basis review. 517 U.S. at 632, 633. *See Windsor*, 2012 U.S. App. LEXIS 21785, at *19 ("the Supreme Court's decision to apply rational basis review in *Romer* does not imply to us a refusal to recognize homosexuals as a quasi-suspect class").

with no independent consideration of the appropriate level of scrutiny, *Lofton v. Sec'y. of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004); (4) and other decisions simply performed no analysis of the issue, *Rich v. Sec'y of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984), or were not presented with a claim to heightened scrutiny, *Able v. United States*, 155 F.3d 628, 632 (2d Cir. 1998).

Finally, Defendant Glover's reliance on *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), and *Jackson*'s discussion of that case, is unavailing. Dkt. 74 at 23. *Adams* simply cannot be regarded as good law any longer because each of its rationales has been undermined or rendered obsolete by subsequent authority. *Miller*, 335 F.3d at 900. Reminiscent of its era, *Adams* relied on since-repealed statutes that excluded lesbian and gay immigrants from the country as having a "psychopathic personality." 673 F.2d at 1040; *see also Boutilier v. INS*, 387 U.S. 118, 121 (1967); Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978 (1990). *Adams* also emphasized the highly deferential review courts traditionally afford Congress' plenary immigration power, 673 F.2d at 1041-42, which is inapplicable here. While *Adams* declined to decide whether a distinctive form of rational basis review is warranted for immigration laws, the particularly deferential review it applied led the Ninth Circuit to accept premises it could not accept today: that marriages of same-sex couples (1) "never produce offspring," (2) "are not recognized in most, if in any, of the states," and (3) "violate traditional and often prevailing societal mores." 673 F.2d at 1042-43. As the Plaintiff couples here prove – six of which have raised or are raising children together – the first assumption is manifestly incorrect. *See also* Nev. Rev. Stat. § 122A.200(1)(d) (providing that the "rights and obligations of domestic partners with respect to a child of either of them are the same as those of spouses"). The second assumption is no longer true: seven jurisdictions allow same-sex couples to marry; others such as Maryland, New Mexico, Rhode Island, and Wyoming recognize those marriages as such for all or some purposes; California may soon become the eighth jurisdiction to allow marriages if *Perry*'s holding is left undisturbed or upheld by the Supreme Court; and three additional states are poised to consider permitting same-sex couples to marry at the general

election in November.[29] *Adams*' third rationale, resting on moral disapproval of same-sex couples, now is precluded as a matter of law. *See Lawrence*, 539 U.S. at 577-78. *Adams* thus does not inform the questions before this Court, and certainly not the appropriate level of review for the sexual orientation classification embedded in the State's marriage exclusion.

Finally, as Plaintiffs previously argued, proper application of the standards for heightened constitutional scrutiny leads ineluctably to the conclusion that the courts must afford at least heightened scrutiny to sexual orientation classifications. Dkt. 86 at 14-19. The most recent Court of Appeals to consider this question concurred in Plaintiffs' analysis. *Compare* Dkt. 86 at 15 ("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") *with Windsor*, 2012 U.S. App. LEXIS 21785, at *24 ("Immutability and lack of political power are not strictly necessary factors to identify a suspect class."); *compare also* Dkt. 86 at 14-19 (arguing that lesbians and gay men have suffered a history of discrimination, sexual orientation is unrelated to their ability to contribute to society and is an immutable characteristic, and gay people are relatively politically powerless) *with Windsor*, 2012 U.S. App. LEXIS 21785, at *26 ("It is easy to conclude that homosexuals have suffered a history of discrimination."); *id.* at *27-29 (concluding that sexual orientation is unrelated to aptitude or performance); *id.* at *33-34 (finding lesbians and gay men are relatively politically powerless because they are "still significantly encumbered" in the political arena, and there "are parallels between the status of

[29] The seven jurisdictions that allow same-sex couples to marry include Connecticut, Conn. Gen. Stat. § 46b-20a; the District of Columbia, D.C. Code § 46-401; Iowa, *Varnum*, 763 N.W.2d at 862; Massachusetts, *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941, 969-970 (Mass. 2003); New Hampshire, N.H. Rev. Stat. Ann. § 457:1-a; New York, N.Y. Dom. Rel. Law § 10-a; Vermont, Vt. Stat. Ann. tit. 15 § 8. These marriages, along with valid marriages from other jurisdictions such as Canada, are recognized in Maryland, *Port v. Cowan*, 426 Md. 435, 455 (2012); New Mexico, New Mexico Attorney Gen. Opinion No. 11-01 (2011); Rhode Island, R.I. Exec. Order No. 12-02; and Wyoming, *Christiansen v. Christiansen*, 253 P.3d 153 (Wyo. 2011) (allowing marital dissolution). California recognizes marriages entered before November 5, 2008 as such. Cal. Fam. Code § 308(b). Voters in Washington, Maryland, and Maine will consider during November's general election measures that would allow same-sex couples to marry in those states. Sandhya Somashekhar and Peyton M. Craighill, *Polls in Fla., Ohio and Va. See Same-sex Marriage Support*, Washington Post (October 9, 2012), *available at* www.washingtonpost.com/politics/ decision2012/poll-support-grows-for-same-sex-marriage-in-florida-ohio-and-virginia/2012/10/09/969bea0e-1220-11e2-be82-c3411b7680a9_story.html.

women at the time of *Frontiero* and homosexuals today"); *id.* at *29 ("homosexuality is a sufficiently discernible characteristic to define a discrete minority class").

IV. THE MARRIAGE RESTRICTION ALSO CONSTITUTES DISCRIMINATION BASED ON SEX, REQUIRING HEIGHTENED SCRUTINY ON THAT BASIS AS WELL.

The Coalition argues that Plaintiffs have failed to prove a sex discrimination claim, but asserts nothing more than the same "equal application" argument that the Supreme Court repeatedly has rejected in analogous circumstances. In essence, the Coalition argues that no sex discrimination exists where the State's marriage exclusion "does not treat women as a class better or worse than it treats men as a class." Dkt. 72 at 3, 7, 30. But the Supreme Court had no trouble rejecting the same argument in the context of challenges to some states' racially discriminatory practices. *See* Dkt. 86 at 20 (Plaintiffs' motion for summary judgment, collecting authorities). In *Loving v. Virginia*, the state argued that its criminal penalty on interracial marriage was valid by virtue of the law's equal punishment for both white and African-American spouses. 388 U.S. at 7-8. The Supreme Court dismissed that argument, stating that it "reject[ed] 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"). Any argument that such rulings are cabined to race discrimination and do not apply to sex discrimination cannot overcome the Supreme Court's ruling in *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127 (1994), which held 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.[30]

The Coalition's equal application theory also violates another bedrock principle of Equal Protection analysis: "It is the individual, we said, who is entitled to the equal protection of the

[30] *Jackson*'s sex discrimination analysis suffers from the same flaw as the Coalition's arguments. *Jackson* accepted the "equal application" argument without even addressing how the authorities above render that theory invalid as a matter of law. 2012 U.S. Dist. LEXIS 111376, at *87 (stating that Hawaii's marriage restriction "does not treat males and females differently as a class"). *Jackson* therefore provides no basis for reliance on such an argument here.

laws, – not merely a group of individuals, or a body of persons according to their numbers." *Mitchell v. United States*, 313 U.S. 80, 97 (1941); *Adarand Constructors*, 515 U.S. at 227 ("the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*"); U.S. Const. amend. XIV, § 1 ("No State shall … deny to any *person* within its jurisdiction the equal protection of the laws.") (emphasis added). As Justice Kennedy observed in *J.E.B.*, the "neutral phrasing of the Equal Protection Clause, extending its guarantee to 'any person,' reveals its concern with rights of individuals, not groups (though group disabilities are sometimes the mechanism by which the State violates the individual right in question)." 511 U.S. at 152 (Kennedy, J., concurring in judgment). The question thus is not whether an entire group has faced discrimination based on a shared characteristic as compared to another group, but whether an individual has experienced discrimination based on that characteristic, as certainly is true when a woman is told that she cannot marry another woman because she is female.

Furthermore, Defendants' moving papers confirm, rather than disprove, that the marriage restriction is a form of prohibited sex stereotyping. *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 720 (1982) (overturning a nursing school policy barring male students as "tend[ing] to perpetuate the stereotyped view of nursing as an exclusively woman's job"). The Coalition's arguments provide myriad illustrations of the impermissible sex stereotypes that underlie Nevada's exclusion of same-sex couples from marriage. *See* Dkt. 72 at 19 (referring to mother as "often vulnerable" and portraying father as the source of support and stability); *id.* at 25 (describing marriage for different-sex couples as "bridging the divide" between the sexes, which requires a "massive cultural effort … at all times and in all places"). Indeed, the Coalition's suggestion that a marriage becomes "genderless" when entered by same-sex couples rests on several levels of stereotyping, including the notion that properly-behaving women marry men, and properly-behaving men marry women; and the idea that, only when a man and a woman are paired, do they retain sufficient masculinity and femininity respectively to remain gendered in a "man-woman marriage." *See* Dkt. 72 at 2 (distinguishing "man-woman marriage" from "genderless marriage"); *id* at 13 (asserting that "[g]enderless marriage is a profoundly different institution than man-woman marriage); *id*. at 13 and 29 (referring to "heteronormativity" as a

legitimate government interest, rather than an unconstitutional interest in perpetuating sex-stereotyped treatment of men and women).

The Coalition makes no attempt to hide that the underlying purpose of the constitutional amendment was to "protect and perpetuate" the Coalition's idea of "man-woman marriage." *Id.* at 20. In fact, the Coalition's conception of marriage relies on archaic sex stereotypes historically associated with the proper roles of men and women in marriage specifically, and in society in general. The Coalition argues that the central purpose of so-called "man-woman marriage" is to turn men into "husbands" and women into "wives" – suggesting that an individual cannot be a proper husband or wife unless paired with the other sex. *Id.* at 24-25 (asserting that so-called "man-woman marriage" is the only means of "confer[ring] the status of *husband* and *wife*" and "prepar[ing] a male for the role, status and identity of *husband*, transform[ing] him into a husband, and sustain[ing] him over time in his performance of that role. The same is true for a female relative to *wife*."). If Plaintiffs and other same-sex couples were to marry one another, the Coalition posits that the very meaning of husband, wife, and marriage would "shrivel." *Id.* at 25. Those among the Plaintiffs who already have married in other jurisdictions, and strive to be devoted, loving spouses every day, illustrate the fallacy and the offensive premise embodied in the Coalition's arguments.

The unmistakable sex stereotyping underlying Nevada's marriage exclusion and the Coalition's justifications constitute impermissible sex discrimination. *See Miss. Univ. for Women*, 458 U.S. at 720; *Craig v. Boren*, 429 U.S. 190, 202 n.14 (1976) (overturning Oklahoma's differential treatment of young men and women regarding access to alcohol and discussing the distorting effects of gender-based stereotypes). The State's marriage exclusion accordingly warrants the heightened judicial review afforded to sex-based classifications, and cannot survive that scrutiny for all the reasons described above.

CONCLUSION

For the forgoing reasons, Plaintiffs respectfully request that the Court deny Defendants' motions for summary judgment and enter judgment in favor of Plaintiffs declaring that same-sex couples' exclusion from marriage in Nevada violates the U.S. Constitution's guarantee of equal

protection and permanently enjoining Defendants from excluding Plaintiffs from civil marriage.

DATED: October 25, 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 October 25, 2012. All participants in the case are registered CM/ECF users, and will be served by the CM/ECF system.

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