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PROJECT OF CALIFORNIA RENEWAL

17 * Admitted *pro hac vice*
18 + *Pro hac vice* application forthcoming

19 **UNITED STATES DISTRICT COURT**
20 **NORTHERN DISTRICT OF CALIFORNIA**

21 KRISTIN M. PERRY, SANDRA B. STIER, PAUL
T. KATAMI, and JEFFREY J. ZARRILLO,

22 Plaintiffs,

23 v.

24 ARNOLD SCHWARZENEGGER, in his official
25 capacity as Governor of California; EDMUND G.
26 BROWN, JR., in his official capacity as Attorney
27 General of California; MARK B. HORTON, in his
28 official capacity as Director of the California
Department of Public Health and State Registrar of
Vital Statistics; LINETTE SCOTT, in her official

CASE NO. 09-CV-2292 VRW

**PROPOSED INTERVENORS’
OPPOSITION TO PLAINTIFFS’
MOTION FOR PRELIMINARY
INJUNCTION**

Date: July 2, 2009
Time: 10:00 a.m.
Judge: Chief Judge Vaughn R. Walker
Location: Courtroom 6, 17th Floor

1 capacity as Deputy Director of Health Information
2 & Strategic Planning for the California Department
3 of Public Health; PATRICK O'CONNELL, in his
4 official capacity as Clerk-Recorder for the County
of Alameda; and DEAN C. LOGAN, in his official
capacity as Registrar-Recorder/County Clerk for
the County of Los Angeles,

5
6 Defendants,

7 and

8 PROPOSITION 8 OFFICIAL PROPONENTS
9 DENNIS HOLLINGSWORTH, GAIL J.
KNIGHT, MARTIN F. GUTIERREZ, HAK-
SHING WILLIAM TAM, and MARK A.
10 JANSSON; and PROTECTMARRIAGE.COM –
YES ON 8, A PROJECT OF CALIFORNIA
RENEWAL,

11 Proposed Intervenors.
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INTRODUCTION

1
2 Plaintiffs labor mightily to frame their claimed constitutional right to same-sex marriage as
3 a logical extension of *Lawrence v. Texas*, 539 U.S. 558 (2003). The overarching and constant
4 theme of Plaintiffs’ position is that California law, by denying them the right to marry, reflects
5 nothing more than moral condemnation and social prejudice. But this is a grotesque caricature of
6 California’s laws and what is at stake in this case. California’s laws are among the most
7 progressive in the Nation in terms of the benefits and protections afforded gay and lesbian
8 individuals and their committed relationships. By contrast, the Texas law at issue in *Lawrence*
9 criminalized “the most private human conduct, sexual behavior, and in the most private of places,
10 the home.” *Lawrence*, 539 U.S. at 567. Here, punishment is simply not at issue. Instead, the issue
11 is whether the Constitution requires the people of California to grant affirmative, official, and legal
12 imprimatur to same-sex unions to the extent of redefining the institution of marriage, which has
13 always been understood as the union of a man and a woman. Nothing in the Constitution requires
14 such a radical redefinition of the ancient institution of marriage, and no court has accepted
15 Plaintiffs’ federal constitutional argument—indeed, the Supreme Court has summarily rejected
16 Plaintiffs’ core legal theory. *See Baker v. Nelson*, 409 U.S. 810 (1972).

FACTS

17
18 The legal institution of marriage in this Nation has always been the union of one man and
19 one woman. *See infra* fn. 3. To confirm that timeless tradition, Proposed Intervenors in the fall of
20 2007 began the task of qualifying Proposition 8 for the state ballot. (*See, e.g.*, Doc # 8-2 at 5 ¶ 10.)
21 In April 2008, after six months of tireless work, they submitted signature petitions to county-
22 election officials for verification—the last affirmative step for placing Proposition 8 before the
23 voters. (*See, e.g.*, Doc # 8-2 at 6 ¶ 19.) Then, on May 15, 2008, the California Supreme Court
24 issued its decision in *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *overruled by* Cal. Const. art.
25 I, § 7.5, which judicially redefined marriage to include same-sex couples. Shortly thereafter, the
26 California Secretary of State announced that Proposition 8 qualified for the November 2008 ballot.
27 (*See, e.g.*, Doc # 8-2 at 6 ¶ 21.)

28 In the 2008 General Election Voter Information Guide, the California Attorney General

1 stated the purpose of Proposition 8 as changing “the California Constitution to eliminate the right of
2 same-sex couples to marry in California.” (Doc # 7 at 8.) Proposed Intervenor’s so vigorously
3 objected to this characterization that they filed a lawsuit to compel the Attorney General to change
4 it. *See Jansson v. Bowen*, No. 34-2008-00017351, slip op. at 1 (Cal. Super. Ct. August 7, 2008)
5 (attached as Exhibit B). Proposed Intervenor’s argued that the Attorney General’s proffered purpose
6 “focus[ed] too narrowly on the measure’s effect on same-sex couples.” (Ex. B at 4.) Proposition
7 8’s actual purpose was to reaffirm California’s definition of marriage as the union of one man and
8 one woman. (Ex. B at 5.) And the obvious corollary of that purpose requires the government to
9 refrain from recognizing as marriages any variation from that definition, including but not limited
10 to polygamous, polyamorous, and same-sex relationships. (Ex. B at 5-6.) In the end, the state court
11 declined to force the Attorney General to change the ballot language. (Ex. B at 6.)

12 On November 4, 2008, more than 7 million California voters approved Proposition 8, and,
13 on the very next day, it became Article I, Section 7.5 of the California Constitution, which states:
14 “Only marriage between a man and a woman is valid or recognized in California.” Cal. Const. art.
15 I, § 7.5. While Californians believe that marriage is the union of a man and a woman, they have
16 chosen to officially recognize and grant benefits to same-sex relationships, *see* Cal. Fam. Code §
17 297, and they have relentlessly strived to eradicate discrimination against gay and lesbian
18 individuals from all facets of society, *see infra* fn. 7.

19 **ARGUMENT**

20 Before this Court may enjoin the application of a state constitutional provision, Plaintiffs
21 must prove that “they are likely to succeed on the merits, that they are likely to suffer irreparable
22 harm in the absence of preliminary relief, that the balance of equities tips in their favor, and that an
23 injunction is in the public interest.” *California Pharmacists Ass’n v. Maxwell-Jolly*, 563 F.3d 847,
24 849 (9th Cir. 2009). Plaintiffs cannot satisfy any of these standards.

25 **I. PLAINTIFFS CANNOT SUCCEED ON THE MERITS OF THEIR CLAIMS.**

26 **A. The Supreme Court’s Decision In *Baker v. Nelson* Forecloses Plaintiffs’ Claims.**

27 The United States Supreme Court in *Baker v. Nelson*, 409 U.S. 810 (1972), dismissed “for
28 want of a substantial federal question” an appeal from the Supreme Court of Minnesota, which

1 rejected a same-sex couple's claim that the State's denial of their request to marry violated the
2 Fourteenth Amendment. *Id.* By dismissing that appeal, the Supreme Court concluded that defining
3 marriage as a union between one man and one woman does not violate the Fourteenth Amendment.
4 *Baker* is binding precedent and requires that Plaintiffs' claims be dismissed.

5 **1. *Baker* Is Dispositive Of The Issues Presented In This Case.**

6 In *Baker*, 409 U.S. at 810, the Supreme Court considered and rejected claims by two men
7 that Minnesota's law defining marriage as a union between two persons of the opposite sex violated
8 the Due Process and Equal Protection Clauses of the Fourteenth Amendment. That ruling affirmed
9 the Supreme Court of Minnesota's decision, which held (1) that there is no fundamental right to
10 same-sex marriage under the Due Process Clause, and (2) that excluding same-sex couples from
11 marriage "is no[t] irrational or invidious discrimination" under the Equal Protection Clause. *See*
12 *Baker v. Nelson*, 191 N.W.2d 185, 186-87 (Minn. 1971), *appeal dismissed for want of a substantial*
13 *federal question*, 409 U.S. 810 (1972).

14 The Supreme Court's dismissal of the *Baker* appeal for "want of a substantial federal
15 question" was a decision on the merits, which binds all federal district courts:

16 Summary affirmances and dismissals for want of a substantial federal question
17 without doubt reject the specific challenges presented in the statement of jurisdiction
18 and do leave undisturbed the judgment appealed from. *They do prevent lower courts*
from coming to opposite conclusions on the precise issues presented and necessarily
decided by those actions.

19 *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam) (emphasis added); *see also Hicks v.*
20 *Miranda*, 422 U.S. 332, 344 (1975). The Supreme Court's summary dismissal in *Baker* "represents
21 [the] view that the judgment appealed from was correct as to those federal questions raised and
22 necessary to the decision." *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*,
23 439 U.S. 463, 476 n.20 (1979). And the precedential value of that "dismissal . . . extends beyond
24 the facts of the particular case to all similar cases." *Wright v. Lane County Dist. Ct.*, 647 F.2d 940,
25 941 (9th Cir. 1981).

26 The question presented to the Court in *Baker* was whether Minnesota's marriage laws
27 "deprive[d] [same-sex couples] of liberty . . . in violation of the due process and equal protection
28 clauses." *Baker v. Nelson*, Jurisdictional Statement, No. 71-1027, at 11 (Oct. Term 1972) (attached

1 as Exhibit C). The *Baker* plaintiffs directly asserted that they, as a same-sex couple, had a
2 fundamental right to marry “protected by the due process and equal protection clauses of the
3 Fourteenth Amendment.” *Id.* at 11. And they argued that “[b]y not allowing [them] the legitimacy
4 of their marriages, the [S]tate [was] denying them this basic right and unlawfully meddling in their
5 privacy.” *Id.* at 18. The Supreme Court’s dismissal of the *Baker* appeal directly rejected the merits
6 of these claims. This Court is “not free to disregard this pronouncement.” *Hicks*, 422 U.S. at 344.
7 As a result, Plaintiffs lack a cognizable legal theory that can succeed on the merits.

8 **2. Baker Is Binding Supreme Court Precedent.**

9 Lower courts are bound by the Supreme Court’s summary decision in *Baker* until “the Court
10 informs them that they are not” either by expressly overruling that decision or through ““doctrinal
11 developments”” that are necessarily incompatible with it. *Id.* at 344-45. To date, the Supreme
12 Court has not expressly overruled *Baker*, nor do any of its later decisions undermine it.

13 Plaintiffs argue that *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Romer v. Evans*, 517 U.S.
14 620 (1996), represent “doctrinal developments” that release this Court from its obligation to follow
15 *Baker*. (Doc # 7 at 16 n.6.) But that argument is unpersuasive. *Lawrence* dealt with whether
16 criminalizing private homosexual conduct violates due process; it did not involve government
17 recognition of a relationship. In fact, the *Lawrence* Court expressly distinguished between
18 protecting private sexual conduct and forcing government recognition of a relationship,
19 emphasizing that the facts of that case did not involve “whether the government must give formal
20 recognition to any relationship that homosexual persons seek to enter.” *Lawrence*, 539 U.S. at 578.
21 And, in her concurring opinion, Justice O’Connor made it clear that *Lawrence* did not disturb the
22 principles announced in *Baker*. *See id.* at 585 (O’Connor, J, concurring) (confirming that many
23 “laws distinguishing between heterosexuals and homosexuals,” such as those “preserving the
24 traditional institution of marriage,” would not violate the Fourteenth Amendment).

25 Neither does *Romer* undermine the efficacy of *Baker*’s holding. The Court in *Romer*
26 applied rational-basis review to invalidate a breathtakingly broad state constitutional amendment
27 that “prohibit[ed] all legislative, executive or judicial action at any level of state or local
28 government designed to protect . . . homosexual persons.” *Romer*, 517 U.S. at 624. The Court

1 made no effort to revisit *Baker* or the constitutionality of defining marriage as the union of one man
2 and one woman. Thus, neither *Lawrence* nor *Romer* “informed” the lower courts that they are no
3 longer bound by *Baker*.

4 Federal courts, including one California district court, have considered *Baker*’s precedential
5 value and consistently found it controlling. *See, e.g., Wilson v. Ake*, 354 F. Supp 2d 1298, 1304-05
6 (M.D. Fla. 2005) (holding that *Baker* “is binding precedent upon this Court and Plaintiffs’ case
7 against [Federal DOMA] must be dismissed”); *McConnell v. Nooner*, 547 F.2d 54, 56 (8th Cir.
8 1976); *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980) (finding “the *Baker* case
9 controlling” and concluding that a “state law which rejects a purported marriage between persons of
10 the same sex [did] not violate the due process or the equal protection clause”), *aff’d on other*
11 *grounds*, 673 F.2d 1036, 1039 n.2 (9th Cir. 1982); *see also Lockyer v. City and County of San*
12 *Francisco*, 95 P.3d 459, 504 (Cal. 2004) (Kennard, J., concurring in part and dissenting in part)
13 (stating that *Baker* “prevents lower courts . . . from coming to the conclusion that a state law barring
14 marriage between persons of the same sex violates the equal protection or due process guarantees”).

15 Plaintiffs point to *Smelt v. County of Orange*, 374 F. Supp 2d 861 (C.D. Cal. 2005), *rev’d in*
16 *part*, 447 F.3d 673 (9th Cir. 2006), as a dissenting voice. But the court in *Smelt* held that *Baker* was
17 not applicable because the plaintiffs in that case were seeking the federal benefits of marriage and
18 “not address[ing] what relationships states may recognize as marriages.” *Id.* at 872. “Th[e] issue of
19 allocating benefits is different from the issue of sanctifying a relationship presented in *Baker*’s
20 jurisdictional statement.” *Id.* at 873; *see also In re Kandou*, 315 B.R. 123, 137 (Bankr. W.D. Wash.
21 2004) (distinguishing between seeking the benefits of marriage and the status of marriage). Here,
22 Plaintiffs seek the status of marriage—the precise issue decided in *Baker*. They do not seek
23 benefits as in *Smelt*. (*See Doc # 7* at 6 (acknowledging that Plaintiffs have or can obtain “most of
24 the substantive rights that accompany the status of marriage”).) Thus, even under the *Smelt* court’s
25 analysis, *Baker* controls here.

26 In sum, “the precise issues presented and necessarily decided” in *Baker* were whether
27 defining marriage as the union of one man and one woman violates the Due Process or Equal
28 Protection Clauses of the Fourteenth Amendment. *See Mandel*, 432 U.S. at 176. Those same issues

1 are presented here. *Baker* has neither been overruled nor undermined by subsequent “doctrinal
2 developments.” Accordingly, *Baker* controls this case, and as a matter of law, Plaintiffs’ motion for
3 a preliminary injunction should be denied.¹

4 **B. Plaintiffs Cannot Succeed On Their Due-Process Claim.**

5 Plaintiffs assert that Proposition 8 violates their due-process rights under the Fourteenth
6 Amendment “because it impermissibly impairs their fundamental right to marry.” (Doc # 7 at 11.)
7 The right asserted by Plaintiffs, however, is not the longstanding right to marry recognized by the
8 Supreme Court but a newly fashioned right to same-sex marriage.

9 Substantive-due-process analysis begins with a threshold inquiry—determining whether the
10 right asserted is fundamental under the Fourteenth Amendment. Plaintiffs would prefer to gloss
11 over this important inquiry, but the Court must engage in this necessary threshold analysis to
12 prevent the improvident expansion of constitutional jurisprudence and the corresponding
13 interference with legislative prerogatives. *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)
14 (“[E]xtending constitutional protection to an asserted right or liberty interest . . . place[s] the matter
15 outside the arena of public debate and legislative action”). That inquiry requires the Court to
16 “carefully formulat[e]” the asserted right and determine whether it “has any place in our Nation’s
17 traditions.” *Id.* at 722-23. Engaging in that analysis here unmistakably demonstrates that Plaintiffs’
18 asserted “right” does not pass this threshold test.

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21 ¹ Plaintiffs also contend that their challenge is sufficiently distinguishable from *Baker* because, in
22 that case, Minnesota did not provide any of the legal benefits associated with marriage to couples of
23 the same sex, whereas, in this case, California provides many such benefits to domestic partners.
24 (Doc # 7 at 16 n.6.) But despite this factual difference, the complained-of injury in both cases is
25 identical—the government’s refusal to redefine the longstanding and clearly established definition
26 of marriage to encompass same-sex couples. *See Smelt*, 374 F. Supp 2d at 872 (explaining that
27 *Baker* addressed “what relationships states may recognize as marriages”—*not* the legal benefits
28 associated with the marriage relationship); *id.* at 873 (“Th[e] issue of allocating benefits is different
from the issue of sanctifying a relationship presented in *Baker*’s jurisdictional statement”); *In re
Kandu*, 315 B.R. at 137 (similar). And it stands to reason that if a State does not violate the
Fourteenth Amendment by refusing both to redefine the traditional understanding of marriage *and*
to provide any of the legal benefits associated with that status to same-sex couples, then it certainly
does not violate that constitutional provision to retain the long-established definition of marriage
while granting almost all the legal benefits associated with marriage to domestic partners. Indeed,
California’s progressive Domestic Partnership Law confirms that Proposition 8 is not animated by
any sort of discriminatory purpose.

1 **1. The Fundamental Right To Marry Recognized By The Supreme Court**
2 **Is The Right To Enter A Legal Union Between A Man and A Woman.**

3 “All of the [Supreme Court’s] cases infer that the right to marry enjoys its fundamental
4 status due to the male-female nature of the relationship and/or the attendant link to fostering
5 procreation of our species.” *Conaway v. Deane*, 932 A.2d 571, 619 (Md. 2007); *see also Andersen*
6 *v. King County*, 138 P.3d 963, 978 (Wash. 2006) (plurality opinion). From the earliest relevant
7 cases, the Supreme Court has always tied the significance of marriage to its procreative aspect. In
8 *Maynard v. Hill*, 125 U.S. 190, 211 (1888), for example, the Court described marriage as “the
9 foundation of the family and of society, without which there would be neither civilization nor
10 progress.” *Id.* at 211. This understanding of marriage—linking that institution directly to
11 procreation, *i.e.*, the future of “civilization”—permeates the Court’s discussions of the fundamental
12 right to marry. *See, e.g., Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Zablocki v. Redhail*, 434 U.S.
13 374, 384-86 (1978).

14 Plaintiffs pluck phrases about the fundamental right to marry from Supreme Court precedent
15 and attempt to use those out-of-context quotes to support their effort to redefine marriage. But
16 when those phrases are read in context, it becomes readily apparent that the fundamental right to
17 marry recognized in the Constitution is limited to unions between one man and one woman.
18 Plaintiffs, for example, rely heavily on *Loving*, a case which invalidated Virginia’s anti-
19 miscegenation laws. But *Loving* involved a marriage between a man and a woman, and the Court’s
20 discussion of the fundamental right focused on the link between marriage and procreation, stating
21 that “[m]arriage is one of the basic civil rights of man, *fundamental to our very existence and*
22 *survival.*” *Loving*, 388 U.S. at 12 (emphasis added; quotations omitted). This recognition of the
23 inextricable interplay between marriage and procreation demonstrates that the Court’s discussion of
24 this fundamental right contemplated the unique union of a man and a woman.

25 Plaintiffs also cite *Zablocki* repeatedly for the proposition that the “right to marry is of
26 fundamental importance for all individuals.” Yet again they ignore the context of the Court’s
27 statement. That case struck down a Wisconsin statute prohibiting persons obligated to pay child
28 support from marrying without first obtaining a court order granting permission. The Court held

1 that the challenged statute violated the right “to marry and raise [a] child in a traditional family.”
2 *Zablocki*, 434 U.S. at 386. The Court explained:

3 Long ago . . . the Court characterized marriage as the most important relation in life
4 and as the foundation of the family and of society, without which there would be
5 neither civilization nor progress [T]he Court recognized that the right to marry,
6 establish a home and bring up children is a central part of the liberty protected by the
Due Process Clause [M]arriage was described as fundamental to the very
existence and survival of the race.

7 *Id.* at 384 (quotations and citations omitted). Thus, as in *Loving*, the *Zablocki* Court’s discussion of
8 marriage’s fostering “survival of the race” links its reasoning directly to procreative marriage
9 between a man and a woman. *See also Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541
10 (1942) (“Marriage and procreation are fundamental to the very existence and survival of the race”).

11 That some married couples choose not to bear children or are infertile does not undermine
12 the unavoidable conclusion that, for constitutional purposes, the Supreme Court has consistently
13 linked the fundamental right to marry with the procreative aspect of marriage. For the Court,
14 protecting the right to marry is about ensuring “our very existence and survival,” *Loving*, 388 U.S.
15 at 12; *Skinner*, 316 U.S. at 541; maintaining our “civilization,” *Zablocki*, 434 U.S. at 384; and
16 “rais[ing] . . . child[ren] in a traditional family,” *id.* at 386. This inherently procreative nature of
17 marriage is unique to opposite-sex couples, and thus, the fundamental right to marry arises from
18 that sort of relationship. Accordingly, the right Plaintiffs assert is not the Court-recognized
19 fundamental right to marry but a novel legal theory—the alleged “right” to same-sex marriage.²

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23 ² Plaintiffs also allege that Proposition 8 burdens the due-process “right to personal sexual
24 autonomy” recognized in *Lawrence*. (Doc # 7 at 13 n.3.) But Proposition 8 affects only the
25 publicly recognized institution of marriage, *see Turner v. Safley*, 482 U.S. 78, 95 (1987) (stating
26 that marriage is a “public commitment”); it does not regulate Plaintiffs’ private sexual behavior.
27 Again, the *Lawrence* decision itself recognized that it did “not involve whether the government
28 must give formal recognition to any relationship that homosexual persons seek to enter.” *See*
Lawrence, 539 U.S. at 578. And, for this reason, this Court should not apply the intermediate
scrutiny created by the Ninth Circuit in *Witt v. Department of the Air Force*, 527 F.3d 806, 819 (9th
Cir. 2008), which is reserved for cases where “the government attempts to intrude upon the personal
and private lives of homosexuals, in a manner that implicates the rights identified in *Lawrence*[,]”
Id. That sort of government “intrusion” is not at issue here.

2. **Plaintiffs’ Interest In Marrying A Person Of The Same Sex Is Not A Protected Interest Under The Due Process Clause.**

The Supreme Court has “always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in [that] unchartered area are scarce and open-ended.” *Glucksberg*, 521 U.S. 702, 720 (1997). By extending constitutional protection to an asserted right or liberty interest, a federal court “place[s] the matter outside the arena of public debate and legislative action.” *Id.* Courts should thus “exercise the utmost care whenever . . . asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of” the judiciary. *Id.* (quotations omitted).

This judicial restraint is particularly appropriate in the area of marriage. Domestic relations is “an area that has long been regarded as a virtually exclusive province of the States.” *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *see also Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1877) (“The State . . . has [the] absolute right to prescribe the conditions upon which the marriage relation . . . shall be created.”), *overruled on other grounds by Shaffer v. Heitner*, 433 U.S. 186 (1977). Federal courts should thus be reluctant to delve into a sensitive area of social policy best left to the States.

The Supreme Court has established a two-part “substantive-due-process analysis” for determining whether to recognize a fundamental right. First, a court must ascertain a “‘careful description’ of the asserted fundamental liberty interest.” *Glucksberg*, 521 U.S. at 721. Plaintiffs throughout their memorandum of law refer broadly to their asserted liberty interest as the “right to marry.” But a “careful description” of their interest is the “right” to same-sex marriage.

Second, a court must determine whether the “carefully described” interest is “so rooted in the traditions and conscience of our people” that it is considered “implicit in the concept of ordered liberty,” *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937), “such that neither liberty nor justice would exist if [the interest] were sacrificed,” *Glucksberg*, 521 U.S. at 721. “Our Nation’s history, legal traditions, and practices thus provide the crucial guideposts for responsible decisionmaking.” *Id.* (quotations omitted). “The mere novelty of . . . a claim is reason enough to doubt that ‘substantive due process’ sustains it” because such a novel “right . . . cannot be considered so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Reno v.*

1 *Flores*, 507 U.S. 292, 303 (1993) (quotation omitted); *see also Jackman v. Rosenbaum Co.*, 260
 2 U.S. 22, 31 (1922) (“If a thing has been practiced for two hundred years by common consent, it will
 3 need a strong case for the Fourteenth Amendment to affect it”).

4 The right to same-sex marriage is not deeply rooted in our Nation’s history and tradition.
 5 The Supreme Court, as demonstrated above, has always understood marriage as “the union . . . of
 6 one man and one woman.” *See Murphy v. Ramsey*, 114 U.S. 15, 45 (1885). Before 2003, for over
 7 two hundred years of our Nation’s history, there was never a time in the United States that marriage
 8 meant anything other than the union of a man and a woman. *See Goodridge v. Dep’t of Pub.*
 9 *Health*, 798 N.E.2d 941 (Mass. 2003) (judicially creating same-sex marriage in Massachusetts).
 10 And, recently, large majority of voters and legislators have strongly reaffirmed marriage as the
 11 union of one man and one woman. The law in 44 States now defines marriage as the union of a
 12 man and a woman, and 30 of those States have enshrined that definition in their constitutions.³
 13 Federal law also defines “marriage” as “a legal union between one man and one woman as husband
 14 and wife.” 1 U.S.C. § 7.

15 In light of this background, then, it is not surprising that every federal court, and a majority
 16 of state appellate courts, that have addressed this issue have declined to find a fundamental right to
 17 same-sex marriage. *See, e.g., Wilson*, 354 F. Supp 2d at 1307; *Smelt*, 374 F. Supp 2d at 879;
 18 *Kandu*, 315 B.R. at 140; *Conaway*, 932 A.2d at 627; *Hernandez v. Robles*, 855 N.E.2d 1, 9 (N.Y.
 19 2006); *Andersen*, 138 P.3d at 978 (collecting cases); *Morrison v. Sadler*, 821 N.E.2d 15, 32-33 (Ind.
 20 Ct. App. 2005). This Court should likewise hold that there is no fundamental right to same-sex

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 22 ³ *See* Ala. Const. art. I, § 36.03; Alaska Const. art. 1, § 25; Ariz. Const. art. XXX § 1; Ark. Const.
 23 amend. 83, § 1-3; Cal. Const. art. I, § 7.5; Col. Const. art. II, § 31; 13 Del. Code § 101; Fla.
 24 Const. art. I § 27; Ga. Const. art. I, §IV; Haw. Rev. Stat. § 572-1; Haw. Rev. Stat. § 572-3; Idaho
 25 Const. art. III, § 28; Kan. Const. art. XV, § 16; Ky. Const. § 233A; La. Const. art. XII, § 15;
 26 Mich. Const. art. I, § 25; Miss. Const. art. XIV, § 263A; Mo. Const. art. I, § 33; Mont. Const. art.
 27 XIII, § 7; Neb. Const. art. I, § 29; Nev. Const. art. I, § 21; N.D. Const. art. IX, § 28; Ohio Const.
 28 art. XV, § 11; Okla. Const. art. II, § 35; Or. Const. art. XV, § 5a; S.C. Const. art. XVII, § 15; S.D.
 Const. art. XXI, § 9; Tenn. Const. art. XI, § 18; Tex. Const. art. I, § 32; Utah Const. art. I, § 29;
 Va. Const. art. I, § 15-A; Wis. Const. art. XIII, § 13; 750 Ill. Comp. Stat. 5/212; Ind. Code § 31-
 11-1-1; Md. Code, Fam. Law § 2-201; Minn. Stat. § 517.01; N.J. Stat. § 37:1-1; N.M. Stat. § 40-
 1-1; N.Y. Dom. Rel. Law § 5-7; N.C. Gen. Stat. § 51-1.2; 23 Pa. Cons. Stat. § 1704; R.I. Gen.
 Laws § 15-1-1 – 15-1-5; Wash. Rev. Code § 26.04.010-20; W. Va. Code § 48-2-603; Wyo. Stat. §
 20-1-101.

1 marriage in the Fourteenth Amendment. To hold otherwise, this Court would part ways with every
 2 federal court that has addressed this issue, abandon over a century of Supreme Court precedent, and
 3 drastically change the institution of marriage in America.⁴

4 3. Proposition 8 Satisfies Rational-Basis Review.

5 With Plaintiffs' theory of fundamental rights foreclosed, Proposition 8 need only "be
 6 rationally related to legitimate government interests." *Glucksberg*, 521 U.S. at 728. Rational-basis
 7 review is "a paradigm of judicial restraint," and not "a license for courts to judge the wisdom,
 8 fairness, or logic of legislative choices." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313-
 9 14 (1993) (citation omitted); *see also Wilson*, 354 F. Supp 2d at 1307 (quoting *Kandu*, 315 B.R. at
 10 145). A law analyzed under rational-basis review has "a strong presumption of validity," *see Beach*
 11 *Communications*, 508 U.S. at 314; "the burden is upon the challenging party to negat[e] any
 12 reasonably conceivable state of facts that could provide a rational basis for the classification." *Bd.*
 13 *of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 367 (2001) (quotations omitted).
 14 Rational-basis review does not require that a law be crafted with precision; "[a] classification does
 15 not fail rational-basis review because it is not made with mathematical nicety or because in practice
 16 it results in some inequity." *Heller v. Doe*, 509 U.S. 312, 320 (1993).

17 Californians possess at least two closely related interests for defining marriage as the union
 18 of one man and one woman, both of which derive from the government's legitimate—indeed
 19 compelling—interest in promoting the welfare of children, the State's most precious and vulnerable
 20 citizens.⁵ *See Maryland v. Craig*, 497 U.S. 836, 852-53 (1990) ("[A] State's interest in

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 22 ⁴ Severing the fundamental right to marry from its link to procreation would subject the marriage
 23 laws in all States to searching scrutiny and would inevitably jeopardize their validity. For example,
 24 state statutes that restrict marriages between people who are closely related by blood would likely
 25 be struck down under Plaintiffs' view of strict scrutiny. While the government certainly has an
 26 interest in discouraging unions that would normatively yield genetically deficient children,
 27 Plaintiffs' reasoning, if followed to its logical conclusion, would mean that such laws, by restricting
 28 unions between infertile relatives, are over-inclusive and thus irrational. Breaking this new
 constitutional ground would also jeopardize the States' polygamy restrictions by subjecting them to
 the judiciary's most searching review. What Plaintiffs invite this Court to do reaches far beyond its
 application to same-sex couples and threatens to invalidate many legitimate state marriage laws.

⁵ California, like other States, also has a legitimate interest in preserving the traditional
 understanding marriage. *See Marriage Cases*, 183 P.3d at 470 (Corrigan, J., concurring and
 dissenting) ("The legitimate purpose of the statutes defining marriage is to preserve the traditional
 understanding of the institution"); *Conaway*, 932 A.2d at 630 ("[T]he State has a legitimate interest
 (Continued)

1 safeguarding the physical and psychological well-being of [children] is compelling”) (alterations
2 and quotations omitted). First, the government has a compelling interest in creating a legal
3 structure that promotes the raising of children by both of their biological parents. Only marriage as
4 defined by Proposition 8 unites the biological, legal, and social dimensions of parenthood. Second,
5 the government has a compelling interest in “responsible procreation”—that is, directing the
6 inherent procreative capacity of sexual intercourse between men and women into stable, legally
7 bound relationships.

8 Marriage between a man and a woman is the only legal construct that maintains the link
9 between a child and both biological parents and that encourages both biological parents to jointly
10 raise their children. Promoting this biological connection benefits children and society. Children,
11 on average, develop best when raised by their biological mother and father. *See* Kristin Anderson
12 Moore *et al.*, *Marriage from a Child’s Perspective: How Does Family Structure Affect Children,*
13 *and What Can We Do about It?*, Child Trends Research Brief, at 1-2 (June 2002) (attached as
14 Exhibit D) (“[I]t is not simply the presence of two [parents, as some have assumed, but the presence
15 of two biological parents that seems to support children’s development”). Well-developed
16 children, in turn, benefit society by decreasing criminal conduct and other forms of antisocial
17 behavior. And aside from these individual and societal benefits, the government has a profound
18 interest in maintaining this biological cohesion and fulfilling the innate desire of every person to
19 know and be raised by their biological parents. *See* Article 7 of the Convention on the Rights of the
20 Child, United Nations (September 2, 1990) (excerpts attached as Exhibit E) (“The child shall . . . ,
21 as far as possible, [have] the right to know and be cared for by his or her parents”).

22 Only a relationship between a man and a woman “is capable of producing biological
23 offspring of both members.” *Conaway*, 932 A.2d at 630-31; *see also Andersen*, 138 P.3d at 982-83.
24 Thus, recognizing those relationships as marriages directly and rationally furthers the government’s
25 interest in encouraging the raising of children by their biological mother and father. In contrast, no

26 (Cont’d)
27 in maintaining and promoting its police powers over the traditional institution of marriage and its
28 binary, opposite-sex nature.”). Proposed Intervenors recognize that there are other government
interests supporting Proposition 8, and they reserve the right to assert those later in this litigation.

1 matter what measures are taken by same-sex couples, they cannot both be a biological parent of the
2 same child. In fact, the only way for same-sex couples to produce children is to involve a third
3 party, a process that risks commoditizing children and intentionally deprives them of having both
4 biological parents in their family. Thus, recognizing same-sex relationships as marriages does not
5 further the government’s interest in encouraging children to be raised by both biological parents.
6 Not surprisingly, then, many courts have found that this government interest satisfies rational-basis
7 review. *See, e.g., Kandu*, 315 B.R. at 146 (collecting cases and holding that “encourag[ing] the
8 maintenance of stable relationships that facilitate to the maximum extent possible the rearing of
9 children by both of their biological parents is a legitimate . . . concern”).

10 Government interests may be “symbolic and aspirational as well as practical.” *Glucksberg*,
11 521 U.S. at 728-29. The institution of marriage—consisting of unions between one man and one
12 woman—communicates to society that, when at all possible, children should be raised by both
13 biological parents in a stable, legally binding relationship. But forcing Californians to redefine
14 marriage to include same-sex couples would eradicate this timeless structure for supporting the vital
15 connection between children and their biological mother and father. In effect, it would force the
16 government to communicate that the biological connection between parent and child is
17 unimportant—a message belied by social science.⁶

18 Furthermore, the government has an interest in promoting “responsible procreation” among
19 its citizens. The government’s interest in responsible procreation is rooted in a concern for
20 children, *i.e.*, the natural result of sexual intercourse between men and women. Relationships
21 between men and women are unique in that they may unintentionally result in the birth of children.
22 *See Morrison*, 821 N.E.2d at 24 (“‘Natural’ procreation . . . may occur only between opposite-sex
23 couples and with no foresight or planning”). The government has an interest in directing these
24 unintended children into committed, legally bound relationships between both of their parents. *See*

25 _____
26 ⁶ Plaintiffs incorrectly contend that defining marriage as the union of a man and a woman “is
27 certainly not necessary to preserve or strengthen the tradition of marriage in California.” (Doc # 7
28 at 14.) But that argument is unsupported. If marriage is redefined to include same-sex couples, it
would no longer serve as society’s model for preserving and promoting the bond between children
and both of their biological parents. Thus, maintaining marriage as the union of a man and a
woman is vitally necessary to preserve the tradition of marriage in California.

1 *Hernandez*, 855 N.E.2d at 3-4 (stating that marriage “create[s] more stability and permanence in the
2 relationships that cause children to be born” and that the government “could rationally believe that
3 it is better, other things being equal, for children to grow up with both a mother and a father”). This
4 interest corresponds closely with California’s “compelling state interest in establishing paternity for
5 all children.” Cal. Fam. Code § 7570(a).

6 Same-sex relationships, however, do not naturally or unintentionally result in pregnancy and
7 child birth. Hence, recognizing those relationships as marriages “would not further [the
8 government’s] interest in . . . ‘responsible procreation.’” *Morrison*, 821 N.E.2d at 25. Many courts
9 have considered the government’s interest in responsible procreation and found it to satisfy rational-
10 basis review. *See, e.g., Hernandez*, 855 N.E.2d at 359; *Morrison*, 821 N.E.2d at 24-26, 29-31;
11 *Standhardt v. Superior Court*, 77 P.3d 451, 462-63 (Ariz. Ct. App. 2003).

12 Plaintiffs do not address these legitimate, and indeed compelling, government interests but
13 instead discuss only the government’s broader interest “in promoting procreation” generally. (Doc
14 # 7 at 14.) Even when viewed in this manner, however, the Government’s interest is plainly
15 furthered by limiting marriage to opposite-sex relationships—the only relationships that naturally
16 produce children. *See Conaway*, 932 A.2d at 630-31 (collecting cases and holding that the
17 “‘inextricable link’ between marriage and procreation reasonably could support the definition of
18 marriage as between a man and a woman only, because it is that relationship that is capable of
19 producing biological offspring of both members”). Plaintiffs argue that “Prop. 8 is a fatally
20 underinclusive means of promoting procreation because it permits individuals of opposite sex who
21 are biologically unable to bear children, or who simply have no desire for children, to marry.”
22 (Doc. # 7 at 15.) Under well-established principles of law, however, California’s definition of
23 marriage “is not invalid under the Constitution because it might have gone farther than it did” in
24 promoting legitimate state interests. *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966). To the
25 contrary, a State may properly focus its laws on promoting legitimate interests by “addressing itself
26 to the phase of the problem which seems most acute to the legislative mind.” *Id.* Accordingly,
27 while the State’s interest might alternatively be promoted by burdensome and intrusive regulations
28 of the sort needed to determine the child-bearing capacity and intentions of opposite-sex couples

1 who desire to marry, no principle of constitutional law requires the State to enact such regulations
2 as a prerequisite for preserving its traditional understanding of marriage.

3 In sum, Proposition 8 furthers compelling government interests and is narrowly tailored to
4 promote those interests. Thus, Plaintiffs lack a cognizable legal theory that their due-process rights
5 have been violated, and their motion for preliminary injunction should be denied.

6 **C. Plaintiffs Cannot Succeed On Their Equal-Protection Claim.**

7 “The Equal Protection Clause of the Fourteenth Amendment . . . is essentially a direction
8 that all persons similarly situated should be treated alike.” *Cleburne v. Cleburne Living Center*, 473
9 U.S. 432, 439 (1985). “The Constitution is violated when government . . . invidiously classifies
10 similarly situated people on the basis of the immutable characteristics with which they were born.”
11 *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 477-78 (1981). But “the
12 Constitution does not require things which are different in fact or opinion to be treated in law as
13 though they were the same.” *Skinner*, 316 U.S. at 541.

14 Plaintiffs have not stated a cognizable equal-protection claim because (1) they cannot show
15 that Proposition 8 invidiously discriminates against any class of persons; (2) they have not
16 demonstrated that they, as same-sex couples, are similarly situated to opposite-sex couples; (3) they
17 have not shown that Proposition 8 violates *Romer*; (4) they cannot demonstrate that Proposition 8
18 impermissibly discriminates on the basis of sexual orientation; (5) they cannot show that
19 Proposition 8 impermissibly discriminates on the basis of sex; and (6) they have not established that
20 Proposition 8 violates *Brown v. Board of Education*, 347 U.S. 483 (1954).

21 **1. Proposition 8 Does Not Invidiously Discriminate Against A Class of**
22 **Persons.**

23 A threshold requirement for any equal-protection claim is a showing of invidious
24 discrimination. *See Michael M.*, 450 U.S. at 477-78. Invidiousness is present where the
25 government acts irrationally or with discriminatory intent. *See City of Cuyahoga Falls v. Buckeye*
26 *Cmty. Hope Fund*, 538 U.S. 188, 194 (2003); *Washington v. Davis*, 426 U.S. 229, 239 (1976). The
27 rational-basis analysis shows that Californians have not acted irrationally in defining marriage as
28 the union of one man and one woman. And neither can Plaintiffs show that Proposition 8 exhibits a

1 discriminatory intent. Consequently, Plaintiffs cannot satisfy the invidiousness requirement.

2 **2. Same-Sex Couples Are Not Similarly Situated To Opposite-Sex Couples**
3 **For The Purpose Of The Marriage Laws.**

4 Another threshold requirement for an equal-protection claim is a showing that a “similarly
5 situated [class] has been treated disparately.” *Christian Gospel Church, Inc. v. City and County of*
6 *San Francisco*, 896 F.2d 1221, 1225-26 (9th Cir. 1990), *superseded on other grounds*, 42 U.S.C. §
7 2000cc. This threshold analysis focuses on whether the plaintiffs are similarly situated for the
8 purpose of the law in question. *See Rostker v. Goldberg*, 453 U.S. 57, 78 (1981). The Supreme
9 Court has repeatedly recognized that biological differences between men and women may preclude
10 a plaintiff from satisfying the similarly situated requirement. *See Miller v. Albright*, 523 U.S. 420,
11 445 (1998) (“The biological differences between . . . men and . . . women provide a relevant basis
12 for differing rules”); *Michael M.*, 450 U.S. at 477-78 (finding men and women not “similarly
13 situated with respect to . . . intercourse and pregnancy”); *Rostker*, 453 U.S. at 78. “[T]he Equal
14 Protection Clause does not mean that the physiological differences between men and women must
15 be disregarded. . . . The Constitution surely does not require a State to pretend that demonstrable
16 differences between men and women do not really exist.” *Michael M.*, 450 U.S. at 481.

17 Marriage is an inherently relational construct; thus, challenges to marriage laws necessarily
18 involve differential treatment between two classes of couples—same-sex and opposite-sex
19 couples—rather than two classes of individuals. These two classes of couples exhibit biological,
20 sociological, and emotional differences, most notable of which pertain to the act of procreation. In
21 short, opposite-sex couples constitute a procreative unit; whereas, same-sex couples do not. *See id.*
22 at 478 (noting that the “most basic” differences between males and females relate to “pregnancy”
23 and “sexual intercourse”). Sexual intercourse between opposite-sex couples naturally produces
24 children, but the sexual acts of same-sex couples cannot. Opposite-sex couples provide children
25 with both of their biological parents, but same-sex couples cannot. And opposite-sex couples create
26 a balanced parenting model by providing daily interaction with both a male and female role model,
27 yet same-sex couples do not. These undisputed biological differences demonstrate that same-sex
28 couples are not similarly situated to opposite-sex couples for the purpose of marriage—a

1 relationship that the Supreme Court has always linked to procreation. *See Zablocki*, 434 U.S. at
2 384. Thus, Plaintiffs’ equal-protection claim does not satisfy this threshold requirement.

3 **3. Proposition 8 Is Unlike The State Constitutional Amendment**
4 **Invalidated In *Romer*.**

5 Plaintiffs unrealistically endeavor to tar this case as exhibiting animus akin to *Romer*. (Doc
6 # 7 at 17.) But that argument falls *far* short of stating a cognizable legal theory. Proposition 8’s
7 narrow focus on defining the institution of marriage is entirely unlike the Colorado constitutional
8 amendment in *Romer* that created a far-reaching political disability against a class of individuals.
9 Thus, Plaintiffs’ *Romer* claim lacks merit.

10 The *Romer* Court invalidated an extensive state constitutional amendment that “prohibit[ed]
11 all legislative, executive or judicial action at any level of state or local government designed to
12 protect . . . homosexual persons.” *Romer*, 517 U.S. at 624. *Romer* differs from the present case in
13 at least four significant ways. First, the amendment at issue in *Romer* prevented the government
14 from protecting gay and lesbian individuals against discrimination. Proposition 8, in contrast, does
15 not involve legal protections for individuals against discrimination; it relates only to the legal
16 promotion of a relationship. Denying legal protection from invidious discrimination hints of
17 animosity, but denying official legal promotion does not; that factual difference sharply
18 distinguishes Proposition 8 from the amendment at issue in *Romer*. Second, the *Romer* Court
19 focused on that amendment’s “sheer breadth,” *id.* at 632, noting that it “denie[d] protection across
20 the board,” *id.* at 633. Proposition 8, however, is not broad; it involves only the issue of marriage
21 and merely reaffirms California’s ancient understanding of that institution.

22 Third, the *Romer* Court focused on the deprivation of political rights involved in that case.
23 The amendment at issue in *Romer* deprived a class of individuals from “the right to seek specific
24 protection from the [government].” *Id.* But Proposition 8 does not impose a political disability on
25 anyone; all Californians are free to seek protection from the government. The only change
26 accomplished by Proposition 8 was a reaffirmation of the historical definition of marriage in
27 California. Fourth, the *Romer* Court presumed the existence of animus against gay and lesbian
28 individuals because “the amendment seem[ed] inexplicable by anything but animus toward the class

1 it affects.” *Id.* at 632. Plaintiffs contend that Proposition 8 evinces similar animus and “moral
2 disapproval of gay men and lesbians.” (Doc # 7 at 18.) But that speculation grossly distorts
3 Proposition 8’s history and purpose, as well as the many California laws addressing the concerns of
4 gay and lesbian individuals.

5 Proposition 8 was not, as asserted by Plaintiffs, “a direct response to the California Supreme
6 Court’s decision in [the] *Marriage Cases*” or motivated by animus to “eliminate the right of same-
7 sex couples to marry in California.” (See Doc # 7 at 8.) To the contrary, Proposed Intervenors
8 began the process of qualifying Proposition 8 for the ballot approximately six months before the
9 *Marriage Cases* decision. (See, e.g., Doc # 8-2 at 5 ¶ 10.) And they completed the last affirmative
10 step to qualify Proposition 8 for the ballot—submitting the signature petitions—weeks before the
11 decision was issued. (See, e.g., Doc # 8-2 at 6 ¶ 19.) So simple chronology shows that Proposition
12 8 could not be a “response” to the *Marriage Cases* decision.

13 Moreover, Proposed Intervenors strenuously objected to the Attorney General’s narrow and
14 crabbed characterization of Proposition 8’s purpose as “eliminat[ing] the right of same-sex couples
15 to marry.” Proposition 8’s actual purpose is to reaffirm California’s historical definition of
16 marriage as the union of a man and a woman, and to prevent the government from recognizing any
17 variation from that definition, including but not limited to polygamous, polyamorous, and same-sex
18 unions. (Ex. B at 5-6.) The affirmative language of Proposition 8 shows that it was intended to
19 protect the proven structure of marriage from a host of threats that would deconstruct it.

20 Nothing in California law, either Proposition 8 or otherwise, indicates that Californians
21 harbor animus towards gay and lesbian individuals. Californians have officially recognized and
22 granted broad legal benefits to same-sex couples. See Cal. Fam. Code § 297. Californians have
23 also insistently sought to eliminate any and all forms of discrimination against those individuals.⁷

24
25 ⁷ See Cal. Fam. Code § 297 (creating domestic partnerships for same-sex couples); Cal. Civ. Code §
26 51 (prohibiting sexual-orientation discrimination in “all business establishments of every kind
27 whatsoever”); Cal. Civ. Code § 51.7 (protecting against “intimidation by threat of violence” based
28 on sexual orientation); Cal. Educ. Code § 220 (prohibiting sexual-orientation discrimination in
“educational institutions”); Cal. Educ. Code § 51500 (prohibiting schools from teaching anything
that could “promote a discriminatory bias” based on sexual orientation); Cal. Penal Code § 422.55
(prohibiting so-called “hate crimes” motivated by sexual orientation).

1 In light of this wider legal landscape, suggesting that Californians are guilty of the animus present
2 in *Romer* is simply unsupportable.

3 Importantly, *Romer* requires that *voter animus must have displaced any legitimate*
4 *government interest*. See *Romer*, 517 U.S. at 634 (“[A] bare . . . desire to harm a politically
5 unpopular group cannot constitute a *legitimate* governmental interest”) (alteration and emphasis in
6 original). The interests detailed in the rational-basis analysis are plainly legitimate and objectively
7 demonstrate the lack of irrational animus by the more than 7 million Californians who voted for
8 Proposition 8. Thus, Plaintiffs’ use of *Romer* stretches that decision beyond what it can bear and
9 should not be adopted by this Court. See *Hernandez*, 855 N.E.2d at 5 (refusing to conclude that
10 everyone who holds the belief that marriage is the union of a man and a woman is “irrational,
11 ignorant, or bigoted”).

12 **4. Proposition 8 Does Not Impermissibly Discriminate On The Basis Of**
13 **Sexual Orientation.**

14 Proposition 8 does not discriminate on the basis of sexual orientation. It does not mention
15 sexual orientation, and neither does it require the government to ask about a person’s sexual
16 orientation. A man and a woman can marry regardless of their sexual orientation. But a same-sex
17 couple cannot marry, regardless of whether they are “oriented” to persons of the same sex, the
18 opposite sex, or both sexes. Thus, Proposition 8 treats heterosexual persons in precisely the same
19 manner it treats gay and lesbian individuals: both can marry a person of the opposite sex, but
20 neither can marry a person of the same sex.

21 Plaintiffs nevertheless imply that Proposition 8 amounts to sexual-orientation discrimination
22 because it has a disparate impact on gay and lesbian individuals. But disparate impact does not
23 establish an equal-protection violation without proof of a discriminatory intent or purpose. See
24 *Buckeye Cmty. Hope Fund*, 538 U.S. at 194; *Washington*, 426 U.S. at 239. And, as demonstrated
25 above, no such discriminatory intent exists here. Thus, Plaintiffs cannot succeed on their sexual-
26 orientation discrimination claim.

27 Even if this Court finds that Proposition 8 discriminates on the basis of sexual orientation,
28 controlling precedent dictates that rational-basis scrutiny applies because, contrary to Plaintiffs’

1 assertion, gay and lesbian individuals do not constitute a suspect or quasi-suspect class. Only a few
2 classifications—race, alienage, national origin, sex, and illegitimacy—trigger heightened scrutiny
3 under federal law. *See Ball v. Massanari*, 254 F.3d 817, 823-24 (9th Cir. 2001). And the Supreme
4 Court has cautioned against creating new suspect classes because courts applying heightened
5 scrutiny require an exacting investigation of legislative decisions, and thus, “respect for the
6 separation of powers” weighs against expanding this area of constitutional jurisprudence.
7 *Cleburne*, 473 U.S. at 441; *see also Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (declining to extend
8 strict scrutiny to “[c]lose relatives”); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313
9 (1976) (per curiam) (declining to extend strict scrutiny to a class of older persons).

10 Every circuit that has applied equal-protection analysis to claims of alleged discrimination
11 against gay and lesbian individuals has declined to create a suspect class, and many of those courts
12 arrived at or reaffirmed their conclusions after *Romer* and *Lawrence*.⁸ Ninth Circuit precedent on
13 this point is unmistakably clear. In *High Tech Gays*, 895 F.2d at 571-74, the Ninth Circuit held that
14 “homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational
15 basis scrutiny[.]” *Id.* at 574. That conclusion was not, as suggested by Plaintiffs, premised solely
16 on *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. at 578. To be sure,
17 the court discussed *Bowers* during the initial part of its analysis, but it then proceeded to analyze the
18 Supreme Court’s suspect-class factors, noting that this reasoning provided “further support for [the]
19 holding that homosexuals are not a suspect or quasi-suspect class.” *Id.* at 573-74. Thus, the *High*
20 *Tech Gays* decision remains controlling here, and this Court is not free to disregard it.

21 Furthermore, since its decision in *High Tech Gays*, the Ninth Circuit has at least twice
22 reaffirmed the application of rational-basis review to equal-protection claims alleging
23

24 ⁸ *See High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990);
25 *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1137 (9th Cir. 2003); *Cook v. Gates*, 528
26 F.3d 42, 61 (1st Cir. 2008); *Veney v. Wyche*, 293 F.3d 726, 731-32 (4th Cir. 2002); *Johnson v.*
27 *Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Scarborough v. Morgan County Bd. of Educ.*, 470 F.3d
28 250, 261 (6th Cir. 2006); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Citizens for*
Equal Prot. v. Bruning, 455 F.3d 859, 866 (8th Cir. 2006); *Rich v. Sec’y of the Army*, 735 F.2d
1220, 1229 (10th Cir. 1984); *Lofton v. Sec’y of Dep’t of Children and Family Servs.*, 358 F.3d 804,
818 (11th Cir. 2004); *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994); *Woodward v. United*
States, 871 F.2d 1068, 1076 (Fed. Cir. 1989).

1 discrimination against gay and lesbian individuals. In its 2003 decision in *Flores*, 324 F.3d at 1137,
2 that court cited *High Tech Gays* and stated that “homosexuals are not a suspect or quasi-suspect
3 class” under federal law. *Id.* And in its 2008 decision in *Witt*, 527 F.3d at 821, the Ninth Circuit
4 held that one of its prior decisions applying rational-basis review to an equal-protection claim
5 alleging discrimination against gay and lesbian individuals “was not disturbed by *Lawrence*, which
6 declined to address equal protection.” *Id.* Thus, controlling precedent dictates that gay and lesbian
7 individuals do not constitute a suspect class under federal law.

8 Even if there were no precedent to bind this Court, Plaintiffs have not made the requisite
9 showing to establish a new suspect class. The Supreme Court has identified four distinguishing
10 characteristics of suspect classes: (1) a history of discrimination; (2) a trait that “bears no relation
11 to ability to perform or contribute to society”; (3) an immutable trait; and (4) political
12 powerlessness. *See Cleburne*, 473 U.S. at 440-41; *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987).
13 Plaintiffs have not demonstrated the immutability or political-powerlessness factors.

14 “Immutability” defines a human characteristic determined “solely by the accident of birth.”
15 *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). A showing of immutability is required to
16 create a suspect class under federal law. *See id.* (grouping sex, race, and national origin, which are
17 “immutable”). The Ninth Circuit has already analyzed this immutability factor as it relates to gay
18 and lesbian individuals: “Homosexuality is not an immutable characteristic; it is behavioral and
19 hence is fundamentally different from traits such as race, gender, or alienage[.]” *High Tech Gays*,
20 895 F.2d at 573. Indeed, the current scientific research shows that issues surrounding one’s sexual
21 orientation are far more complex than a mere “accident of birth.” *See For a Better Understanding*
22 *of Sexual Orientation and Homosexuality*, American Psychological Association (2008) (attached as
23 Exhibit F).

24 Moreover, Plaintiffs have not established the political-powerless factor. One of the reasons
25 the judiciary creates a suspect class is because discrimination against that class “is unlikely to be
26 soon rectified by legislative means.” *Cleburne*, 473 U.S. at 440. But, here, legislatures across this
27 Nation, and particularly in California, have addressed and continue to address the concerns of gay
28 and lesbian individuals. *See supra* fn. 7. Thus, “homosexuals are not without political power; they

1 have the ability to and do ‘attract the attention of the lawmakers,’ as evidenced by such legislation.”
 2 *High Tech Gays*, 895 F.2d at 574 (citing *Cleburne*, 473 U.S. at 445). This Court should thus
 3 decline Plaintiffs’ request to create a new suspect class.

4 **5. Proposition 8 Does Not Impermissibly Discriminate On The Basis Of**
 5 **Sex.**

6 “Supreme Court precedent has only found [impermissible] sex-based classifications in laws
 7 that have a disparate impact on one sex or the other.” *Smelt*, 374 F. Supp 2d at 876-77 (collecting
 8 cases). Yet Proposition 8 does not have a disparate impact on one sex or the other; it treats men and
 9 women equally: neither may marry a person of the same sex. It does not separate men and women
 10 into classes and grant benefits to one of those classes while withholding them from the other. Nor
 11 does Proposition 8, either facially or in its application, place men and women in unequal positions.
 12 To the contrary, it equally prohibits men and women from the same conduct—that is, marrying
 13 another person of the same sex. All federal courts and most state appellate courts that have
 14 addressed this issue have rejected the claim that defining marriage as the union of one man and one
 15 woman discriminates on the basis of sex. *See Kandu*, 315 B.R. at 143 (concluding that “the
 16 marriage definition contained in DOMA does not classify according to gender”); *Smelt*, 374 F.
 17 Supp 2d at 876-77 (“To date, the laws in which the Supreme Court has found sex-based
 18 classifications have all treated men and women differently”); *Baker v. State*, 744 A.2d 864, 880
 19 n.13 (Vt. 1999) (collecting cases); *Marriage Cases*, 183 P.3d at 440; *Andersen*, 138 P.3d at 988;
 20 *Conaway*, 932 A.2d at 598; *Hernandez*, 855 N.E.2d at 6.

21 **6. Proposition 8 Does Not Violate *Brown v. Board of Education*.**

22 Plaintiffs rely on *Brown v. Board of Education* to argue that the “separate institutions of
 23 civil marriage for opposite-sex couples and domestic partnerships for same-sex couples ‘are
 24 inherently unequal.’” (Doc # 7 at 13.) But Plaintiffs have not shown that *Brown* has any
 25 application in the present context.

26 Plaintiffs’ use of *Brown* is similar to their use of the Supreme Court’s cases discussing the
 27 fundamental right to marry: they selectively pull quotes and concepts without regard for the
 28 context in which the law arose. The principles espoused in *Brown* have been largely, if not entirely,

1 confined to the issue of racial segregation in education. *See, e.g., Swann v. Charlotte-Mecklenburg*
2 *Bd. of Educ.*, 402 U.S. 1, 5-6 (1971). But Plaintiffs seek to expand *Brown* far from its origins,
3 beyond the education context to eradicate a biologically based distinction between two classes of
4 couples. The separate education systems invalidated by *Brown* and its progeny were designed to
5 maintain the inferiority of African-Americans. *See Brown*, 347 U.S. at 494. But, here, the different
6 domestic relations recognized under California law are not designed to discriminate against any
7 class of persons, and Plaintiffs offer only a few conclusory assertions to show that they are. This is
8 insufficient to state a cognizable claim under *Brown*.

9 Moreover, the principles expressed in *Brown* have no application here. At the time *Brown*
10 was decided, the Court's precedent demanded that invidious racial classifications be subject to the
11 "most rigid" judicial scrutiny. *See Korematsu v. United States*, 323 U.S. 214, 216 (1944). Thus,
12 *Brown's* rejection of "separate but equal" education systems necessarily depended on the Court's
13 engaging in searching scrutiny. But, here, as has been shown, heightened scrutiny does not apply,
14 and thus neither does the inherently searching judicial review created by *Brown*.

15 Plaintiffs' broad view of *Brown* would prevent the government from ever creating different
16 structures, labels, or institutions, even when it has rational, nondiscriminatory reasons for doing so.
17 Plaintiffs' view of that case apparently permits the judiciary to engage in social engineering under
18 the guise of bringing "equality" to "separate" government programs, structures, or institutions. But
19 responsible application of precedent requires that *Brown* be confined to the Court's historical
20 application of it, or that there be a legally principled reason for extending it to a different context.
21 Yet Plaintiffs wholly fail—and indeed do not even attempt—to establish why *Brown* should be
22 extended into the realm of domestic relations.

23 **II. THE IRREPARABLE-HARM, BALANCE-OF-EQUITIES, AND PUBLIC-INTEREST FACTORS**
24 **ALL WEIGH IN FAVOR OF DENYING A PRELIMINARY INJUNCTION.**

25 Plaintiffs' request for an injunction runs contrary to the "basic function of a preliminary
26 injunction," which is "to preserve the status quo pending a determination of the action on the
27 merits." *Chalk v. United States District Court*, 840 F.2d 701, 704 (9th Cir. 1988). Indeed, courts
28 are "extremely cautious" in granting a preliminary injunction that would disturb the status quo, and

1 such relief “is particularly disfavored under the law of this circuit.” *Stanley v. Univ. of S. Cal.*, 13
2 F.3d 1313, 1319-20 (9th Cir. 1994). Proposition 8 has been the governing law in California for
3 more than six months; thus, Plaintiffs’ injunction would alter the status quo and change the
4 California Constitution. That relief would irreparably harm the State, undermine the public interest,
5 and burden the rights of Proposed Intervenors.

6 A plaintiff without a meritorious constitutional claim does not suffer a threat of irreparable
7 injury. *Coalition for Economic Equality v. Wilson*, 122 F.3d 692, 711 (9th Cir. 1997). Plaintiffs
8 have not shown a meritorious constitutional claim; thus, they do not satisfy the irreparable-harm
9 requirement. Additionally, Plaintiffs are not being deprived of substantive legal benefits; the only
10 alleged injury is a particular label or status; such an ethereal injury is not irreparable.

11 The only irreparable injury involved here is the one imposed on the State and its citizens.
12 “[A]ny time a State is enjoined by a court from effectuating statutes enacted by . . . its people, it
13 suffers a form of irreparable injury.” *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S.
14 1345, 1351 (1977) (Rehnquist, Circuit Justice); *see also Coalition for Economic Equality*, 122 F.3d
15 at 719 (“[I]t is clear that a state suffers irreparable injury whenever an enactment of its people or
16 their representatives is enjoined”). Here, Plaintiffs seek to enjoin not a typical statute but rather a
17 constitutional provision enacted by the people; thus, granting an injunction irreparably harms the
18 State. Moreover, given the government’s compelling reasons for defining marriage as the union of
19 one man and one woman, forcing the State to abandon that choice inflicts further irreparable injury.
20 Thus, the balance of equities tips sharply in favor of denying a preliminary injunction.

21 Plaintiffs admit that issuing a preliminary injunction would provide another judicially
22 created “window” for same-sex couples to marry in California. (Doc # 7 at 24.) That legal change
23 would directly undermine the public interest as expressed in Proposition 8. What is more, Plaintiffs
24 suggest that, should they take advantage of this “window” and marry, the status quo in this case
25 would not be upset temporarily but permanently. (Doc # 7 at 24 (asserting that “the California
26 Attorney General himself has acknowledged that marriages that were legal at the time of formation”
27 would “remain legal after an intervening change in law”) (quotation marks omitted).)

28 Even were that not the case (and Proposed Intervenors do not suggest that it is), if this Court

1 later denies Plaintiffs’ claims and lifts the injunction, it would create a cloud of uncertainty
 2 regarding the validity of the same-sex marriages entered during that “interim” period. *See Orrin W.*
 3 *Fox*, 434 U.S. at 1351 (acknowledging the harm created by a later-lifted preliminary injunction).
 4 Thus, issuing a preliminary injunction potentially harms all same-sex couples who would enter into
 5 marriages during that “interim” period, by subjecting their marriages to legal uncertainty. It also
 6 harms the State, which has an interest in the marital status of couples domiciled within its borders.
 7 That fact alone—*i.e.*, creating further legal uncertainty regarding marriage in California—weighs
 8 heavily against granting a preliminary injunction. Given the emotional sensitivity surrounding this
 9 issue, the proper course is to deny Plaintiffs’ request for preliminary injunction and preserve the
 10 status quo in an area of law that has experienced much turmoil in the last year.

11 Additionally, issuing a preliminary injunction would nullify Proposed Intervenor’s exercise
 12 of their state constitutional right to amend the California Constitution through initiative. (*See, e.g.*,
 13 Doc # 8-2 at 4 ¶ 2-4.) An injunction would also cast aside Proposed Intervenor’s substantial
 14 investments of time, effort, reputation, and personal resources in qualifying Proposition 8 for the
 15 ballot and campaigning for its enactment. (*See, e.g.*, Doc # 8-2 at 7 ¶ 27.) In short, issuing an
 16 injunction would directly and significantly harm Proposed Intervenor, by undoing all that they
 17 have done in working diligently for Proposition 8’s enactment.

18 **CONCLUSION**

19 For the foregoing reasons, this Court should deny Plaintiffs’ motion for a preliminary
 20 injunction.

21 Dated: June 11, 2009

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 28 8, A PROJECT OF CALIFORNIA RENEWAL

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