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15 **UNITED STATES DISTRICT COURT**
16 **NORTHERN DISTRICT OF CALIFORNIA**

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

19 Plaintiffs,

20 v.

21 ARNOLD SCHWARZENEGGER, in his official
capacity as Governor of California; EDMUND
22 G. BROWN, JR., in his official capacity as
Attorney General of California; MARK B.
23 HORTON, in his official capacity as Director of
the California Department of Public Health and
State Registrar of Vital Statistics; LINETTE
24 SCOTT, in her official capacity as Deputy
Director of Health Information & Strategic
25 Planning for the California Department of Public
Health; PATRICK O'CONNELL, in his official
26 capacity as Clerk-Recorder for the County of
Alameda; and DEAN C. LOGAN, in his official
27 capacity as Registrar-Recorder/County Clerk for
the County of Los Angeles,

28 Defendants.

CASE NO. 09-CV-2292 VRW

**PLAINTIFFS' NOTICE OF MOTION AND
MOTION FOR A PRELIMINARY
INJUNCTION, AND MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT
OF MOTION FOR A PRELIMINARY
INJUNCTION**

Date: July 2, 2009
Time: 2:30 p.m.
Judge: Chief Judge Walker
Location: Courtroom 6, 17th Floor

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1 **TO THE PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that on July 2, 2009, at 2:30 p.m., or as soon thereafter as the
3 matter may be heard, before the Honorable Vaughn R. Walker, United States District Court, Northern
4 District of California, 450 Golden Gate Avenue, San Francisco, California, Plaintiffs will move the
5 Court for a preliminary injunction.

6 Plaintiffs respectfully request a preliminary injunction enjoining Defendants from enforcing
7 Article I, § 7.5 of the California Constitution (“Prop. 8”) insofar as it limits civil marriage in
8 California to the union of a man and a woman, and prohibits two individuals of the same sex from
9 getting married.¹

10 **INTRODUCTION**

11 The “freedom to marry has long been recognized as one of the vital personal rights essential
12 to the orderly pursuit of happiness by free men.” *Loving v. Virginia*, 388 U.S. 1, 12 (1967). As a
13 result, “[c]hoices about marriage” are “sheltered by the Fourteenth Amendment against the State’s
14 unwarranted usurpation, disregard, or disrespect.” *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996)
15 (internal quotation marks omitted). Despite the “fundamental importance” of marriage “for all
16 individuals” (*Zablocki v. Redhail*, 434 U.S. 374, 384 (1978)), the State of California prohibits gay
17 and lesbian individuals from marrying the person of their choice. Through Prop. 8, the State
18 relegates gay and lesbian individuals to domestic partnerships, which—though affording same-sex
19 couples most of the substantive rights that accompany the status of marriage—brand same-sex unions
20 with an indelible status and badge of inferiority. Such separate-but-inherently-unequal classifications
21 for favored and disfavored groups are sharply at odds with the promise of “[f]ormal equality . . .
22 [that] is the bedrock of our legal system.” *Jinro Am., Inc. v. Secure Invs., Inc.*, 266 F.3d 993, 1009
23 (9th Cir. 2001).

24 _____
25 ¹ In an abundance of caution, Plaintiffs have also challenged the constitutionality of California
26 Family Code §§ 300 and 308.5, which purport to restrict civil marriage in California to opposite-
27 sex couples, and California Family Code § 301, which also could be read to impose such a
28 restriction. To the extent that those statutes have any continuing legal force after the California
Supreme Court’s decision in *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), their enforcement
should be enjoined for the same reasons as the enforcement of Prop. 8.

1 It is impossible to reconcile the restrictions that Prop. 8 imposes on the right of gay men and
2 lesbians to marry with the U.S. Supreme Court’s conclusion that the Fourteenth Amendment protects
3 the right of *all* citizens to make personal decisions about marriage without unwarranted state
4 intrusion. *Loving*, 388 U.S. at 12. This discriminatory measure also transgresses the Supreme
5 Court’s direction that state ballot initiatives may not be used to strip gay and lesbian individuals of
6 rights accorded to all other citizens (*Romer v. Evans*, 517 U.S. 620, 635 (1996)) and its conclusion
7 that due process protects the intimate personal relationships of gay and lesbian individuals. *Lawrence*
8 *v. Texas*, 539 U.S. 558, 578 (2003). Together, these decisions lead to the inexorable conclusion that
9 Prop. 8 is fundamentally inconsistent with the federal constitutional rights of gay men and lesbians.

10 This Court should issue a preliminary injunction prohibiting the enforcement of Prop. 8
11 insofar as it prohibits two individuals of the same sex from getting married. Each of the well-
12 established requirements for a preliminary injunction—likelihood of success on the merits,
13 irreparable harm to the plaintiffs, the balance of hardships, and public-interest considerations—
14 weighs strongly in favor of an injunction in this case. Most importantly, Plaintiffs have a substantial
15 likelihood of prevailing on the merits of their constitutional challenge because Prop. 8 denies gay and
16 lesbian individuals in same-sex relationships their rights to due process and equal protection under
17 the Fourteenth Amendment to the United States Constitution. Prop. 8 deprives gay and lesbian
18 individuals of their fundamental constitutional right to marry, and discriminates against them on the
19 basis of their sexual orientation and their sex. Prop. 8 can therefore be sustained only if the State can
20 prove that it is narrowly tailored to serve a compelling governmental interest. But none of the
21 purported state interests typically offered in defense of prohibitions on marriage by individuals of the
22 same sex—preservation of tradition, expression of moral condemnation, or promotion of
23 procreation—is a remotely legitimate basis for denying gay and lesbian individuals their
24 constitutionally protected “freedom of personal choice in matters of marriage” (*Cleveland Bd. of*
25 *Educ. v. LaFleur*, 414 U.S. 632, 639 (1974)) and for discriminating against them on arbitrary and
26 invidious grounds. And, even if those interests were legitimate, Prop. 8 is not adequately tailored to
27 further those interests because it is vastly underinclusive. In the absence of a legitimate state interest
28 furthered by Prop. 8, this discriminatory measure cannot satisfy even rational basis review—let alone,

1 the stringent requirements of strict scrutiny. Because Plaintiffs are therefore likely to prevail on the
2 merits of their claims—and because an injunction would prevent irreparable harm to Plaintiffs’
3 constitutional rights, impose no burden on Defendants, and promote the public interest in
4 safeguarding the constitutional rights of all citizens—a preliminary injunction is warranted.

5 **FACTS**

6 Prop. 8 limits the institution of civil marriage in California to the union of a man and a
7 woman, and prohibits two individuals of the same sex from marrying each other. This measure
8 added a new Article I, § 7.5 to the California Constitution, which provides that “[o]nly marriage
9 between a man and a woman is valid or recognized in California.”

10 Prop. 8 was narrowly approved by California voters in November 2008—160 years after the
11 adoption of the State’s first constitution—and was a direct response to the California Supreme
12 Court’s decision in *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). That decision held that
13 California Family Code §§ 300 and 308.5 were unconstitutional under the due process and equal
14 protection guarantees of the California Constitution because they prohibited marriage between
15 individuals of the same sex. *Id.* at 452. According to the official General Election Voter Information
16 Guide, Prop. 8 “[c]hange[d] the California Constitution to eliminate the right of same-sex couples to
17 marry in California.” *Strauss v. Horton*, No. S168047, 2009 WL 1444594, slip op. at 40 (Cal. May
18 26, 2009) (internal quotation marks omitted). The measure went into effect on November 5, 2008,
19 the day after the election. During the period between the California Supreme Court’s decision in the
20 *Marriage Cases* on May 15, 2008, and the effective date of Prop. 8, more than 18,000 same-sex
21 couples were married in California. *Id.* at 3. On May 26, 2009, the California Supreme Court upheld
22 Prop. 8 against a state constitutional challenge, but held that the new amendment to the California
23 Constitution did not invalidate the marriages of same-sex couples that had been performed before its
24 enactment. *Id.* at 135.

25 When Prop. 8 changed the California Constitution to eliminate the right of individuals of the
26 same sex to marry, it relegated same-sex couples seeking government recognition of their
27 relationships to so-called “domestic partnerships.” California’s domestic partnership legislation—
28 which was adopted in 1999 and has been amended on several occasions since—defines “domestic

1 partners” as “two adults who have chosen to share one another’s lives in an intimate and committed
2 relationship of mutual caring.” Cal. Fam. Code § 297(a). To qualify for domestic partnership, a
3 couple must share a common residence, each be at least 18 years of age and unrelated by blood in a
4 way that would prevent them from marrying each other, and not be married or a member of another
5 domestic partnership. *Id.* § 297(b). Domestic partnerships are available only to same-sex couples and
6 to opposite-sex couples where at least one member of the partnership is more than 62 years old. *Id.*
7 § 297(b)(5).

8 A domestic partnership “affords the couple virtually all of the same substantive legal benefits
9 and privileges, and imposes upon the couple virtually all of the same legal obligations and duties, that
10 California law affords to and imposes upon a married couple.” *Marriage Cases*, 183 P.3d at 397-98.
11 Although there are several relatively minor substantive differences between the rights that California
12 law affords to married couples and domestic partners, by far the most significant distinction is that the
13 domestic partnership legislation does not afford gay and lesbian individuals access to the institution of
14 civil marriage itself—a distinction that the California Supreme Court found as a matter of fact and
15 California law to “perpetuat[e]” the “general premise . . . that gay individuals and same-sex couples
16 are in some respects ‘second-class citizens’ who may, under the law, be treated differently from, and
17 less favorably than, heterosexual individuals or opposite-sex couples.” *Id.* at 402.²

18
19 ² The California Supreme Court identified nine differences between the corresponding provisions
20 of the marriage and domestic partnership statutes, including that (1) to qualify for domestic
21 partnership (but not for marriage), both partners must have a common residence at the time the
22 partnership is established, Cal. Fam. Code § 297(b)(1); (2) both persons must be 18 years of age
23 to enter into a domestic partnership, *id.* § 297(b)(4), but a person under 18 may be married with
24 the consent of a parent or guardian or court order, *id.* §§ 302, 303; (3) to become domestic
25 partners, both individuals must file a Declaration of Domestic Partnership with the Secretary of
26 State, who registers the declaration in a statewide registry, Cal. Fam. Code § 298.5(a) & (b), but a
27 couple who wishes to marry must obtain a marriage license and certificate of registry of marriage
28 from the county clerk, have the marriage solemnized by an authorized individual, and return the
license and certificate of registry to the county recorder, who transmits it to the State Registrar of
Vital Statistics, *id.* §§ 306, 359; Cal. Health & Safety Code §§ 102285, 102330, 102355; (4) the
marriage laws, unlike the domestic partnership law, establish a procedure through which an
unmarried man and woman who have been living together as husband and wife may enter into a
“confidential marriage” in which the marriage certificate and date of marriage are not made
available to the public, Cal. Fam. Code § 500 *et seq.*; (5) Article XIII, § 3(o) & (p) of the

[Footnote continued on next page]

1 Plaintiffs are gay and lesbian residents of California who are involved in long-term, serious
2 relationships with individuals of the same sex and who desire to marry those individuals in order to
3 demonstrate publicly their commitment to their partner and to obtain all the benefits that come with
4 the official recognition of their family relationship. Plaintiffs Perry and Stier are lesbian individuals
5 who have been in a committed relationship for ten years. Perry Decl. ¶ 2; Stier Decl. ¶ 2. They reside
6 together in Alameda County and are raising four children, who range in age from fourteen to twenty.
7 Perry Decl. ¶ 2; Stier Decl. ¶ 2. Plaintiffs Katami and Zarrillo are gay individuals who have been in a
8 committed relationship for eight years and who reside together in Los Angeles County. Katami Decl.
9 ¶ 2; Zarrillo Decl. ¶ 2.

10 On May 21, 2009, Plaintiffs Perry and Stier applied for a marriage license from Defendant
11 O’Connell, the Alameda County Clerk-Registrar, but were denied a license solely because they are a
12 same-sex couple. Perry Decl. ¶ 8-9; Stier Decl. ¶ 8-9. On May 20, 2009, Plaintiffs Katami and
13 Zarrillo applied for a marriage license from Defendant Logan, the Los Angeles County Clerk, but also
14 were denied a license solely because they are a same-sex couple. Katami Decl. ¶ 12-13; Zarrillo
15 Decl. ¶ 12-13.

16 ARGUMENT

17 “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the
18 merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance
19 of equities tips in his favor, and that an injunction is in the public interest.” *Am. Trucking Ass’ns v.*
20 *City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting *Winter v. NRDC, Inc.*, 129 S. Ct.
21 365, 374 (2008)). Because Plaintiffs are likely to succeed on the merits of their claims that Prop. 8
22 violates their rights under the Due Process and Equal Protection Clauses of the Fourteenth

23
24 [Footnote continued from previous page]

25 California Constitution grants a \$1,000 property tax exemption to an “unmarried spouse of a
26 deceased veteran” who owns property valued at less than \$10,000, but not to a domestic partner
27 of a deceased veteran; and (6) domestic partners may initiate a summary dissolution of a domestic
28 partnership without any court action, whereas a summary dissolution of a marriage becomes
effective only upon entry of a court judgment, Cal. Fam. Code § 299(a)-(c); Cal. Fam. Code
§ 2400 *et seq.* See *Marriage Cases*, 183 P.3d at 416 n.24.

1 Amendment to the United States Constitution—and because prohibiting the State from continuing to
2 impair Plaintiffs’ due process and equal protection rights would prevent irreparable harm to
3 Plaintiffs, impose no material burden on Defendants, and promote the public interest in safeguarding
4 fundamental constitutional rights—this Court should preliminarily enjoin Defendants from enforcing
5 Prop. 8 insofar as it precludes marriage by individuals of the same sex.

6 **I. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS OF THEIR CONSTITUTIONAL**
7 **CHALLENGE TO PROP. 8.**

8 Prop. 8 violates Plaintiffs’ right to due process under the Fourteenth Amendment because it
9 impermissibly impairs their fundamental constitutional right to marry. Prop. 8 also violates
10 Plaintiffs’ right to equal protection under the Fourteenth Amendment because it not only burdens a
11 fundamental constitutional right but also unlawfully discriminates against Plaintiffs on the basis of
12 their sexual orientation and their sex.

13 **A. Plaintiffs Are Likely To Establish That Prop. 8 Violates The Due**
14 **Process Clause Of The Fourteenth Amendment.**

15 As the Supreme Court declared in *Loving*, the “freedom to marry” is “one of the vital personal
16 rights essential to the orderly pursuit of happiness by free men.” 388 U.S. at 12. Because “the right
17 to marry is of fundamental importance for all individuals” (*Zablocki*, 434 U.S. at 384), “freedom of
18 personal choice in matters of marriage and family life is one of the liberties protected by the Due
19 Process Clause.” *LaFleur*, 414 U.S. at 639. Indeed, this Nation has a deeply rooted—and frequently
20 reaffirmed—“tradition” of “afford[ing] constitutional protection to personal decisions relating to
21 marriage,” “family relationships,” and “child rearing.” *Lawrence*, 539 U.S. at 573-74. “Statutes that
22 directly and substantially impair those rights require strict scrutiny” (*P.O.P.S. v. Gardner*, 998 F.2d
23 764, 767-68 (9th Cir. 1993)), and can be sustained only where the government meets its burden of
24 establishing that the statutes are “narrowly drawn” to further a “compelling state interest[.]” *Carey*
25 *v. Population Servs. Int’l, Inc.*, 431 U.S. 678, 686 (1977). Prop. 8 cannot survive rational basis
26 review—let alone, the rigors of strict scrutiny.

27 1. Prop. 8 directly and substantially impairs Plaintiffs’ constitutionally protected
28 “freedom of personal choice in matters of marriage” and the fundamental liberty interest that

1 guarantees that freedom. The provision categorically prohibits individuals of the same sex from
2 entering into civil marriages and thereby excludes gay and lesbian individuals from what the
3 Supreme Court has recognized to be “*the most important relation in life.*” *Zablocki*, 434 U.S. at 384
4 (emphasis added; internal quotation marks omitted). Prop. 8 imposes an insurmountable barrier
5 between gay and lesbian individuals and the personal fulfillment that all other citizens are able to
6 attain by entering into that “most important” of life’s relations.

7 The availability of domestic partnerships does not ameliorate the constitutionally intolerable
8 burden that Prop. 8 imposes on the right to marry of gay and lesbian individuals. A State cannot
9 discharge its constitutional obligations by conferring separate but partially equal rights on socially
10 disfavored groups because excluding a disfavored group from the rights enjoyed by all other
11 members of society—be it the right to attend a respected educational institution (*see United States v.*
12 *Virginia*, 518 U.S. 515, 554 (1996)), or the right to enter into the esteemed institution of marriage—
13 brands the disfavored group with an indelible mark of inferiority. *Brown v. Bd. of Educ.*, 347 U.S.
14 483, 494 (1954).

15 As the California Supreme Court recognized in the *Marriage Cases*, one of the “core elements
16 of th[e] fundamental right [to marry] is the right of same-sex couples to have their official family
17 relationship accorded the same dignity, respect, and stature as that accorded to all other officially
18 recognized family relationships.” 183 P.3d at 434. By “reserving the historic and highly respected
19 designation of ‘marriage’ exclusively to opposite-sex couples while offering same-sex couples only
20 the new and unfamiliar designation of domestic partnership,” Prop. 8 communicates the “official
21 view that [same-sex couples’] committed relationships are of lesser stature than the comparable
22 relationships of opposite-sex couples” and impermissibly stamps gay and lesbian individuals—and
23 their children—with a “mark of second-class citizenship.” *Id.* at 402, 434, 445. Other courts that
24 have invoked state constitutional grounds to invalidate prohibitions on marriage by individuals of the
25 same sex have also concluded that domestic partnerships and civil unions are constitutionally
26 inadequate substitutes for marriage—even if they afford same-sex couples all of the substantive rights
27 enjoyed by opposite-sex couples. *See Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 417 (Conn.
28 2008) (“the legislature, in establishing a statutory scheme consigning same sex couples to civil

1 unions, has relegated them to an inferior status, in essence, declaring them to be unworthy of the
2 institution of marriage”); *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 570 (Mass. 2004)
3 (same).

4 Especially in light of the long history of invidious, government-sponsored discrimination
5 against gay and lesbian individuals—including the unconstitutional criminalization of their sexual
6 relationships (*Lawrence*, 539 U.S. at 578)—the separate institutions of civil marriage for opposite-sex
7 couples and domestic partnership for same-sex couples “are inherently unequal,” and thus materially
8 and substantially burden the marriage rights of gay and lesbian individuals. *Brown*, 347 U.S. at 495.³

9 2. Defendants cannot meet their burden of demonstrating that they have a compelling
10 reason for consigning gay and lesbian individuals to the separate-but-inherently-unequal institution of
11 domestic partnership. Indeed, Prop. 8 does not even further a single legitimate state interest.⁴

12 For example, tradition alone is a manifestly insufficient basis for a State to impair a person’s
13 constitutionally protected right to marry. “[N]either the antiquity of a practice nor the fact of
14 steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional
15 attack.” *Williams v. Illinois*, 399 U.S. 235, 239 (1970). A state practice of restricting citizens’
16 constitutional rights thus cannot be perpetuated merely “for its own sake.” *Romer*, 517 U.S. at 635.
17 As the Supreme Court recently recognized when invalidating a criminal prohibition on same-sex
18 intimate conduct, “times can blind us to certain truths and later generations can see that laws once

19
20
21 ³ Prop. 8 also burdens the constitutional right to personal sexual autonomy recognized by the
22 Supreme Court in *Lawrence*, 539 U.S. at 578, by perpetuating the misconception that same-sex
23 expressions of intimacy are abnormal and less deserving of official recognition than expressions
24 of intimacy between opposite-sex couples. The Ninth Circuit has held that “when the government
25 attempts to intrude upon the personal and private lives of homosexuals, in a manner that
26 implicates the rights identified in *Lawrence*, the government must advance an important
27 governmental interest, the intrusion must significantly further that interest, and the intrusion must
28 be necessary to further that interest.” *Witt v. Dep’t of the Air Force*, 527 F.3d 806, 819 (9th Cir.
2008). As discussed subsequently, Defendants cannot meet that heightened standard of scrutiny
in this case because they cannot identify *any* legitimate governmental interest furthered by Prop.
8.

⁴ For that reason, Prop. 8 would violate the Due Process Clause of the Fourteenth Amendment even
if examined under the rational basis standard.

1 thought necessary and proper in fact serve only to oppress.” *Lawrence*, 539 U.S. at 579.

2 Accordingly, California’s longstanding tradition of prohibiting marriage by individuals of the same
3 sex cannot shield Prop. 8 from federal constitutional scrutiny any more than Virginia’s longstanding
4 tradition of prohibiting marriage by individuals of different races—which dated back to “the colonial
5 period”—could shield its anti-miscegenation law from the Fourteenth Amendment’s requirements.
6 *Loving*, 388 U.S. at 6.

7 In any event, the prohibition on marriage by individuals of the same sex is certainly not
8 necessary to preserve or strengthen the tradition of marriage in California. Protecting the right of
9 individuals to marry a person of the same sex will not impair the ability of individuals who wish to
10 marry a person of the opposite sex to exercise their own constitutional right to marry. Removing the
11 unconstitutional state-law impediment to marriage by gay and lesbian individuals will simply put an
12 end to the irrational denial of the right to marry to a group of individuals who have historically been
13 excluded from this most “basic civil right[] of man.” *Loving*, 388 U.S. at 12.⁵

14 Nor can Defendants rely on an asserted interest in promoting procreation to establish the
15 constitutionality of Prop. 8. As an initial matter, the promotion of procreation is not a remotely
16 sufficient ground for preventing a couple from getting married. If it were, “it would follow that in
17 instances in which the state is able to make a determination of an individual’s fertility . . . , it would
18 be constitutionally permissible for the state to preclude an individual who is incapable of bearing
19 children from entering into marriage” with even a partner of the opposite sex. *Marriage Cases*, 183
20 P.3d at 431. It is well established, however, that procreation is not the only purpose of marriage. *See*
21 *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (upholding the right of married individuals to use
22 contraception to prevent procreation).

23
24 ⁵ Prop. 8 is also drastically underinclusive if its true purpose is to defend some “traditional” notion
25 of marriage. Under California law, individuals of the opposite sex remain free to enter into
26 marriages that may be “nontraditional” in any number of ways, such as “open,” nonmonogamous
27 marriages or marriages between people who have only just met. Indeed, it is telling—and a cause
28 for significant constitutional concern—that the only “traditional” aspect of marriage that Prop. 8
sees fit to protect is the exclusion of gay and lesbian individuals from that institution. *See City of
Ladue v. Gilleo*, 512 U.S. 43, 52 (1994) (underinclusiveness “diminish[es] the credibility of the
government’s rationale for restricting” constitutional rights).

1 Moreover, even if a State could constitutionally impose such far-reaching restrictions on the
2 right to marry, Prop. 8 is a fatally underinclusive means of promoting procreation because it permits
3 individuals of the opposite sex who are biologically unable to bear children, or who simply have no
4 desire for children, to marry—a fact that belies the theory that the State actually prohibits marriage by
5 individuals of the same sex for procreation-related reasons. *See Fla. Star v. B.J.F.*, 491 U.S. 524,
6 540-41 (1989) (holding that a statute prohibiting the publication of particular information in certain
7 media but not in others was unconstitutionally underinclusive).

8 Ultimately, then, Prop. 8 seems to be premised on little more than the moral disapproval of
9 homosexuality by a transitory majority of voters. Of course, this is a demonstrably improper ground
10 for abridging fundamental constitutional rights. The Supreme Court has already made absolutely
11 clear that “[m]oral disapproval” of homosexuals, “like a bare desire to harm the group, is an interest
12 that is insufficient to satisfy” even rational basis review (*Lawrence*, 539 U.S. at 582), and it thus
13 cannot possibly meet the onerous requirements of strict scrutiny. While “[p]rivate biases may be
14 outside the reach of the law,” the “law cannot, directly or indirectly, give them effect” at the expense
15 of a disfavored group’s fundamental constitutional rights. *Palmore v. Sidoti*, 466 U.S. 429, 433
16 (1984).

17 The moral opprobrium animating Prop. 8 is exposed by the fact that California law establishes
18 virtually *no* restrictions on the right of adults to marry *other than* the requirement that the couple be
19 of the opposite sex. Murderers, child molesters, rapists, serial divorcers, spousal abusers, and
20 philanderers are permitted to marry in California. California law even guarantees inmates
21 incarcerated in state prisons the right to marry. *See Cal. Penal Code § 2601(e)*; *see also Turner v.*
22 *Safley*, 482 U.S. 78, 99 (1987) (an almost-complete prohibition on inmate marriages was
23 unconstitutional because it was not “reasonably related to legitimate penological objectives”). Thus,
24 while two individuals of the opposite sex who each have a long history of divorces, incarceration,
25 mistreatment of children, and drug abuse can get married the morning after meeting each other at a
26 night club, two individuals of the same sex who have spent years together in a loving and committed
27 relationship are denied the opportunity to pledge their lives to each other and start an officially
28 sanctioned family. This is an utterly irrational restriction premised on nothing more than

1 longstanding misconceptions about and prejudice toward gay and lesbian individuals. *Cf. Varnum v.*
2 *Brien*, 763 N.W.2d 862, 900 (Iowa 2009) (law restricting marriage to opposite-sex couples could not
3 be justified as a measure to ensure an optimal child-rearing environment where “child abusers, sexual
4 predators, . . . [and] violent felons” were allowed to marry persons of the opposite sex).

5 Because Prop. 8 does not further a compelling—or even a legitimate—state interest, it
6 unconstitutionally impairs Plaintiffs’ right to marry under the Due Process Clause of the Fourteenth
7 Amendment.⁶

8 **B. Plaintiffs Are Likely To Establish That Prop. 8 Violates The Equal**
9 **Protection Clause Of The Fourteenth Amendment.**

10 Under the Equal Protection Clause, a “law is subject to strict scrutiny if it targets a suspect
11 class or burdens the exercise of a fundamental right.” *United States v. Hancock*, 231 F.3d 557, 565
12 (9th Cir. 2000). As demonstrated above, Prop. 8 impairs the fundamental right of gay and lesbian
13 individuals to marry. Because Defendants lack a compelling justification for permitting individuals

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15 ⁶ In *Baker v. Nelson*, 409 U.S. 810 (1972), the Supreme Court dismissed “for want of a substantial
16 federal question” an appeal from a Minnesota Supreme Court decision rejecting federal due
17 process and equal protection challenges to the State’s refusal to issue a marriage license to a
18 same-sex couple. 191 N.W.2d 185 (1971). The Supreme Court’s summary dismissals are
19 binding on lower courts only “on the precise issues presented and necessarily decided” (*Mandel v.*
20 *Bradley*, 432 U.S. 173, 176 (1977) (per curiam)) and only to the extent that they have not been
21 undermined by subsequent “doctrinal developments” in the Supreme Court’s case law. *Hicks v.*
22 *Miranda*, 422 U.S. 332, 344 (1975) (internal quotation marks omitted). Neither of those
23 requirements is met here. The issue in *Baker*—the constitutionality of an outright refusal by a
24 State to afford any recognition to same-sex relationships—is different from the issue presented by
25 Plaintiffs’ constitutional challenge, which asks this Court to determine whether it is constitutional
26 for California to reserve the institution of marriage for opposite-sex couples and relegate same-
27 sex couples to domestic partnerships. Moreover, the Supreme Court’s subsequent decisions in
28 *Lawrence*—which invalidated a state prohibition on same-sex intimate conduct on due process
grounds—and *Romer*—which struck down on equal protection grounds a state constitutional
amendment prohibiting governmental action to protect gay and lesbian individuals against
discrimination—have fatally weakened *Baker*. Indeed, at least one California district court has
already concluded as much in a decision holding that *Baker* did not foreclose the court from
considering a federal constitutional challenge to the federal Defense of Marriage Act. *See Smelt*
v. County of Orange, 374 F. Supp. 2d 861, 873 (C.D. Cal. 2005) (“Doctrinal developments show
it is not reasonable to conclude the questions presented in the *Baker* jurisdictional statement
would still be viewed by the Supreme Court as ‘unsubstantial.’”), *rev’d in part on other grounds*,
447 F.3d 673 (9th Cir. 2006).

1 of the opposite sex to marry and for consigning individuals of the same sex to the inferior institution
2 of domestic partnership, Prop. 8 violates Plaintiffs’ equal protection rights for the same reasons that it
3 violates Plaintiffs’ due process rights. *See Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535,
4 541 (1942) (applying strict equal protection scrutiny to a state law that burdened the fundamental
5 right to procreate).

6 While Prop. 8 must therefore be evaluated under—and fails—strict equal protection scrutiny
7 regardless of whether it targets a suspect class, Prop. 8 also violates the Equal Protection Clause for
8 the additional reasons that it impermissibly discriminates against Plaintiffs on the basis of their sexual
9 orientation and their sex.

10 **1. Prop. 8 Discriminates Against Gay And Lesbian Individuals On The Basis Of**
11 **Their Sexual Orientation.**

12 Prop. 8 is unconstitutional under any standard of equal protection scrutiny because it does not
13 further a legitimate—much less, an important or compelling—governmental interest.

14 a. Prop. 8 is unconstitutional under even rational basis review because it irrationally
15 deprives gay and lesbian individuals of the right to marry that they had previously possessed under
16 California law and that it is still enjoyed by all other citizens of the State.

17 The Supreme Court has already invalidated one voter-enacted state constitutional provision
18 that—like Prop. 8—stripped gay and lesbian individuals of legal protections they had previously
19 enjoyed under state law. In *Romer*, the Court concluded that Colorado’s Amendment 2—which
20 “prohibit[ed] all legislative, executive or judicial action at any level of state or local government
21 designed to protect” gay and lesbian individuals and thereby overturned several local laws barring
22 discrimination based on sexual orientation—was not rationally related to any legitimate governmental
23 interest. 517 U.S. at 624. The Court determined that the measure “classifie[d] homosexuals not to
24 further a proper legislative end but to make them unequal to everyone else.” *Id.* at 635. Such a “bare
25 . . . desire to harm a politically unpopular group,” the Court emphasized, “cannot constitute a
26 *legitimate* governmental interest.” *Id.* at 634 (internal quotation marks omitted; emphasis in
27 original).

28 Prop. 8 suffers from the same constitutional flaw. The voter-enacted constitutional

1 amendment stripped gay and lesbian individuals of their right to marry under the California
2 Constitution, and, as explained above, did so for no other reason than to express the majority's moral
3 disapproval of gay men and lesbians. Because Prop. 8 does not further any legitimate governmental
4 interest, it could not withstand equal protection scrutiny even if gay and lesbian individuals were not
5 a suspect or quasi-suspect class.

6 b. In any event, gay and lesbian individuals are a suspect or quasi-suspect class, and
7 Prop. 8 does not even come close to surviving the heightened equal protection scrutiny applicable to
8 laws that target such groups.⁷

9 i. A classification is suspect or quasi-suspect where it targets a group that has been
10 subject to a history of discrimination (*Bowen v. Gilliard*, 483 U.S. 587, 602 (1987)) and that is
11 defined by a "characteristic" that "frequently bears no relation to ability to perform or contribute to
12 society." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440-41 (1985) (internal
13 quotation marks omitted). It is also relevant whether the group exhibits "obvious, immutable, or
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15 ⁷ In *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 574 (9th Cir.
16 1990), the Ninth Circuit held that classifications based on sexual orientation are subject to rational
17 basis review. That case is no longer controlling because it was premised on the Supreme Court's
18 since-overruled decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986). *High Tech Gays* reasoned
19 that, "by the *Hardwick* majority holding that the Constitution confers no fundamental right upon
20 homosexuals to engage in sodomy, and because homosexual conduct can thus be criminalized,
21 homosexuals cannot constitute a suspect or quasi-suspect class entitled to greater than rational
22 basis review for equal protection purposes." 895 F.2d at 571. *Lawrence*'s holding that the
23 government may not criminalize same-sex intimate conduct and its explicit overruling of
24 *Hardwick* leaves this Court free to reexamine whether sexual orientation is a suspect or quasi-
25 suspect classification. See *Witt*, 527 F.3d at 820-21 (where "the relevant court of last resort . . .
26 ha[s] undercut the theory or reasoning underlying the prior circuit precedent in such a way that
27 the cases are clearly irreconcilable, . . . district courts should consider themselves bound by the
28 intervening higher authority and reject the prior opinion of this court") (quoting *Miller v.*
Gammie, 335 F.3d 889, 900 (9th Cir. 2003) (en banc)). Moreover, nothing in the Ninth Circuit's
post-*Lawrence* decision in *Witt* forecloses that reexamination. In *Witt*, the plaintiff's equal
protection challenge to the Defense Department's "Don't Ask, Don't Tell" policy was not
premiered on the government's differential treatment of heterosexuals and homosexuals. See *id.* at
821; see also *id.* at 823-24 & n.4 (Canby, J., concurring in part and dissenting in part). Even if
High Tech Gays or *Witt* were controlling, however, Prop. 8 would still violate Plaintiffs' equal
protection rights because the State has no rational basis for discriminating against them by
restricting civil marriage to opposite-sex couples.

1 distinguishing characteristics that define them as a discrete group” and whether they are “politically
2 powerless.” *Bowen*, 483 U.S. at 602.

3 Classifications based on sexual orientation easily meet the criteria for suspect or quasi-suspect
4 status. First, it is beyond dispute that “gay persons historically have been, and continue to be, the
5 target of purposeful and pernicious discrimination due solely to their sexual orientation.” *Kerrigan*,
6 957 A.2d at 432; *see also Varnum*, 763 N.W.2d at 889. “[F]or centuries there have been powerful
7 voices to condemn homosexual conduct as immoral” (*Lawrence*, 539 U.S. at 571), and this moral
8 condemnation continues to find expression today in state-sanctioned discrimination that denies gay
9 and lesbian individuals the right to marry, the right to serve in the military (10 U.S.C. § 654), and, in
10 some States, the right to adopt children (*see, e.g.*, Ark. Code § 9-8-304; Fla. Stat. § 63.042). This
11 “history of purposeful unequal treatment” based on the sexual orientation of gay and lesbian
12 individuals is the hallmark of a suspect classification. *Mass. Bd. of Retirement v. Murgia*, 427 U.S.
13 307, 313 (1976) (internal quotation marks omitted).

14 Second, like the suspect classifications of race, alienage, national origin, and religion, sexual
15 orientation has absolutely no “relation to the ability” of a person “to perform or contribute to
16 society.” *City of Cleburne*, 473 U.S. at 440-41. Sexual orientation is simply irrelevant to whether
17 someone can make a meaningful contribution to the social, political, or cultural life of this Nation.
18 *See, e.g., Marriage Cases*, 183 P.3d at 442; *Kerrigan*, 957 A.2d at 434. Unlike age or mental
19 disability—two classifications that receive rational basis scrutiny (*Murgia*, 427 U.S. at 314; *City of*
20 *Cleburne*, 473 U.S. at 446)—it is impossible to identify “real and undeniable” differences in the
21 ability of homosexuals and heterosexuals to function in, and contribute to, society. *City of Cleburne*,
22 473 U.S. at 444. Indeed, the only limitations on the ability of gay and lesbian individuals to
23 participate fully in all aspects of American life are those imposed by discriminatory laws or private
24 discriminatory conduct.

25 These two factors alone are sufficient to establish that classifications based on sexual
26 orientation are suspect or quasi-suspect. Because gay and lesbian individuals have “experienced a
27 history of purposeful unequal treatment” and “been subjected to unique disabilities on the basis of
28 stereotyped characteristics not truly indicative of their abilities” (*Murgia*, 427 U.S. at 313 (internal

1 quotation marks omitted)), there is an overwhelming probability that laws singling out gay and
2 lesbian individuals for adverse treatment are grounded on nothing more than “prejudice and
3 antipathy.” *City of Cleburne*, 473 U.S. at 440. Such classifications demand especially exacting
4 judicial scrutiny.

5 This conclusion is reinforced by the two remaining factors relevant to the suspect-
6 classification inquiry. The Ninth Circuit has concluded that “[s]exual orientation and sexual identity
7 are immutable,” and that “[h]omosexuality is as deeply ingrained as heterosexuality.” *Hernandez-*
8 *Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (internal quotation marks omitted). Because
9 sexual orientation is “so fundamental to one’s identity,” a “person should not be required to abandon”
10 it in order to secure access to fundamental rights that the Constitution guarantees to *all* persons. *Id.*⁸

11 Finally, gay and lesbian individuals possess less political power than other groups that are
12 afforded the protection of suspect or quasi-suspect status under the Equal Protection Clause,
13 including African-Americans and women. Indeed, of the more than half million people who hold
14 political office at the local, state, and national levels in this country, less than 300 are openly gay.
15 *Kerrigan*, 957 A.2d at 446. No openly gay person has ever served in the United States Cabinet, on
16 any federal court of appeals, or in the United States Senate. *Id.* at 447. In contrast, African-
17 Americans have served as President of the United States, Attorney General, and Secretary of State, as
18 well as in the United States Senate and on the U.S. Supreme Court. Similarly, women currently head
19 the Departments of State, Homeland Security, and Labor, and the 111th Congress includes seventeen
20 female Senators and seventy-eight female representatives. *See* Congressional Research Service,

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23 ⁸ As the California Supreme Court explained, it is therefore “sophistic to suggest”—as have some
24 defenders of prohibitions on marriage by individuals of the same sex—that these measures do not
25 discriminate against gay and lesbian individuals because they “permit a gay man or a lesbian to
26 marry someone of the opposite sex.” *Marriage Cases*, 183 P.3d at 441. “[M]aking such a choice
27 would require the negation of the person’s sexual orientation” (*id.*), and thus presents no real
28 choice at all for same-sex couples seeking official recognition of their commitment to the person
with whom they have chosen to spend the rest of their lives. *See also Varnum*, 763 N.W.2d at
893 (“sexual orientation forms a significant part of a person’s identity,” and “influences the
formation of personal relationships between all people—heterosexual, gay, or lesbian—to fulfill
each person’s fundamental needs for love and attachment”) (internal quotation marks omitted).

1 *Membership of the 111th Congress: A Profile* 5 (2008). While comparisons among types of
2 discrimination must be made cautiously, it is apparent that gay and lesbian individuals have not yet
3 made all of the great political strides accomplished by other groups subject to similar histories of
4 discrimination in this country.

5 For all these reasons, government classifications based on sexual orientation are inherently
6 suspect and should be rigorously examined in order to foreclose the type of purposeful and invidious
7 discrimination that has been directed at gay and lesbian individuals for centuries. Indeed, “the
8 bigotry and hatred that gay persons have faced are akin to, and, in certain respects, perhaps even
9 more severe than, those confronted by some groups that have been accorded heightened judicial
10 protection.” *Kerrigan*, 957 A.2d at 446. Strict scrutiny—or, at a minimum, heightened scrutiny—of
11 classifications based on sexual orientation is therefore appropriate.

12 ii. Prop. 8 cannot survive either of these exacting standards of scrutiny because it does
13 not further *any* permissible governmental interest. Neither the preservation of tradition nor the
14 expression of moral disapproval is a legitimate—let alone, an important—governmental interest. The
15 “fact that the governing majority in a State has traditionally viewed a particular practice as immoral is
16 not a sufficient reason for upholding a law prohibiting the practice.” *Lawrence*, 539 U.S. at 577
17 (internal quotation marks omitted). Moreover, Prop. 8 does not bear even a rational relationship to
18 the government’s purported interest in promoting procreation because it does not prohibit marriage
19 by opposite-sex couples who are unable or unwilling to have children and does not make it any more
20 likely that those opposite-sex couples who are able and willing to have children will do so. The
21 “classifications drawn” by Prop. 8 thus constitute precisely the type of “arbitrary and invidious
22 discrimination” prohibited by the Equal Protection Clause. *Loving*, 388 U.S. at 10.

23 **2. Prop. 8 Discriminates Against Gay And Lesbian Individuals On The Basis Of**
24 **Their Sex.**

25 Prop. 8 is also unconstitutional because it impermissibly discriminates against Plaintiffs on
26 the basis of their sex.

27 Classifications based on sex can be sustained only where the government demonstrates that
28 they are “substantially related” to an “important governmental objective.” *Virginia*, 518 U.S. at 533

1 (internal quotation marks omitted). Prop. 8 classifies Plaintiffs based on their sex because the male
2 Plaintiffs—Katami and Zarrillo—would be able to marry their partners if those partners were female,
3 and the female Plaintiffs—Perry and Stier—would be able to marry their partners if they were male.
4 The Equal Protection Clause prohibits such “differential treatment or denial of opportunity” based on
5 a person’s sex in the absence of an “exceedingly persuasive” justification. *Id.* at 532-33 (internal
6 quotation marks omitted).

7 For the reasons discussed above, Defendants cannot muster even a minimally plausible—let
8 alone, an “exceedingly persuasive”—justification for employing these sex-based distinctions to
9 restrict marriage to opposite-sex couples. Not tradition, not moral condemnation, and not the
10 promotion of procreation. None of these grounds is a constitutionally sufficient rationale for
11 prohibiting a person from entering into a marriage on the basis of nothing more than the
12 happenstance of his or her sex.

13 **II. PLAINTIFFS WILL BE IRREPARABLY HARMED IN THE ABSENCE OF A PRELIMINARY**
14 **INJUNCTION.**

15 Plaintiffs are irreparably harmed each day that Prop. 8 remains in force and continues to
16 deprive them of their due process and equal protection rights. This Court should therefore enter a
17 preliminary injunction enjoining Defendants from enforcing that provision insofar as it prohibits two
18 individuals of the same sex from getting married.

19 “[C]onstitutional violations cannot be adequately remedied through damages and therefore
20 generally constitute irreparable harm.” *Nelson v. NASA*, 530 F.3d 865, 882 (9th Cir. 2008); *see also*
21 *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997). Each Plaintiff has attempted to
22 exercise his or her fundamental constitutional right to marry by applying for a marriage license in
23 California, and each has been denied a marriage license on the sole ground that he or she was seeking
24 to marry a person of the same sex. Thus, as long as Prop. 8 remains on the books, Plaintiffs will be
25 denied their “freedom of personal choice in matters of marriage . . . protected by the Due Process
26 Clause” (*LaFleur*, 414 U.S. at 639) and their right to be free from “arbitrary and invidious
27 discrimination” guaranteed by the Equal Protection Clause. *Loving*, 388 U.S. at 10.

28

1 Monetary damages would be an utterly inadequate remedy for the denial of these fundamental
2 constitutional guarantees, and for the emotional distress, psychological harm, and humiliation that
3 Plaintiffs have suffered as a result of being denied the right to marry the person they love. Perry
4 Decl. ¶ 10; Stier Decl. ¶ 10; Katami Decl. ¶ 6; Zarrillo Decl. ¶ 6. Plaintiffs are each involved in a
5 loving and committed relationship with a person with whom they plan to spend the rest of their lives,
6 and they seek nothing more than the same official respect, recognition, and approval of that
7 relationship that is accorded to opposite-sex couples. Financial damages cannot make Plaintiffs
8 whole for being excluded from the most “intimate” and “sacred” of life’s relationships. *Zablocki*,
9 434 U.S. at 384.⁹

10 **III. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST FAVOR A PRELIMINARY**
11 **INJUNCTION.**

12 Finally, a preliminary injunction is appropriate because an order enjoining the enforcement of
13 Prop. 8 would not burden the rights of Defendants or third parties, and would promote the Nation’s
14 profound commitment to equal rights.

15 Requiring the State of California to issue marriage licenses to otherwise-qualified same-sex
16 couples would not remotely burden Defendants’ rights. Indeed, the State issued more than 18,000
17 marriage licenses to same-sex couples between the California Supreme Court’s decision in the
18 *Marriage Cases* and the voters’ approval of Prop. 8, and the California Supreme Court has upheld the
19 validity of those marriages. *Strauss*, No. S168047, slip op. at 135. There is no reason to believe that
20 it would be a significant administrative hardship for Defendants to begin issuing licenses again. It is
21 equally implausible that extending the right to marry to same-sex couples would impose a material
22 burden on the public fisc. Because domestic partnership already “affords the couple virtually all of
23 the same substantive legal benefits and privileges” as marriage (*Marriage Cases*, 183 P.3d at 397-
24

25 ⁹ In any event, monetary damages are unavailable in this case because sovereign immunity bars the
26 award of monetary relief against state officials sued in their official capacities. *See Edelman v.*
27 *Jordan*, 415 U.S. 651, 665 (1974). Similarly, qualified immunity would likely bar any
28 subsequent suit seeking monetary relief from these Defendants in their personal capacities. *See*
Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

1 98), the State is unlikely to incur additional financial obligations if gay and lesbian individuals are
2 afforded the same marriage rights as individuals in heterosexual relationships.

3 Nor will a preliminary injunction burden the rights of third parties. Enjoining the
4 enforcement of Prop. 8 insofar as it prohibits marriage by individuals of the same sex will not impair
5 the right of opposite-sex couples to marry. Moreover, the risk that the validity of marriages of same-
6 sex couples performed after the issuance of a preliminary injunction would be compromised if this
7 Court later vacated the injunction falls squarely on Plaintiffs alone. In any event, this Court will not
8 issue a preliminary injunction unless Plaintiffs are likely to prevail on the merits of their claims.
9 And, even if the Court were ultimately to sustain Prop. 8, the California Attorney General himself has
10 acknowledged that “marriages that were legal at the time of formation”—such as those performed
11 while the enforcement of a state law prohibiting marriage by same-sex couples has been enjoined by
12 a federal court—remain legal after an intervening change in the law. Br. for Respondents at 75,
13 *Strauss*, No. S168047 (Cal. filed Dec. 19, 2008) (emphasis omitted). The California Supreme Court
14 agrees. *See Strauss*, No. S168047, slip op. at 135.

15 Indeed, far from burdening the rights of third parties, a preliminary injunction would promote
16 the public interest because “all citizens have a stake in upholding the Constitution” and have
17 “concerns [that] are implicated when a constitutional right has been violated.” *Preminger v. Principi*,
18 422 F.3d 815, 826 (9th Cir. 2005). A preliminary injunction vindicating gay and lesbian individuals’
19 fundamental constitutional rights would advance the shared interest of all citizens in enforcing the
20 Constitution’s guarantees and reinforce this “Nation’s basic commitment . . . to foster the dignity and
21 well-being of all persons within its borders.” *Goldberg v. Kelly*, 397 U.S. 254, 264-65 (1970).

1 **CONCLUSION**

2 For the foregoing reasons, the Court should issue a preliminary injunction enjoining
3 Defendants from enforcing Article I, § 7.5 of the California Constitution insofar as that provision
4 limits civil marriage in California to the union of a man and a woman, and prohibits two individuals
5 of the same sex from getting married.

6 Dated: May 27, 2009

7 GIBSON, DUNN & CRUTCHER LLP

8
9 By: _____ /s/
10 Theodore J. Boutrous, Jr.

11 and

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