Case No. S147999

IN THE SUPREME COURT OF CALIFORNIA

In re MARRIAGE CASES

Judicial Council Coordination Proceeding No. 4365

After a Decision of the Court of Appeal
First Appellate District, Division Three
Nos. A110449, A110450, A110463, A110651, A110652
San Francisco Superior Court No. BC088506
Honorable Richard A. Kramer, Judge

OPENING BRIEF ON THE MERITS OF THE TYLER-OLSON PETITIONERS

GLORIA ALLRED, Bar No. 65053
MICHAEL MAROKO, Bar No. 62013
JOHN S. WEST, Bar No. 102034
ALLRED, MAROKO & GOLDBERG
6300 Wilshire Boulevard, Suite 1500
Los Angeles, CA 90048
Tel: (323) 653-6530/Fax: (323) 653-1660

Attorneys for Respondents ROBIN TYLER, DIANE OLSON, TROY PERRY, and PHILLIP De BLIECK

TABLE OF CONTENTS

I. INTRODUCTION 1

A. Issues to Be Briefed 1

B. Nature of the Action and Relief Sought 1

C. Summary of Argument 2

II. ARGUMENT 6

A. The Equal Protection Clause of the California Constitution Requires That All Persons Enjoy the Same Legal Protections as Are Enjoyed by Others Who Are Similarly Situated 6

B. An Individual Enjoys a Fundamental Constitutional Right to Marry. The Constitutional Right to Marry Includes the Right to Marry the Person of One's Choice 7

C. Because the Right to Marry Is Fundamental, Any Classification Infringing upon That Right must Pass a Strict Scrutiny Test 10

D. Family Code Sections 300 and 308.5 Operate to Deny Certain Individuals the Right to Marry in Violation of the Equal Protection Clause. The Strict Scrutiny Test Applies to the Court's Equal Protection Analysis 11

E. There Is No Compelling State Interest in Denying Same Sex Couples the Right to Marry 13

F. Historical Denials of Equal Protection Should Not Prevent a Court from Declaring a Statute Unconstitutional, and Neither Popular Vote Nor Legislative Will Can Overcome Constitutional Defects in Legislation .. 15

G. The Court of Appeal Applied a Rational Review Standard to the Issues Before it Based upon a Series of Analytical Errors 16

1. Marriage Is Not Purely a Creature of Statutory Law 16

2. The Court of Appeal Erroneously Viewed the Relief Sought by the Tyler-olson Petitioners as Calling for a Violation of the Doctrine of Judicial Restraint. Since the Only Questions Before the Court Are Constitutional, the Doctrine Cannot Serve as a Basis for Avoiding the Court's Duty to Declare Statutes Unconstitutional When Required by Law 19

3. The Court of Appeal Erroneously Viewed the Issue in Dispute as Turning upon a Right to Same Sex Marriage. This Dispute Turns upon the Recognized Right of an Individual to Marry the Person of His or Her Choice 20

4. The Court of Appeal Erroneously Relied upon Historical Denials of Equal Protection as a Basis for Refusing to Recognize an Individual's Fundamental Right to Marry Someone of the Same Se21

5. The Court of Appeal Erroneously Held That the Legislature Has Full Control of the "Subject of Marriage." The Right to Marry Has Constitutional Origins Which the Legislature Cannot Control . . . 23

6. The Court of Appeal Erroneously Held That the Marriage Statutes Do Not Discriminate Based upon Gender 24

7. While Correctly Acknowledging the Disparate Impact of the Marriage Statutes upon Same Sex Couples (I.e., Homosexuals Who Would Marry), the Court of Appeal Erroneously Declined to View Homosexuals as a Suspect Class 26

III. CONCLUSION 28

TABLE OF AUTHORITIES

CASES:

Binder v. Aetna Life Ins. Co.,
75 Cal.App.4th 832, 89 Cal.Rptr.2d 540 (1999) 20

California Federation of Teachers, AFL-CIO v. Oxnard Elementary Schools,
272 Cal.App.2d 514, 77 Cal.Rptr. 497 (1969) 6

Citizens for Responsible Behavior v. Superior Court,
1 Cal.App.4th 1013, 2 Cal.Rptr.2d 648 (1992) 6

Committee To Defend Reproductive Rights v. Myers,
29 Cal.3d 252, 172 Cal.Rptr. 866 (1981) 20

Connerly v. State Personnel Bd.,
92 Cal.App.4th 16, 112 Cal.Rptr.2d 5 (2001) 4, 12

Conservatorship of Valerie N.,
40 Cal.3d 143, 219 Cal.Rptr. 387 (1985) 9

Cooley v. Superior Court,
29 Cal.4th 228, 127 Cal.Rptr.2d 177 (2002) 12

Creighton v. Regents of University of California,
58 Cal.App.4th 237, 68 Cal.Rptr.2d 125 (1997) 6

Elden v. Sheldon,
46 Cal.3d 267, 250 Cal.Rptr. 254 (1988) 14

In re Marriage Cases,
2006 Daily Journal D.A.R. 13, 49 Cal.Rptr.3d 675 (2006) 2, 15, 16, 20-23, 26

In re Marriage of Haines,
33 Cal.App.4th 277, 39 Cal.Rptr.2d 673 (1995) 18

Johnson v. Calvert,
5 Cal.4th 84, 19 Cal.Rptr.2d 494 (1993) 14

Lyng v. Northwest Indian Cemetery Protective Ass'n,
485 U.S. 439, 108 S.Ct. 1319 (1988) 19

Marvin v. Marvin,
18 Cal.3d 660, 134 Cal.Rptr. 815 (1976) 14

Mateel Environmental Justice Foundation v. Edmund A. Gray Co.,
115 Cal.App.4th 8, 9 Cal.Rptr.3d 486 (2003) 19

Ortiz v. Los Angeles Police Relief Ass'n,
98 Cal.App.4th 1288, 120 Cal.Rptr.2d 670 (2002) 3, 9, 17, 24

People v. Belous,
71 Cal.2d 954, 80 Cal.Rptr. 354 (1969) 9

People v. Leng,
71 Cal.App.4th 1, 83 Cal.Rptr.2d 433 (1999) 7, 11

Perez v. Lippold,
32 Cal.2d 711, 198 P.2d 17 (1948) 3, 5, 8, 9, 16, 20, 22

Robert B. v. Susan B.,
109 Cal.App.4th 1109, 135 Cal.Rptr.2d 785 (2003) 14

Santa Clara County Local Transportation Authority v. Guardino,
11 Cal.4th 220, 45 Cal.Rptr.2d 207 (1995) 4, 19

Sharon S. v. Superior Court,
31 Cal.4th 417, 2 Cal.Rptr.3d 699 (2003) 14, 15

Turner v. Safley,
482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987) 17

Venegas v. County of Los Angeles,
32 Cal.4th 820, 11 Cal.Rptr.3d 692 (2004) 27

Village of Willowbrook v. Olech,
528 U.S. 562, 120 S.Ct. 1073 (2000) 5, 25

Williams v. Garcetti,
5 Cal.4th 561, 20 Cal.Rptr.2d 341 (1993) 9

STATUTES:

California Family Code Section 300 . . . . . 1, 12

California Family Code Section 308.5 . . . . . 1, 5, 12, 24

Civil Code Section 51.7 27

Civil Code Section 52.1 28

Civil Code Section 60 7

Civil Code Section 69 7

Code of Civil Procedure Section 1085 1

Code of Civil Procedure Section 1086 1

Code of Civil Procedure Section 1102 1

Code of Civil Procedure Section 1103 1

OTHER:

Article I, Section 1 of the California Constitution 2, 9, 10, 17, 18, 24

Article I, Section 7 of the California Constitution 1, 5, 6

Chapter 421 of A.B. No. 205 26

OPENING BRIEF OF THE TYLER-OLSON PETITIONERS

I. INTRODUCTION

A. Issues to Be Briefed

In its order issued January 5, 2007, the Supreme Court stated that the Petitioners in this matter "may address in their opening briefs on the merits the issues related to whether the marriage statutes violate the California Constitution."

B. Nature of the Action and Relief Sought

Petitioners Robin Tyler, Diane Olson, Troy Perry and Philip DeBliek (the "Tyler-Olsen Petitioners") comprise two same sex couples who desire the benefits of marriage under California law. They filed a petition for a writ of mandamus or prohibition (Code of Civil Procedure Sections 1085, 1086, 1102, and/or 1103) in the Los Angeles Superior Court after they were refused marriage licenses pursuant to Sections 300 and 308.5 of the California Family Code. Those statutes prohibit an individual from marrying someone of the same sex. In their Superior Court proceeding, the Tyler-Olson Petitioners sought, *inter alia*, to prevent the County of Los Angeles from enforcing policies and/or a definition of "marriage" which denied them fundamental rights under the California Constitution. Their petition alleged that Family Code sections 300 and 308.5 violate the equal protection guaranties embodied in Article I, Section 7 of the California Constitution, that those statutes operate to deny same sex couples the "inalienable" right to "acquiring, possessing and protecting property, and pursuing and

obtaining . . . happiness and privacy" embodied in Article I, Section 1 of the California Constitution, and that those statutes violate the substantive due process rights inherent in our State Constitution.

The Judicial Council ordered the Tyler-Olson Petitioners Superior Court case coordinated with various other cases addressing the constitutionality of the marriage statutes,[1] and the consolidated matters proceeded to a mandamus hearing before the Honorable Richard A. Kramer of the San Francisco Superior Court in December of 2003.

Judge Kramer issued an historic ruling which declared Sections 300 and 308.5 to be unconstitutional. The State of California and other parties appealed that ruling.

After briefing and argument, the Court of Appeal issued a published opinion, In re Marriage Cases, 2006 Daily Journal D.A.R. 13,485, 49 Cal.Rptr.3d 675, 685 (2006), which upheld the constitutionality of the marriage statutes. That opinion is now before the Supreme Court for review.

C. Summary of Argument

Over a detailed and vigorous dissent by Justice Kline, the Court of Appeal (1) found a way to reverse the trial court's holding that Family Code sections 300 and 308.5

---

[1] City and County of San Francisco vs. State of California, San Francisco Superior Court case no. CGC-04-429539; Woo vs. Lockyer, San Francisco Superior Court case no. CGC-04-50438; Thomasson v. Newsom, San Francisco Superior Court case no. CGC-04-428794; Proposition 22 Legal Defense & Education Fund v. City and County of San Francisco, San Francisco Superior Court case no. CGC-04-503943; and Clinton vs. State of California, San Francisco Superior Court case no. CGC-04-429548.

are unconstitutional, and (2) found a way, against law and logic, to insulate from judicial scrutiny restrictions upon some of the most sacred rights bestowed upon (most of) the citizens of this state. In the discussion to follow, the Tyler-Olson Petitioners hope to refocus the analysis upon the governing principles, and to demonstrate to the Supreme Court that the court below went to great lengths to avoid applying those principles.

While the Court of Appeal certainly paid lip service to the concept that "[t]he right to marry is as fundamental as the right to send one's child to a particular school or the right to have offspring, "and is "one of the basic civil rights of man," Perez v. Lippold, 32 Cal.2d 711, 715, 198 P.2d 17, 19 (1948), the opinion under review trivializes that right by subjecting it to a "rational basis" review, thereby insuring the upholding of the marriage statutes. In order to maneuver marriage into rational basis review, the Court of Appeal had to make a series of erroneous assumptions about the right to marry which, in the aggregate, would immunize the marriage statutes, and any other statutes, from constitutional attack.

In the discussion to follow, the Tyler-Olson Petitioners will show that the opinion under review contains numerous errors of law, including the following:

1. The court of Appeal erroneously held that marriage is purely a creature of statutory law. The right to marry derives from the fundamental rights of man, as embodied in our constitution, and not purely from statute. Perez v. Lippold, 32 Cal.2d 711, 715, 198 P.2d 17, 19 (1948). In Ortiz v. Los Angeles Police Relief Ass'n, 98

Cal.App.4th 1288, 120 Cal.Rptr.2d 670 (2002), the Court of Appeal stated that "the Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees." 98 Cal.App.4th at 1302-3, 120 Cal.Rptr.2d at 677-8.

2. The Court of Appeal erroneously relied upon the doctrine of judicial restraint to duck deciding issues. Under the doctrine of judicial restraint, a "Court will not decide constitutional questions where other grounds are available and dispositive of the issues of the case." Santa Clara County Local Transportation Authority v. Guardino, 11 Cal.4th 220, 230, 45 Cal.Rptr.2d 207, 212 (1995). Here, however, the only question before the Court is constitutional, and there is no way to decide a constitutional question without addressing constitutionality. Moreover, judicial deference does not extend to laws that employ suspect classifications. Connerly v. State Personnel Bd., 92 Cal.App.4th 16, 32-3, 112 Cal.Rptr.2d 5, 19-20 (2001).

3. The Court of Appeal erroneously viewed the issue in dispute as turning upon a right to "same sex marriage." This dispute is not about same sex marriage; it is about the right of an individual to chose his or her spouse. The cases to have addressed the right to marry have done so in that context, not in the artificial way selected by the Court of Appeal.

4. The Court of Appeal erroneously relied upon historical denials of equal protection as a basis for refusing to recognize an individual's fundamental right to marry

someone of the same sex. The law recognizes that past practices do not justify constitutional violations. In language tailor made to address the "history" argument, the Supreme Court in Perez v. Lippold, *supra*, held as follows: "Certainly the fact alone that the discrimination has been sanctioned by the state for many years does not supply such justification." 32 Cal.2d at 727, 198 P.2d at 27.

5. The Court of Appeal held that from the perspective of groups, the marriage laws do not violate equal protection (i.e., all men and all women are treated the same). Equal protection, however, is viewed from the perspective of the individuals within a group. "Our cases have recognized successful equal protection claims brought by a ' "class of one, "' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated . . . " Village of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S.Ct. 1073, 1074 - 1075 (2000). From the perspective of an individual who wants to marry someone of the same gender, an equal protection violation has taken place because that individual's gender is the basis for his inability to marry (i.e., he cannot marry another man because he is a man).

The Tyler-Olson Petitioners will show that the restrictions upon the right to marry contained in Sections 300 and 308.5 of the California Family Code operate as (1) a denial of the equal protection guaranties embodied in Article I, Section 7 of the California Constitution, (2) a denial of the "inalienable" right to "acquiring, possessing and protecting property, and pursuing and obtaining . . . happiness and privacy" embodied in

Article I, Section 1 of the California Constitution, and (3) a violation of substantive due process rights inherent in our State Constitution.

II. ARGUMENT

A. The Equal Protection Clause of the California Constitution Requires That All Persons Enjoy the Same Legal Protections as Are Enjoyed by Others Who Are Similarly Situated

Article I, Section 7 of the California Constitution provides in relevant part as follows: "A person may not be . . . denied equal protection of the laws . . . " Here, of course, many of the individuals who seek same sex marriage are homosexuals. "[T]he equal protection clause in the California Constitution has been construed to apply to homosexuals." Citizens for Responsible Behavior v. Superior Court, 1 Cal.App.4th 1013, 1025, 2 Cal.Rptr.2d 648, 654 (1992).

"Equal protection requires 'that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.'" Creighton v. Regents of University of California, 58 Cal.App.4th 237, 246, 68 Cal.Rptr.2d 125, 130 (1997). "Concededly a law which confers particular privileges or imposes peculiar disabilities upon an arbitrarily selected class of persons who stand in precisely the same relation to the subject matter of the law as does the larger group from which they are segregated constitutes a special law which is tantamount to a denial of equal protection." California Federation of Teachers, AFL-CIO v. Oxnard Elementary Schools, 272 Cal.App.2d 514, 527, 77 Cal.Rptr. 497,

509 (1969).

"The equal protection guarantees of the Fourteenth Amendment and the California Constitution are substantially equivalent and analyzed in a similar fashion. (Citations omitted) 'The constitutional guarantee of equal protection of the laws has been judicially defined to mean that no person or class of persons shall be denied the same protection of the law which is enjoyed by other persons or other classes in like circumstances in their lives, liberty and property and in their pursuit of happiness. [Citations.]' (citation omitted) The concept recognizes that persons similarly situated not be treated differently unless the disparity is justified." People v. Leng, 71 Cal.App.4th 1, 11, 83 Cal.Rptr.2d 433, 439-440 (1999).

B. An Individual Enjoys a Fundamental Constitutional Right to Marry. The Constitutional Right to Marry Includes the Right to Marry the Person of One's Choice

In Perez v. Lippold, *supra*, the California Supreme Court recognized individuals enjoy a constitutionally protected and fundamental right to marry and to choose a spouse. The appellants in Perez were a white female and a black male who sought to marry, but were denied a marriage license by the Los Angeles County Clerk. That denial was based upon former Civil Code Section 69, which then provided that " . . . no license may be issued authorizing the marriage of a white person with a Negro, mulatto, Mongolian or member of the Malay race." A related statute then in force, Civil Code Section 60,

provided that "[a]ll marriages of white persons with Negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void."

The petitioners sought mandamus to compel the Los Angeles County Clerk to issue them a marriage license. They appealed the trial court's denial of their petition for mandamus, and the matter made its way to the California Supreme Court.

The Supreme Court reversed the trial court, and confirmed the fundamental nature of the constitutional right to marry. In doing so, the Supreme Court specifically held that an individual's right to marry includes the right to marry the person of his or her choice.

In the reasoning that applies to laws which prohibit same sex marriage, the Perez court held: "The right to marry is as fundamental as the right to send one's child to a particular school or the right to have offspring. Indeed, 'We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.' (Citation omitted) Legislation infringing such rights must be based upon more than prejudice and must be free from oppressive discrimination to comply with the constitutional requirements of due process and equal protection of the laws." Perez v. Lippold, 32 Cal.2d 711, 715, 198 P.2d 17, 19 (1948). The Supreme Court went on to hold that "[s]ince the right to marry is the right to join in marriage with the person of one's choice, a statute that prohibits an individual from marrying a member of a race other than his own restricts the scope of his choice and thereby restricts his right to marry." 32 Cal.2d at 715, 198 P.2d at 19.

(Emphasis added).

In the years following the Perez decision, the California courts have consistently held that because marriage is a fundamental constitutional right, and because decisions relating to marriage and family are highly personal, such decisions are protected against unwarranted governmental intrusion. See, e.g., Conservatorship of Valerie N., 40 Cal.3d 143, 161, 219 Cal.Rptr. 387, 399 (1985) ("The right to marriage and procreation are now recognized as fundamental, constitutionally protected interests."); Williams v. Garcetti, 5 Cal.4th 561, 577, 20 Cal.Rptr.2d 341, 350 (1993) ("[W]e have already recognized that '[t]he concept of personal liberties and fundamental human rights entitled to protection against overbroad intrusion or regulation by government . . . extends to . . . [citations] such basic liberties and rights not explicitly listed in the Constitution [as] the right "to marry, establish a home and bring up children" . . . and the right to privacy and to be let alone by the government in 'the private realm of family life.'"'); People v. Belous, 71 Cal.2d 954, 963, 80 Cal.Rptr. 354, 359 (1969) ("The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex.").

In Ortiz v. Los Angeles Police Relief Ass'n, 98 Cal.App.4th 1288, 120 Cal.Rptr.2d 670 (2002), the Court of Appeal discussed the right to marry in the context of Article I, Section 1 of the California Constitution, which provides as follows: "All people are by

nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." According to Ortiz, "[t]he constitutional right of privacy under state law is quite broad. In addition to the right of personal autonomy and the protection of private information, the state Constitution ensures the freedom of association." 98 Cal.App.4th at 1302-3, 120 Cal.Rptr.2d at 677-8. Ortiz cited earlier Supreme Court opinions for the proposition that the Article I, Section 1 right of privacy encompasses "the right to freely associate." That right protects "highly personal relationships . . . exemplified by 'those that attend the creation and sustenance of a family-- marriage . . . , childbirth . . . , the raising and education of children . . . and cohabitation with one's relatives.'" *Id.* Given the language of Article I, Section 1 and the importance of the rights protected by that provision, the Ortiz court stated that "the Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees." 98 Cal.App.4th at 1302-3, 120 Cal.Rptr.2d at 677-8. (Emphasis added).

C. Because the Right to Marry Is Fundamental, Any Classification Infringing upon That Right must Pass a Strict Scrutiny Test

"In considering an equal protection challenge, we must first determine the appropriate standard of review, which depends upon the classification involved in, and the interests affected by, the challenged law. (Citations omitted) Personal liberty is a

fundamental right, and a classification infringing on such a right is subject to strict judicial scrutiny. (Citations omitted) Under this very severe standard, a discriminatory law will not be given effect unless the state establishes the classification bears a close relation to the promotion of a compelling state interest, the classification is necessary to achieve the government's goal, and the classification is narrowly drawn to achieve the goal by the least restrictive means possible." People v. Leng, 71 Cal.App.4th 1, 11, 83 Cal.Rptr.2d 433, 440 (1999). (emphasis added).

D. Family Code Sections 300 and 308.5 Operate to Deny Certain Individuals the Right to Marry in Violation of the Equal Protection Clause. The Strict Scrutiny Test Applies to the Court's Equal Protection Analysis

"Legislative classification is the act of specifying who will and who will not come within the operation of a particular law. (Citations omitted). A legislative classification satisfies equal protection of law so long as persons similarly situated with respect to the legitimate purpose of the law receive like treatment. (Citation omitted). Legislative classifications generally are entitled to judicial deference, are presumptively valid, and may not be rejected by the courts unless they are palpably unreasonable. (Citations omitted). However, judicial deference does not extend to laws that employ suspect classifications, such as race. Because suspect classifications are pernicious and are so rarely relevant to a legitimate governmental purpose (citation omitted), they are subjected

to strict judicial scrutiny; i.e., they may be upheld only if they are shown to be necessary for furtherance of a compelling state interest and they address that interest through the least restrictive means available." Connerly v. State Personnel Bd., 92 Cal.App.4th 16, 32-3, 112 Cal.Rptr.2d 5, 19-20 (2001) "Under California law, classifications based on gender are considered suspect for purposes of equal protection analysis." Id., 92 Cal.App.4th at 32, 112 Cal.Rptr.2d at 19.

"'The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.' (Citations omitted). This initial inquiry is not whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.'" Cooley v. Superior Court, 29 Cal.4th 228, 253, 127 Cal.Rptr.2d 177, 196 (2002). Under the Cooley inquiry, it is clear that Family Code sections 300 and 308.5 deny equal protection to the respondents and to millions like them. Sections 300 and 308.5 effectively create two groups of persons similarly situated for purposes of the constitutional right to marry the person of one's choice.

The first group consists or men or women who want to marry persons of the opposite sex. The second group consists of men or women who want to marry persons of the same sex. Sections 300 and 308.5 deny marriage to the first group because, under the

statutes, a particular man can marry any woman, but cannot marry a man.[2] That individual is therefore denied the right to marry another man because he is a man. On the other hand, a man who wants to marry a woman is permitted to do so because he is a man. Thus, two groups (men who want to marry men and men who want to marry women) are similarly situated in terms of having the constitutional right to marry the person of their choice, but are treated differently by the Family Code due to their gender. This is the very essence of an equal protection violation.

E. There Is No Compelling State Interest in Denying Same Sex Couples the Right to Marry

In order to determine whether the state has a compelling interest in denying indviduals the right to marry others of the same sex, it is necessary to start the analysis with a statement of the state's legitimate interest. "It is instructive to consider the rationale behind the well-accepted maxim that marriage serves as the building block of society. One commentator did so by roughly classifying the functions served by marital relationships. First, they provide the setting for procreative activity and thus act as a transmitter of culture and a means to perpetuate society. Second, they serve as cooperative economic units which increase the well-being of the spouses as well as that of society. Third, they serve an emotional, psychological and sexual function. The

---

[2] Needless to say, the same analogy would apply to a woman who seeks to marry a woman.

importance of these functions to the individual and to society are what makes the relationship worthy of legal protection. Some cohabital relationships serve these functions to the same extent as do marriages, and are thus equally deserving of legal recognition and protection." Elden v. Sheldon, 46 Cal.3d 267, 281, 250 Cal.Rptr. 254, 263 (1988), fn.1.

A same sex couple cannot meaningfully be distinguished from an opposite gender couple for purposes of transmitting culture, for purposes of establishing cooperative economic units, and for purposes of serving an emotional, psychological or sexual function. Any such arguments are mooted, if not rendered absurd, by a plethora of decisions by the Courts. Those decisions hold, among other things, (1) that unmarried persons are allowed to cohabit, engage in sexual relations and contract as to their obligations toward one another (Marvin v. Marvin, 18 Cal.3d 660, 134 Cal.Rptr. 815 (1976)); (2) that married (or unmarried) persons can bear children with the sperm or eggs of anonymous donors (See, e.g., Robert B. v. Susan B., 109 Cal.App.4th 1109, 135 Cal.Rptr.2d 785, 786 (2003)); (3) that "California's adoption statutes have always permitted adoption without regard to the marital status of prospective adoptive parents," (Sharon S. v. Superior Court, 31 Cal.4th 417, 433, 2 Cal.Rptr.3d 699, 711-2 (2003)); (4) that gestational surrogacy contracts are valid in this state[3] (See e.g., Johnson v. Calvert, 5

[3] In gestational surrogacy, and embryo created by the sperm of the father and the egg of the mother is implanted in woman other than the mother who gives birth to the child of the legal "parents." Johnson v. Calvert, *supra*.

Cal.4th 84, 19 Cal.Rptr.2d 494 (1993)); and (5) that children can legally be adopted by homosexuals (Sharon S. v. Superior Court, 31 Cal.4th 417, 422, 2 Cal.Rptr.3d 699, 702 (2003)). It follows that there is no compelling state interest in denying same sex couples the right to marry.

F. Historical Denials of Equal Protection Should Not Prevent a Court from Declaring a Statute Unconstitutional, and Neither Popular Vote Nor Legislative Will Can Overcome Constitutional Defects in Legislation

In prior discussion, the Tyler-Olson Petitioners argued that the issue is choice in marriage, not "same sex marriage" *per se*. The Court of Appeal, however, analyzed the case in terms of whether there was a right to same sex marriage. Under that formulation of the issue, the Court of Appeal stressed history as the primary reason for its refusal to recognize a right to same sex marriage. In the words of the Court of Appeal: "While same-sex relationships have undeniably gained greater societal and legal acceptance, the simple fact is that same-sex marriage has never existed before. The novelty of this interest, more than anything else, is what precludes its recognition as a constitutionally protected fundamental right." *In re Marriage Cases*, 49 Cal.Rptr.3d at 703 -704. (emphasis added).

It is true that marriage has been viewed by many as existing only for opposite sex couples, and that statutes in this state have defined marriage in those terms, for too long.

Racial exclusion, denial of votes for women, and discrimination against homosexuals (i.e., "sodomy" laws) was also viewed as appropriate, and supported by legislation, for long periods of time in our culture. The fact that we have acted abominably in the past is no cure for a constitutionally defective law in the present.

Fortunately, the law recognizes that past practices do not justify constitutional violations. The analysis in Perez v. Lippold, 32 Cal.2d 711, 198 P.2d 17 (1948) demonstrates the absurdity of defending unconstitutional laws based on the fact that such laws have previously been in place. In language tailor made to address the "history" argument, the Supreme Court in Perez v. Lippold held as follows: "Careful examination of the arguments in support of the legislation in question reveals that 'there is absent the compelling justification which would be needed to sustain discrimination of that nature.' (Citation omitted) Certainly the fact alone that the discrimination has been sanctioned by the state for many years does not supply such justification." 32 Cal.2d at 727, 198 P.2d at 27. (Emphasis added).

G. The Court of Appeal Applied a Rational Review Standard to the Issues Before it Based upon a Series of Analytical Errors

1. Marriage Is Not Purely a Creature of Statutory Law

The Court of Appeal began its analysis with an incorrect view of marriage. According to the Court below, civil marriage is "entirely a creature of statutory law." In re Marriage Cases, 49 Cal.Rptr.3d at 692. Case law, however, makes it clear that marriage

is more than simply a definition adopted by the Legislature after a popularity contest. The institution confers an important and unique status which is beyond the Legislature's province to restrict. In Turner v. Safley, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), the United States Supreme Court recognized that marriage constitutes far more than a simple statutory definition when it held unconstitutional a restriction on the right of prisoners to marry because, among other things, that restriction deprived prisoners of the "expressions of emotional support and public commitment" which were "an important and significant aspect of the marital relationship." 482 U.S. at pp. 95-96, 107 S.Ct. 2254.

In California, the courts have recognized that the right to marry is derived at least in part from the constitutional right to privacy and therefore has attributes that are beyond the power of the legislature to restrict. In Ortiz v. Los Angeles Police Relief Ass'n, 98 Cal.App.4th 1288, 120 Cal.Rptr.2d 670 (2002), the Court of Appeal discussed the right to marry in the context of Article I, Section 1 of the California Constitution.[4] According to Ortiz, "[t]he constitutional right of privacy under state law is quite broad. In addition to the right of personal autonomy and the protection of private information, the state Constitution ensures the freedom of association." 98 Cal.App.4th at 1302-3, 120 Cal.Rptr.2d at 677-8. Ortiz cited earlier Supreme Court opinions for the proposition that

---

[4] Article I, Section 1 provides as follows: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

the Article I, Section 1 right of privacy encompasses "the right to freely associate." That right protects "highly personal relationships . . . exemplified by 'those that attend the creation and sustenance of a family-- marriage . . . , childbirth . . . , the raising and education of children . . . and cohabitation with one's relatives.'" Id. Given the language of Article I, section 1 and the importance of the rights protected by that provision, the Ortiz court stated that "the Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees." 98 Cal.App.4th at 1302-3, 120 Cal.Rptr.2d at 677-8. (Emphasis added).

Marriage was also viewed as having a special status In re Marriage of Haines, 33 Cal.App.4th 277, 287-8, 39 Cal.Rptr.2d 673, 679-80 (1995) Under the heading "The Unique Status of Marriage" (emphasis in original), the Court in that case observed: " '"The laws relating to marriage and divorce . . . have been enacted because of the profound concern of our organized society for the dignity and stability of the marriage relationship. This concern relates primarily to the status of the parties as husband and wife. The concern of society as to the property rights of the parties is secondary and incidental to its concern as to their status' . . . " "Marriage is a matter of public concern. The public, through the state, has interest in both its formation and dissolution . . . The regulation of marriage and divorce is solely within the province of the Legislature except as the same might be restricted by the Constitution."...'" (emphasis added).

2. The Court of Appeal Erroneously Viewed the Relief Sought by the Tyler-olson Petitioners as Calling for a Violation of the Doctrine of Judicial Restraint. Since the Only Questions Before the Court Are Constitutional, the Doctrine Cannot Serve as a Basis for Avoiding the Court's Duty to Declare Statutes Unconstitutional When Required by Law

The Court of Appeal fell back upon "judicial restraint" a basis for declining to overturn the statutory definition of marriage. While that doctrine is well established, and serves a valuable function, it is inappropriate in this context. Under the doctrine of judicial restraint, a "Court will not decide constitutional questions where other grounds are available and dispositive of the issues of the case." Santa Clara County Local Transportation Authority v. Guardino,11 Cal.4th 220, 230, 45 Cal.Rptr.2d 207, 212 (1995).[5] Here, however, the only question before the Court is constitutional, and there is no way to decide a constitutional question without addressing constitutionality. Thus, it was the duty of the Court of Appeal to decide the constitutional questions presented in the Marriage Cases and, where appropriate, to declare the statutes in question

---

[5] The doctrine of judicial restraint "requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 446, 108 S.Ct. 1319, 1323 (1988) (emphasis added) "In an emerging area of the law, we do well to tread carefully and exercise judicial restraint, deciding novel issues only when the circumstances require." Mateel Environmental Justice Foundation v. Edmund A. Gray Co., 115 Cal.App.4th 8, 20, 9 Cal.Rptr.3d 486, 491 (2003).

unconstitutional notwithstanding judicial restraint. "The independent obligation to interpret this state's Constitution (citation omitted) imposes upon this court the responsibility to be consistent in giving life to the principles which that document embodies." Committee To Defend Reproductive Rights v. Myers, 29 Cal.3d 252, 294, 172 Cal.Rptr. 866, 892 (1981). "[I]t is . . . a proper function of the courts to evaluate the constitutionality of a statute . . . " Binder v. Aetna Life Ins. Co., 75 Cal.App.4th 832, 850, 89 Cal.Rptr.2d 540, 551 (1999).

3. The Court of Appeal Erroneously Viewed the Issue in Dispute as Turning upon a Right to Same Sex Marriage. This Dispute Turns upon the Recognized Right of an Individual to Marry the Person of His or Her Choice

The Court of Appeal, invoking notions of judicial restraint, described "the right at issue in these cases [as] . . . the right to same-sex marriage, not simply marriage." In re Marriage Cases, 49 Cal.Rptr.3d 675, 702 (Cal.App. 1 Dist.,2006). Apart from the incorrect resort to judicial restraint (See discussion, *supra*, in Section 2), the Court's definition of the disputed issue is erroneous. This dispute is not about same sex marriage; it is about the right of an individual to choose his or her spouse.

In the leading miscegenation case, Perez v. Lippold, 32 Cal.2d 711, 198 P.2d 17 (1948), the Supreme Court did not define the issue in terms of interracial marriage, and did not invoke judicial restraint in defining the issue at all. Instead, the Court squarely

defined the issue in terms of an individual's right to choose his or her spouse. In this regard, the Supreme Court stated that "[s]ince the right to marry is the right to join in marriage with the person of one's choice, a statute that prohibits an individual from marrying a member of a race other than his own restricts the scope of his choice and thereby restricts his right to marry." 32 Cal.2d at 715, 198 P.2d at 19. (Emphasis added).

4. The Court of Appeal Erroneously Relied upon Historical Denials of Equal Protection as a Basis for Refusing to Recognize an Individual's Fundamental Right to Marry Someone of the Same Sex

To justify denying the right to marry someone of the same sex, the Court of Appeal relies upon the circular argument that since there has never been a right to marry someone of the same sex, there is no such right now.[6] It is certainly true that marriage has been viewed by many as existing only for opposite sex couples, and that statutes in this state have defined marriage in those terms, for too long. It is equally true, however, that our constitution evolves over time to eradicate inequality. At various times, racial segregation, miscegenation, and discrimination against homosexuals (i.e., "sodomy"

---

[6] According to the Court of Appeal: "However, it is important to acknowledge the historical definition of marriage because this definition limits the precedential value of cases discussing the fundamental right to marriage. No authority binding upon us-from California appellate courts to the United States Supreme Court-has ever held or suggested that individuals have a fundamental constitutional right to enter the public institution of marriage with someone of the same sex." In re Marriage Cases, 49 Cal.Rptr.3d 675, 700 -701 (2006).

laws), among other things, were viewed as constitutionally permissible and were supported by enabling legislation in our culture. The fact that we have acted abominably in the past is no cure for a constitutionally defective law in the present.

Fortunately, the law recognizes that past practices do not justify constitutional violations. In language tailor made to address the "history" argument, the Supreme Court in Perez v. Lippold, *supra*, held as follows: "Careful examination of the arguments in support of the legislation in question reveals that 'there is absent the compelling justification which would be needed to sustain discrimination of that nature.' (Citation omitted) Certainly the fact alone that the discrimination has been sanctioned by the state for many years does not supply such justification." 32 Cal.2d at 727, 198 P.2d at 27. (Emphasis added).

As noted above, Perez v. Lippold was a miscegenation case in which the California Supreme Court overturned more than a century of equal protection denials in the area of marriage. In the present case, the Court of Appeal was hard pressed to find a way to distinguish Perez, and cases like it, in which a long history of discrimination was overturned. Ultimately, the Court of Appeal concocted a distinction based upon race where none was present. It stated that "These laws were subjected to strict scrutiny because they drew distinctions based solely on the race of potential spouses, and race has long been recognized as a suspect classification." In re Marriage Cases, 49 Cal.Rptr.3d at 704.

It is clear that the Supreme Court in Perez did not hold the miscegenation statute unconstitutional simply because it had a racist motive. While the Supreme Court was mindful of the racial purpose of the statute, it focused upon the fundamental right to marry in holding that the miscegenation statute was unconstitutional. "Since the right to marry is the right to join in marriage with the person of one's choice, a statute that prohibits an individual from marrying a member of a race other than his own restricts the scope of his choice and thereby restricts his right to marry." 32 Cal.2d at 715, 198 P.2d at 19. (Emphasis added). Thus, the Court of Appeal was simply incorrect when it suggested that the Perez holding "cannot be divorced from" the context of racial discrimination. In re Marriage Cases, 49 Cal.Rptr.3d at 704.

5. The Court of Appeal Erroneously Held That the Legislature Has Full Control of the "Subject of Marriage." The Right to Marry Has Constitutional Origins Which the Legislature Cannot Control

One of the key aspects of the refusal of the Court of Appeal to go beyond either (a) the dubious precedent of history or (b) the comfort of what the electorate passed, is the argument that the Legislature has "full control of the subject of marriage . . . " In re Marriage Cases, 49 Cal.Rptr.3d at 705. That view, however, ignores the constitutional origins of the right to marry. Under the constitution, choices relating to marriage are protected against unwarranted governmental intrusion.

In Ortiz v. Los Angeles Police Relief Ass'n, 98 Cal.App.4th 1288, 120 Cal.Rptr.2d 670 (2002), the Court of Appeal discussed the right to marry in the context of Article I, Section 1 of the California Constitution. Ortiz cited earlier Supreme Court opinions for the proposition that the Article I, Section 1 right of privacy protects "highly personal relationships . . . exemplified by 'those that attend the creation and sustenance of a family-- marriage '" 98 Cal.App.4th at 1302-3, 120 Cal.Rptr.2d at 677-8. Given the importance of the rights emanating from Article I, Section 1, the Ortiz court stated that "the Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees." 98 Cal.App.4th at 1302-3, 120 Cal.Rptr.2d at 677-8. (Emphasis added).

6. The Court of Appeal Erroneously Held That the Marriage Statutes Do Not Discriminate Based upon Gender

In prior discussion, the Tyler-Olson Petitioners argued that Sections 300 and 308.5 discriminate based upon gender by creating two groups of persons similarly situated for purposes of the constitutional right to marry. One group is composed of individuals who want to marry persons of the opposite sex, and the other group consists of individuals who want to marry persons of the same sex. Sections 300 and 308.5 deny marriage to the first group because (focusing for the moment upon males) a man can marry any woman, but cannot marry a man. That individual is therefore denied the right to marry another

man because he is a man, which is the essence of gender discrimination.

The Court of Appeal closed its eyes to this problem, and simply held that from the perspective of groups, no discrimination has taken place (i.e., all men and all women are treated the same). Equal protection, however, is viewed from the perspective of the individuals within a group. "Our cases have recognized successful equal protection claims brought by a ' "class of one, "' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. (Citations omitted). In so doing, we have explained that ' "' "[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." ' " ' " Village of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S.Ct. 1073, 1074 - 1075 (2000). (emphasis added). Thus, an individual who is denied the right to marry because of his gender has been denied equal protection as compared to another individual who seeks to marry someone of the opposite gender.

///

///

///

7. While Correctly Acknowledging the Disparate Impact of the Marriage Statutes upon Same Sex Couples (I.e., Homosexuals Who Would Marry), the Court of Appeal Erroneously Declined to View Homosexuals as a Suspect Class

The Court of Appeal is certainly to be commended for its forthright acknowledgment that the marriage statutes have a disparate impact upon gay and lesbian individuals. In re Marriage Cases, 49 Cal.Rptr.3d at 709 -710. At the same time, however, the Court of Appeals declined to declare those laws unconstitutional because (1) homosexuality has not been declared a suspect class, (2) the record does not contain "evidence" on whether homosexuality is an "immutable trait," and (3) in the absence of suspect classification, rational review applies to the statutes in question. With all respect, the Court of Appeal wrongfully ignored history and common sense in order to avoid declaring the marriage laws unconstitutional.

The Legislative History of the Domestic Partnership Act demonstrates that homosexuals are a suspect class in the eyes of the law for purposes of marriage. As noted in Chapter 421 of A.B. No. 205:

> "SECTION 1. (a) This act is intended to help California move closer to fulfilling the promises of inalienable rights, liberty, and equality contained in Sections 1 and 7 of Article 1 of the California Constitution by providing all caring and committed

couples, regardless of their gender or sexual orientation, the opportunity to obtain essential rights, protections, and benefits . . .

(b) The Legislature hereby finds and declares that despite longstanding social and economic discrimination, many lesbian, gay, and bisexual Californians have formed lasting, committed, and caring relationships with persons of the same sex . . . Expanding the rights and creating responsibilities of registered domestic partners would further California's interests in promoting family relationships and protecting family members during life crises, and would reduce discrimination on the bases of sex and sexual orientation in a manner consistent with the requirements of the California Constitution." (emphasis added).

It was also error for the Court of Appeal to look for "evidence" regarding the nature of homosexuality. First of all, the courts of this state have already treated homosexuality as an inherent trait, as opposed to a choice. For example, in the context of the Unruh Civil Rights Act, the Supreme Court has already recognized sexual orientation as a characteristic (immutable trait). In Venegas v. County of Los Angeles, 32 Cal.4th 820, 842, 11 Cal.Rptr.3d 692, 706 (2004), the Supreme Court held: "Civil Code section

51.7, a separate and independent enactment referred to in Section 52.1, declares that all persons have the right to be free from violence or intimidation because of their race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute, or because they are perceived by another to have any of these characteristics." (Emphasis added).

Finally, the immutability of the trait of homosexuality is, or should be, beyond dispute at this point. Were the court to take "evidence" on the subject, the litigation would degenerate into a battle of published articles, or of experts who are legendary for their ability to eloquently support any point of view, and the opposite position as well. This case is about fundamental questions of constitutional law, not about resumes, academic background, journals read, papers authored, or hours spent preparing to testify.

III. CONCLUSION

The time has come to recognize the rights of all Californians to marry the persons of their choice according to law. For all of the foregoing reasons, the Tyler-Olson Petitioners urge the Supreme Court to hold the marriage statutes to be unconstitutional.

Dated: February 13, 2007

ALLRED, MAROKO & GOLDBERG

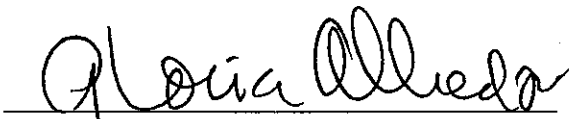
GLORIA ALLRED
Attorneys for Petitioners ROBIN TYLER, DIANE OLSON, TROY PERRY, and PHILLIP De BLIECK

CERTIFICATE OF WORD COUNT PURSUANT TO RULE 14(c)(1)

Pursuant to California Rule of Court 8.520, counsel for the Tyler Olson Petitioners hereby certifies that the number of words contained in the foregoing Brief on the Merits, including footnotes by excluding the Table of Contents, Table of Authorities, and this Certificate, is 6,998 words, as calculated using the word count feature of the computer program used to prepare the brief.

Dated: February 13, 2007

ALLRED, MAROKO & GOLDBERG



GLORIA ALLRED
Attorneys for Petitioners ROBIN TYLER, DIANE OLSON, TROY PERRY, and PHILLIP De BLIECK

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 6300 Wilshire Boulevard, Suite 1500, Los Angeles, California 90048.

On **February 14, 2007**, I served the foregoing document described as **OPENING BRIEF ON THE MERITS OF THE TYLER-OLSON PETITIONERS** on the interested parties in this action

[X] by placing [ ] the original [X] a true copy thereof enclosed in a sealed envelope addressed **as indicated on the attached Mailing List**

[X] **BY MAIL:** I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

[ ] **BY PERSONAL SERVICE:** I caused such envelope to be hand-delivered to the offices of the addressee(s).

[ ] **BY FAX**: by transmitting a true copy via facsimile transmission from telecopier number (323) 653-1660 located at 6300 Wilshire Blvd., Ste. 1500, Los Angeles, California 90048, to the following:

Executed on February 14, 2007, at Los Angeles, California.

[X] (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[ ] (Federal) I declare that I am employed in the office of a member of the bar of this Court at whose direction the service is made.

Jennifer Shuemaker

SIGNATURE

SERVICE LIST

Christopher E. Krueger Louis Muro STATE OF CALIFORNIA, DEPT. OF JUSTICE OFFICE OF THE ATTORNEY GENERAL 1300 I Street, Suite 125 Sacramento, CA 95814 Tel: 916-445-7385 Fax: 916-324-5567 *Counsel for the State of California, Attorney General Bill Lockyer, and Michael Rodrian, State Registrar of Vital Services*	Robert H. Tyler ADVOCATES FOR FAITH AND FREEDOM 24910 Las Brisas Road, Suite 110 Murrieta, CA 92562 Tel: 951-304-7583 Fax: 951-600-4996 *Counsel for Proposition 22 Legal Defense and Education Fund*
Benjamin W. Bull Glen Lavy Christopher R. Stoval Dale Schowengert ALLIANCE DEFENSE FUND 15333 North Pima Road, Suite 165 Scottsdale, AZ 85260 Tel: 480-444-0020 Fax: 480-444-0028 *Counsel for Proposition 22 Legal Defense and Education Fund*	Terry L. Thompson LAW OFFICES OF TERRY L. THOMPSON 199 East Linda Mesa, Suite 10 Danville, CA 94526 Tel: 925-855-1507 Fax: 925-820-6034 *Counsel for Proposition 22 Legal Defense and Education Fund*
Vincent P. McCarthy CENTER FOR MARRIAGE LAW 8 South Main Street New Milford, CT 06776 Tel: 860-210-1182 Fax: 860-355-8008 *Counsel for Proposition 22 Legal Defense and Education Fund*	Andrew P. Pugno Timothy D. Chandler Law Offices of Andrew P. Pugno 101 Parkshore Drive, Suite 100 Folsom, CA 95630-4726 Tel: 916-608-3065 Fax: 916-608-3066 *Counsel for Proposition 22 Legal Defense and Education Fund*

Rena M. Lindevaldsen Mary E. McAlister LIBERTY COUNSEL 100 Mountain View Road Suite 2775 Lynchburg, VA 24502-2272 Tel: 434-592-3369 Fax: 434-582-7019 *Counsel for Randy Thomasson and Campaign for California Families*	Matthew D. Staver LIBERTY COUNSEL 1055 Maitland Center Commons Second Floor Maitland, FL 32751-7214 Tel: 800-671-1776 Fax: 407-875-0770 *Counsel for Randy Thomasson and Campaign for California Families*
Ross S. Heckmann ATTORNEY AT LAW 1214 Valencia Way Arcadia, CA 91006 Tel: 626-256-4664 Fax: 626-256-4774 *Counsel for Randy Thomasson and Campaign for California Families*	Raymond G. Fortner Judy W. Whitehurst 648 Kenneth Hahn Hall of Administration 500 W. Temple Street Los Angeles, CA 90012-2713 Tel: 213-974-8948 Fax: 213-626-2105 *Counsel for County of Los Angeles*
** Tamara Lange Alan L. Schlosser ACLU FOUNDATION OF NORTHERN CALIFORNIA 1663 Mission Street, Suite 460 San Francisco, CA 94103 Tel: 415-621-2493 Fax: 415-255-1478	** Stephen V. Bomse Richard Denatale Scott A. Westrich Hilary E. Ware Ryan R. Tacorda HELLER EHRMAN WHITE & MCAULIFFE LLP 333 Bush Street San Francisco, CA 91401-2878 Tel: 415-772-6000 Fax: 415-772-6268
** Jon W. Davidson Jennifer C. Pizer LAMBDA LEGAL DEFENSE AND EDUCATION FUND 3325 Wilshire Blvd., Suite 1300 Los Angeles, CA 90010 Tel: 213-382-7600 Fax: 213-351-6063	** Shannon Minter Courtney Joslin NATIONAL CENTER FOR LESBIAN RIGHTS 870 Market Street, Suite 570 San Francisco, CA 94014 Tel: 415-392-6257 Fax: 415-392-8442

** David C. Codell Aimee Dudovitz LAW OFFICE OF DAVID C. CODELL 9200 Sunset Boulevard, Penthouse Two Los Angeles, CA 90069 Tel: 310-273-0306 - Fax: 310-273-0307	** Martha A. Matthews ACLU OF SOUTHERN CALIFORNIA 1616 Beverly Boulevard Los Angeles, CA 90026 Tel: 213/977-9500 Fax: 213/250-3919
** Dena L. Narbaitz Clyde J. Wadsworth STEEFEL, LEVITT & WEISS A Professional Corporation One Embarcadero Center, 30th Floor San Francisco, CA 94111 Tel: 415-788-090 Fax: 415-788-2019	** *Counsel for Petitioners/Plaintiffs:* *Lancy Woo and Christy Chung, Joshua Rymer and Tim Frazer, Jewell Gomez and Diane Sabin, Myra Beals and Ida Matson, Arthur Frederick Adams and Devin Wayne Baker, Jeanne Rizzo and Pali Cooper, Our Family Coalition, and Equality California*
Bobbie J. Wilson Pamela K. Fulmer Amy E. Margolin Sarah M. King HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN Three Embarcadero Center, 7th Floor San Francisco, CA 94111-4024 Tel: 415-434-1600 Fax: 415-217-5910 *Counsel for the City and County of San Francisco*	Waukeen Q. McCoy LAW OFFICES OF WAUKEEN Q. MCCOY 703 Market Street San Francisco, CA 94103 Tel: 415-675-7705 Fax: 415-675-2530 *Counsel for Proposed Intervenors Bernan, et al.*

Victor M. Marguez Oliver Gutierrez THE MARGUEZ LAW GROUP, LLP 250 Montgomery Street, Suite 1100 San Francisco, CA 94104 Tel: 415-773-0242 Fax: 415-773-0261 *Counsel for Amicus Curiae San Francisco La Raza Lawyers Association*	Dennis J. Herrera, Therese Stewart Ellen Forman, Wayne K. Snodgrass K. Scott Dickey, Kathleen S. Morris, Sherri Sokeland Kaiser CITY AND COUNTY OF SAN FRANCISCO OFFICE OF THE CITY ATTORNEY 1 Dr. Carlton B. Goodlett Place, Room 325 San Francisco, CA 94102-5408 Tel: 415-554-4700 Fax: 415-554-4747 *Counsel for the City and County of San Francisco*
Honorable James L. Warren SAN FRANCISCO SUPERIOR COURT 400 McAllister Street, Dept. 301 San Francisco, CA 94102-4514	Honorable Ronald E. Quidachay SAN FRANCISCO SUPERIOR COURT 400 McAllister Street, Dept. 302 San Francisco, CA 94102-4514
Honorable David P. Yaffe LOS ANGELES SUPERIOR COURT 111 North Hill Street, Dept. 86 Los Angeles, CA 90012	Carlotta Tillman Administrative Coordinator JUDICIAL COUNCIL OF CALIFORNIA Administrative Office of the Courts Appellate & Trial Court Judicial Services (Civil Case Coordination) 455 Golden Gate Avenue San Francisco, CA 94102-3688
Honorable Donna J. Hitchens Presiding Judge SUPERIOR COURT OF CALIFORNIA COUNTY OF SAN FRANCISCO 400 McAllister Street, Dept. 206 San Francisco, CA 94102-4514	