Case No. S 147999

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
Of Consolidated Cases A110449, A110450, A110451,
A110463, A110651 and A110652
San Francisco Superior Court Case Nos. 504038, JCCP 4365
Honorable Richard A. Kramer, Judge

ANSWER BRIEF OF CAMPAIGN FOR CALIFORNIA FAMILIES ON THE MERITS

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INTRODUCTION

Campaign for California Families ("Campaign") is the Plaintiff in Court of Appeal Case No. A110652, *Campaign for California Families v. Newsom,* which was consolidated on appeal with Case Numbers A110449 (*City and County of San Francisco v. State*), A110450 (*Tyler v. State*), A110451(*Woo v. Lockyer*), A110463 (*Clinton v. State*) and A110651(*Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco*). Cases A110449, A110450, A110451, A110463, A110651 and A110652 were all decided at the trial court level by Judge Richard Kramer as part of Judicial Coordination Proceeding No. 4365 in accordance with an order by Chief Justice George. Judge Kramer held that state statutes defining marriage as the union of one man and one woman violated equal protection under the California Constitution. *In re Coordination Proceeding, Marriage Cases* (Cal. Superior 2005) 2005 WL 583129.

On appeal, the Second District Court of Appeal reversed the trial court. The Court of Appeal held that the fundamental due process right to marry does not encompass the right to "same-sex marriage." The Court of Appeal also held that defining marriage as the union of one man and one woman does not impermissibly discriminate on the basis of sex or sexual orientation, does not violate the right or privacy or free expression, and furthers legitimate state

interests. Based upon those holdings, the Court of Appeal held that marriage statutes which define marriage as the union of one man and one woman do not violate equal protection. *In re Marriage Cases* (2006) 143 Cal.App. 4th 873.

The City and County of San Francisco ("CCSF"), Tyler Plaintiffs, Equality California, Woo[1] Plaintiffs and Clinton Plaintiffs are now asking this Court to reverse the Court of Appeal's decision and declare that defining marriage as the union of one man and one woman is unconstitutional. Those Plaintiffs have submitted four separate opening briefs on the merits. The Campaign is submitting this single Answer Brief on the Merits in response to the Opening Briefs.

SUMMARY OF ARGUMENT

Plaintiffs have presented this Court with a package cleverly wrapped in the patriotic mantle of liberty, privacy and equal protection. Beneath the colorful packaging, however, lies a ticking bomb aimed at demolishing the very institution to which Plaintiffs claim to seek admission. Plaintiffs are asking this Court to detonate that bomb and destroy an institution that has existed for at several thousand years "in all or nearly all known human

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[1] According to the Petition for Review filed in Case No. A110451, Plaintiffs Lancy Woo and Cristy Chung are not continuing as parties and did not join the Petition. However, for ease of reference and consistency with the underlying case names, the Campaign will refer to the Plaintiffs in Case No. A110451 as the "Woo Plaintiffs."

societies."[2] As this Court recognized nearly 150 years ago, marriage – the union of one man and one woman – is "the foundation of the social system." *Baker v. Baker* (1859) 13 Cal. 87, 94. "[T]he structure of society itself largely depends upon the institution of marriage....The joining of the man and woman in marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime." *Marvin v. Marvin* (1976) 18 Cal.3d 660, 684 [134 Cal.Rptr. 815, 557 P.2d 106]. Implicit in these holdings is this Court's understanding of the transcendent nature of marriage, which John Locke described as "the First Society."[3] Locke defined marriage as:

> [A] voluntary Compact between Man and Woman; and tho' [sic] it consist chiefly in such a Communion and Right in one another's Bodies, as is necessary to its chief end, Procreation; yet it draws with it mutual Support, and Assistance, and a Community of Interest too, as necessary to unite not only their Care and Affection, but also necessary to their common Off-spring, who have a right to be nourished and maintained by them, till they are able to provide for themselves.[4]

That definition has carried across time and cultures, as all human groups have

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[2] David Blankenhorn, THE FUTURE OF MARRIAGE 9 (Encounter Books, 2007).

[3] *Id.* at 26 (citing John Locke, TWO TREATISES OF GOVERNMENT (1698; Cambridge, U.K.: Cambridge University Press, 1965) 179).

[4] *Id.*

"fashioned kinship symbols and marriage rules aimed at guaranteeing that each child is emotionally, morally, practically, and legally affiliated with both parents."[5] All human societies recognize marriage as a social institution based upon the biological and social facts of human sexuality and reproduction, which are what enable society to continue.[6] In other words, as this Court said in *Marvin*, marriage is the institution upon which the structure of society is built. *Marvin v. Marvin,* 18 Cal.3d at 684.

Plaintiffs are asking this Court to abandon that universal understanding of marriage in favor of a concept of marriage as a bundle of rights and benefits to be bestowed upon any two people who profess to love each other. Recasting the universal definition of marriage as a "statutory ban" and "exclusionary rule," Plaintiffs claim that society is obligated to recognize and bestow benefits upon any group of individuals who profess to love each other and that any attempt to limit the award of benefits is an unconstitutional deprivation of rights. Based upon that premise, Plaintiffs claim that defining marriage as the union of one man and one woman violates equal protection, the right to privacy and the right to free expression. Plaintiffs also claim that defining marriage as the union of one man and one woman is a notion born of

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5 *Id.* at 100.

6 *Id.* at 101-102.

animosity toward homosexuals similar to the anti-miscegenation statutes born of animosity toward minorities. In a similar vein, Plaintiffs argue that the comprehensive rights granted same-sex couples under AB205 are nothing more than institutional segregation reminiscent of the "separate but equal" educational system struck down in *Brown v. Bd. of Education* (1954) 347 U.S. 483. Finally, Plaintiffs claim that the advent of assisted reproduction means that procreation, or even an interest in fostering responsible procreation, is no longer relevant to marriage. Based upon those allegations, Plaintiffs ask this Court to deconstruct the institution of marriage at the same time that they are asking to become a part of it.

This Court must refuse Plaintiffs' request to ignite the spark that would cause the foundation of society to disintegrate. Defining marriage as the union of one man and one woman establishes the framework for the institution. The definition of marriage as the union of one man and one woman does not discriminate on the basis of sex or sexual orientation. Plaintiffs are not deprived of the fundamental right to marry, nor are they deprived of a right to "same-sex marriage" which is not a fundamental right. Defining marriage as the union of one man and one woman does not deprive Plaintiffs of an autonomous privacy interest, or in the right to freely associate with any other person. Similarly, defining marriage as the union of one man and one woman

does not infringe upon Plaintiffs' right to free expression, including referring to themselves as "married." Since there is no infringement of any fundamental rights, the definition of marriage as the union of one man and one woman is presumed to be constitutional. That presumption is more than amply supported by the numerous state interests served by defining marriage as the union of one man and one woman.

Consequently, this Court should uphold the Court of Appeal's ruling finding that laws defining marriage as the union of one man and one woman are constitutional.

LEGAL ARGUMENT

I. THIS COURT MUST UPHOLD THE BEDROCK SOCIAL INSTITUTION OF MARRIAGE AND REJECT PLAINTIFFS' PLEAS TO VINDICATE A PURPORTED DEPRIVATION OF INDIVIDUAL RIGHTS BY DECONSTRUCTING MARRIAGE.

Before embarking on the constitutional analysis required to resolve this matter, it is necessary to cogently and thoroughly define the institution that this Court is being asked to analyze. Plaintiffs have skewed the analysis by describing the issue as the "statutory ban on marriage between two persons of the same sex,"[7] and "the exclusion of lesbians and gay men from marriage,"[8] instead of the definition of marriage as the union of one man and one woman.

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[7] Brief of Woo Plaintiffs, et. al "Woo Brief," p. 1.

[8] Brief of City and County of San Francisco, "CCSF Brief," p.1

Family Code §§ 300, 301, 308.5. Plaintiffs portray marriage as a goody basket of rights and benefits which should be available to any two people who love each other. Based upon that viewpoint, Plaintiffs claim that any attempt to define the parties who may partake in marriage should be considered a deprivation of individual rights. To bolster their point of view, Plaintiffs assert that describing marriage as the union of one man and one woman is akin to long-rejected laws that barred interracial marriage. According to Plaintiffs, since marriage is a basket of government-sanctioned goodies, it should be available to all couples who profess to love each other.

Contrary to Plaintiffs' portrayals, the question before this Court is not the exclusion of homosexuals from a basket of benefits, but the continuing validity of a social institution that predates the state and transcends the law. Marriage is not a lump of clay that is to be re-molded to fit every new cultural trend, but is the cornerstone upon which society has been built and upon which society's future depends. This Court must base its constitutional analysis upon that premise.

A. State Marriage Laws Do Not Create A Bundle Of Rights Called "Marriage," But Regulate A Social Institution Upon Which Society Has Been Built And The Future Of Society Rests.

1. This Court has consistently recognized that marriage – the union of one man and one woman – is the foundation of society.

As this Court said at the dawn of California's statehood, "The public is interested in the marriage relation and in the maintenance of its integrity, as it is the foundation of the social system." *Baker v. Baker* (1859) 13 Cal. 87, 94. By 1904 this Court could say "that the marriage relation is the foundation of all society has been so frequently expressed by this court that it is entirely unnecessary to refer to the cases wherein it is so held." *Estate of De La Veaga* (1904) 142 Cal. 158, 170-171[75 P. 790]. The rights and obligations of marriage "are fixed by society, in accordance with the principles of natural law, and are beyond and above the parties themselves. They cannot modify the terms on which they are to live together, nor superadd [sic] to the relation a single condition." *Sharon v. Sharon* (1888) 75 Cal.1, 8 [16 P. 345]. That is why anti-miscegenation laws, which tried to add the condition of no interracial unions, were invalidated, *See Perez v. Sharp* (1948) 32 Cal.2d 711 [198 P.2d 17], and why Plaintiffs' attempts to add the proviso that the sex of the partners does not matter must also fail. Statutes define how marriages are entered into, how they are dissolved and how property and contract rights are determined,

but they do not define marriage. *Sesler v. Montgomery* (1889) 78 Cal. 486 [21 P. 185]. Statutes do not attempt "to change the essential nature of marriage, or to state its manifold incidents and consequences, or to establish new rules for the solution of the various questions which arise out of those incidents and consequences." *Id.* at 486-487.

That "essential nature" is the union of one man and one woman, not an amorphous "right to marry the person of one's choice" as Plaintiffs maintain. Plaintiffs have taken a statement from the *Perez* decision out of context and transformed it into the definitive word on what constitutes marriage in California, ignoring dozens of subsequent cases that have maintained that marriage is the union of one man and one woman. In *Perez*, this Court held that the state's anti-miscegenation law violated equal protection. 32 Cal.2d 711. In particular, this Court said:

> 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. It must therefore be determined whether the state can restrict that right on the basis of race alone without violating the equal protection of the laws clause of the United States Constitution.

Id. at 715. This Court went on to discuss the various justifications that the state offered in defense of the law, all of which focused on the "progeny" of a mixed race marriage. "It might be concluded therefrom that section 60 is based

upon the theory that the progeny of a white person and a Mongolian or Negro or Malay are inferior or undesirable, while the progeny of members of other different races are not." *Id.* at 721. The state further contended that "persons wishing to marry in contravention of race barriers come from the 'dregs of society' and that their progeny will therefore be a burden on the community." *Id.* at 724. "Respondent contends that even if the races specified in the statute are not by nature inferior to the Caucasian race, the statute can be justified as a means of diminishing race tension and preventing the birth of children who might become social problems." *Id.* The "progeny" of a mixed race marriage could only result from the union of a man and a woman. The emphasis on the progeny of mixed race couples means that this Court was operating from the premise that marriage is the union of one man and one woman. The Court's use of the term, "right to join with the person of one's choice" was not, as Plaintiffs claim, an affirmation that marriage can constitute any mixture of the sexes that people choose. Instead, it is a recognition that a man's choice of a wife or a woman's choice of a husband should be free from race-based restrictions.

This Court's subsequent decisions regarding restrictions on marriage further demonstrate that marriage as described in *Perez* and since then is the union of one man and one woman, not an undifferentiated "right to join with

whomever you choose" regardless of sex. Even while it was upholding the contractual rights of an unmarried partner, this Court was careful to acknowledge the foundational role that marriage plays in society because it is the union of a man and a woman. *Marvin v. Marvin* (1976) 18 Cal.3d 660, 684.

> Lest we be misunderstood, however, we take this occasion to point out that the structure of society itself largely depends upon the institution of marriage, and nothing we have said in this opinion should be taken to derogate from that institution. **The joining of the man and woman in marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime.**

Id. (emphasis added). In *Elden v. Sheldon*, this Court emphasized that marriage is accorded a high degree of dignity "in recognition that '**[t]he joining of the man and woman in marriage** is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime.' [Citation.]. Consonant therewith, the state is most solicitous of the rights of spouses." *Elden v. Sheldon* (1988) 46 Cal.3d 267, 274-275 [250 Cal.Rptr. 254, 758 P.2d 582] (emphasis added). As recently as 2005, this Court re-emphasized the foundational nature of the institution of marriage. *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 844-845 [31 Cal.Rptr.3d 565, 115 P.3d 1212].

> Unquestionably, there is a strong public policy favoring marriage. (Citation). This policy serves specific interests "not based on anachronistic notions of morality. The policy favoring marriage 'is rooted in the necessity of providing an institutional

> basis for defining the fundamental relational rights and responsibilities of persons in organized society.'" (Citation).

Id. at 844 (citations omitted). Marriage is, by definition, the union of one man and one woman, not because of any animus toward homosexuals, polygamists, polyandrists or any other group of people, but because it is the joining of a man and a woman that perpetuates society. The marriage statutes reflect that reality and provide governmental approval and support for the institution upon which society depends for its future.

2. *The United States Supreme Court has similarly consistently acknowledged that marriage – the union of one man and one woman – is the essential social institution.*

The United States Supreme Court has similarly recognized since the early days of the Republic that marriage is the foundational social institution. Statutes "regulate the mode of entering into the contract, but they do not confer the right." *Meister v. Moore* (1877) 96 U.S. 76, 78-79.

> For, certainly, no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate states of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the **union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization**; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.

Murphy v. Ramsey (1885) 114 U.S. 15, 45 (emphasis added). Marriage "is an

institution in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress." *Maynard v. Hill* (1888) 125 U. S. 190. Marriage fosters responsible procreation and child-rearing, and therefore is "fundamental to the very existence and survival of the race." *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.

Marriage is not merely a creation of statute, but is an institution that is older than the Constitution, state statutes and court decisions. *See Griswold v. Connecticut* (1965) 381 U.S. 479, 486.

> We deal with a right of privacy older than the Bill of Rights-older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Id. The *Griswold* court struck down a Connecticut law prohibiting the sale of contraceptives to married couples. Since contraceptives are only an issue for couples consisting of a man and a woman, the "coming together" addressed by the *Griswold* court is a "coming together" of a man and woman, not the amorphous joining together of any two people who love each other, as Plaintiffs claim.

The United States Supreme Court, like this Court, has consistently

confirmed that marriage is a fundamental social institution which, by definition, is the union of one man and one woman. Statutes such as the ones under consideration by this Court memorialize, but do not create the definition.

3. Marriage is the cornerstone of society.

Therefore, far from being merely a statutorily created bundle of rights, marriage – the union of one man and one woman – is a social institution that forms the cornerstone of society. As marriage scholar Maggie Gallagher said, there are many problems with the concept that marriage as a bundle of rights that should be bestowed upon any couple who is in love and wants social recognition.

> It reduces marriage to a creature of the state. By emphasizing the rights of adults, it intrinsically devalues the interest of children and the community in marriage. By reducing marriage to an individual right, it undermines the very norms of commitment it rhetorically upholds. It logically calls into question the notion of family law itself. If the purpose of marriage and family law is to affirm neutrally the multiplicity of adult emotional choices, because individual declarations of intimacy are sacred matters in which the state has no right to interfere, then the question becomes: why do we have laws about marriage at all?[9]

Similarly, marriage scholar David Blankenhorn writes that "Speaking of marriage exclusively or primarily in terms of 'rights' is misleading and I think

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[9] Maggie Gallagher, *Rites, Rights, and Social Institutions: Why and How Should the Law Support Marriage?* 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 225, 231 (2004).

also demeaning, because it obscures the human dimension."[10] "Defining marriage as a set of 'rights' also obscures the fact that the married spouses are not simply rights-bearing individuals in an interpersonal relationship, but also agents of society in a vital *social institution*."[11] "A social institution is not a 'bundle of rights,' but a pattern of rules and structures intend to meet social needs."[12] Social institutions create and maintain rules, including rules for who is part of the institution, maintain guidelines for behavior that are binding for the participants, build and express shared agreements about what is important and what is to be valued, and create authoritative public meaning.[13] "Finally, and perhaps most importantly, social institutions exist in order to solve basic problems and meet core needs."[14]

In the case of marriage, it exists to address the fundamental problem that humans are divided into males and females and reproduce sexually and to meet the need for a shared life between the sexes and for the successful raising of children.[15] None of the cultural changes that sparked revisions to rules

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10 Blankenhorn at 96.

11 *Id.* (emphasis in original).

12 *Id.*

13 *Id.* at 61.

14 *Id.*

15 *Id.*

regarding property and contract rights in marriage have changed the innate sexual differences upon which marriage is based.

Marriage is not about bestowing society's blessings, and the concomitant benefits, upon two people who love each other, as Plaintiffs allege. Instead, it is "the principle human institution through which women and men share a common life."[16] Marriage exists to strengthen the bridge between male and female that is necessary to create and perpetuate society. The Family Code sections under review are a memorialization of that universal understanding of marriage, not a "statutory ban" aimed at homosexuals.

B. Maintaining The Definition Of Marriage As The Union Of One Man And One Woman Serves The Same Purposes As Did The Demise Of Anti-Miscegenation Laws.

Defining marriage as the union of one man and one woman is also not, as Plaintiffs claim, an exclusionary rule based upon animus toward homosexuals akin to the anti-miscegenation laws that were borne of animus toward racial minorities. Plaintiffs claim that defining marriage as the union of one man and one woman is comparable to saying that a white person cannot marry a black person. In fact, the two concepts could hardly be more opposite.

As David Blankenhorn observes, "two men (or two women) seeking to marry one another is not remotely similar to a black person of one sex seeking

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16 *Id.* at 105.

to marry a white person of the other sex."[17] Furthermore, "yesterday's proponents of anti-miscegenation laws have more in common with today's *proponents* of gay marriage than with those who oppose gay marriage."[18]

> If a white person of one sex aims to marry a black person of the other sex, we have not the slightest reason to believe that marriage's fundamental forms are being weakened or violated, or that the institution's fundamental purposes are being challenged or denied. On the contrary, we have every reason to assume that such a marriage would be fully consistent with the core forms, meanings, and purposes of marriage as a human and social institution. But whenever someone seeks to *prevent* an interracial couple from marrying – say, by passing anti-miscegenation laws – that person is weakening the institution of marriage, because *promoting racism by enforcing racial separatism is not one of marriage's public purposes.* Accordingly, people who use marriage laws to promote racism are corrupting marriage by grafting onto it a public value that is alien and even hostile to the institution's core forms, meanings and reasons for being. They are manipulating marriage for their own purposes, turning an institution designed to bring women and men together into one that often keeps them apart.[19]

That improper grafting of racism onto marriage was the basis for this Court's invalidation of California's anti-miscegenation statute and for the United States Supreme Court's invalidation of Virginia's, and all other remaining, anti-miscegenation statutes. *Perez v. Sharp* (1948) 32 Cal.2d 711, 731-732; *Loving v. Virginia* (1967) 388 U.S. 1, 11-12.

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[17] Blankenhorn at p. 174.

[18] *Id.* (emphasis in original).

[19] *Id.* at 175-176 (emphasis in original).

Now, Plaintiffs are asking this Court to reverse course and graft onto marriage a concept that is wholly foreign to the institution's core purposes. "[T]oday's proponents of same-sex marriage in the United States are seeking to restructure marriage and use it for a special purpose. That purpose is to gain social recognition of the dignity of homosexual love."[20]

> Marriage exists for public purposes that can be specified. *Diminishing homophobia is not one of marriage's public purposes.* Marriage is institutionally alive to the fact of sexual embodiment and, flowing from it, sexual reproduction. Regarding the subjective and often complex issue of sexual orientation, marriage is institutionally blind, deaf and dumb. It doesn't ask, tell, require, record, stipulate, accept, judge, or reject on the basis of individual sexual desire. Asking marriage to do so now – asking marriage to reconstitute itself according to the criterion of sexual orientation, and in doing so to help change public attitudes about orientation – is asking marriage to do something entirely unprecedented, and something for which the institution is radically ill equipped.[21]

As is true with Plaintiffs' description of the Family Code sections as "statutory bans" or "exclusions," Plaintiffs' analogy of the Family Code to anti-miscegenation laws reflects a fundamental misunderstanding of the nature of marriage. Plaintiffs' view of marriage is that it is an expression of love, a private relationship of commitment which should be honored by society regardless of the sex of the partners. However, centuries of human history have

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20 *Id.* at 177-178.

21 *Id.* at 179 (emphasis in original)..

demonstrated that marriage is a social institution aimed at bridging the sexual divide so as to provide for the perpetuation of society.[22] It is the latter view that is memorialized in the Family Code and which should inform this Court's analysis.

C. This Court Must Reject The Plaintiffs' Perspective Of Marriage As The Granting Of Public Approval To Private Relationships And Honor Its Long-Standing Recognition Of The Public Purposes Served By Defining Marriage As The Union Of One Man And One Woman.

Plaintiffs' portrayal of the marriage statutes as exclusionary rules and statutory bans reflects their perception that marriage exists solely to bestow social approval upon private relationships. Plaintiffs operate from the perspective that society is obligated to recognize and bestow benefits upon any group of individuals who profess to love each other, regardless of whether they are male or female. This perspective wholly ignores the public purposes upon which the social institution of marriage was built hundreds of years before the statutes were enacted.[23] Since these public purposes are the essence of the institution of marriage, they must be at the forefront of this Court's analysis of the marriage statutes.

Marriage scholar Lynn Wardle summarized the problem posed by

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22 *See id.*

23 These public purposes are discussed in detail in Section III.

adopting Plaintiffs' perspective on the meaning of marriage:

> Most arguments for same-sex marriage emphasize the individual interest in marriage and argue from that perspective that there is no difference between heterosexual marriage and same-sex "marriage" – a major flaw because the primary purpose of marriage laws has been and should be to regulate marriage in the public interest, not to promote any individual's or any particular class' private interests. Asserting that legalizing same-sex marriage will enhance the lives or lifestyles of homosexuals misses the target. The proper question is whether, and if so, how, legalizing same-sex marriage will contribute to promoting the public interests in marriage, and to achieving the social policy purposes for which laws establishing marriage have been enacted.[24]

"Marriage law is not enacted to promote private, personal interests, but to protect and promote those individual interests that are shared in common with society as a whole, i.e., social interests.[25] Professor Wardle cogently described the consequences of adopting Plaintiffs' individual-centered perspective of marriage. "Prolonged excessive accentuation of individualism in marriage can be cancerous, and can destroy not only a marriage but also the sense of community and respect for the institution of marriage that is essential to the survival of our society."[26] Ms. Gallagher agrees that "[t]he private relationship

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[24] Lynn D. Wardle, *"Multiply and Replenish:" Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J. L. & PUB. POL'Y 771, 779 (2001).

[25] *Id.* at 778.

[26] *Id.* at 779.

view of marriage requires a deconstruction of the institution as the private needs of the individuals are all that matter."[27]

By contrast, the public purpose view of marriage is designed to reinforce key norms that are necessary to protect children and the reproduction of the family system and society.[28]

> Marriage law is at its heart not simply a cluster of benefits given to people whose taste in sex or lifestyle we happen to personally approve; it is a set of obligations and rewards that serve important social, not merely personal, goals. Marriage serves a pointing function, elevating a certain type of relationship – permanent, exclusive, normally procreative – above all others. Marriage law demarcates certain public boundaries which social norms can then use to impose informal rewards or sanctions.[29]

Consequently, contrary to Plaintiffs' portrayal, "marriage does not merely reflect individual desire, it shapes and channels it."[30]

> Marriage as a social institution communicates that a certain kind of sexual union is, in fact, our shared ideal: one where a man and a woman join not only their bodies, but also their hearts and their bank accounts, in a context where children are welcome. In important ways marriage regulates the relationships and sexual conduct even of people who are not married and may never marry. Its social and legal prominence informs young lovers of the end towards which they aspire, the outward meaning of their most urgent, personal impulses. Its existence signals to

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27 Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773, 778-779 (2002).

28 *See id.* at 788.

29 *Id.* at 788-789.

30 *Id.* at 790.

> cohabitors the limitations of their own, as well as their partners' commitment.[31]

As Ms. Gallagher observed, maintaining marriage as the union of one man and one woman "does not require the ruthless suppression of alternatives"[32] Society can still recognize that there are alternative forms of sexual expression but just not agree to grant those alternatives the same legal status as the union of a man and a woman.[33] If society does what Plaintiffs suggest, and loses the idea that "marriage is, at some basic level, about the reproduction of children and society, if our law rejects the presumptions that children need mothers and fathers, and that marriage is the most practical way to get them for children, then we cannot expect private tastes and opinions alone to sustain the marriage idea."[34]

Therefore, this Court cannot adopt Plaintiffs' myopic view of marriage, but must analyze the marriage statutes in light of the predominant public purposes of the institution, purposes which this Court alluded to more than 50 years ago.

The family is the basic unit of our society, the center of the

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31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.*

> personal affections that ennoble and enrich human life. It channels biological drives that might otherwise become socially destructive; it ensures the care and education of children in a stable environment; it establishes continuity from one generation to another; it nurtures and develops the individual initiative that distinguishes a free people. Since the family is the core of our society, the law seeks to foster and preserve marriage.

De Burgh v. De Burgh (1952) 39 Cal.2d 858, 863-864 [250 P.2d 598]. It is that perspective of marriage, rather than Plaintiffs'"deprivation of rights" perspective, that this Court must utilize. In so doing, this Court will see that preserving the definition of marriage is not about preserving a tradition of discrimination or exclusion, but about preserving the relationship upon which the future of society rests.

II. DEFINING MARRIAGE AS THE UNION OF ONE MAN AND ONE WOMAN DOES NOT VIOLATE EQUAL PROTECTION.

Again framing the issue as the pejorative terms "exclusion" and "statutory ban"against homosexuals, Plaintiffs claim that the marriage statutes violate equal protection in that they discriminate on the basis of sex and sexual orientation and violate Plaintiffs' fundamental right to marry. When the issue is properly cast as the definition of marriage as the union of one man and one woman, it becomes apparent, as the Court of Appeal found, that there is no violation of the equal protection clause.

When determining whether a statute violates equal protection, this Court has utilized a two-tiered analysis. *D'Amico v. Bd. of Medical Examiners*

(1974) 11 Cal.3d 1, 16 [112 Cal.Rptr. 786, 520 P.2d 10]. "The first is the basic and conventional standard for reviewing economic and social welfare legislation in which there is a 'discrimination' or differentiation of treatment between classes or individuals,"known as the "rational basis" test. *Id.* The rational basis test

> manifests restraint by the judiciary in relation to the discretionary act of a co-equal branch of government; in so doing it invests legislation involving such differentiated treatment with a presumption of constitutionality and"requir[es] merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose."

Id. (citations omitted). "So long as such a classification 'does not permit one to exercise the privilege while refusing it to another of like qualifications, under like conditions and circumstances, it is unobjectionable upon this ground.'" *Id.* If a challenged statute involves "suspect classes" or abridges a fundamental right, then the court applies "strict scrutiny." *Id.* at 17. Under this standard, the court adopts "an attitude of active and critical analysis," and the state must establish that it has a compelling interest which justifies the law and that the distinctions drawn by the law are necessary to further its purpose. *Id.*

This Court has applied strict scrutiny to statutes that discriminate on the basis of sex, *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 17-19 [95 Cal.Rptr. 329, 485 P.2d 529], but has not applied strict scrutiny to laws which discriminate on the basis of sexual orientation. Other state courts and the

United States Supreme Court have consistently subjected laws which differentiate on the basis of sexual orientation to rational basis review. *See, e.g., Lawrence v. Texas* (2003) 539 U.S. 558 (striking down Texas' anti-sodomy law utilizing rational basis); *Romer v. Evans* (1996) 517 U.S. 620 (invalidating Colorado's prohibition on legislation designed to protect homosexuals based upon rational basis review). This Court has also applied strict scrutiny when laws infringe upon the fundamental right to marry. *Perez v. Sharp* (1948) 32 Cal.2d 711, 731-732.

Plaintiffs claim that strict scrutiny should apply to the marriage statutes on each of these bases. However, the marriage statutes do not discriminate on the basis of sex or sexual orientation and do not infringe upon the fundamental right to marry. Therefore, as the Court of Appeal properly held, rational basis, not strict scrutiny, is the proper constitutional standard. Under that standard, the marriage statutes are clearly constitutional.

A. Defining Marriage As The Union Of One Man And One Woman Does Not Discriminate On The Basis of Sex.

The Court of Appeal correctly followed precedents from this Court and the United States Supreme Court when it found that statutes defining marriage as the union of one man and one woman do not discriminate on the basis of sex. The Court of Appeal's finding is also consistent with other state appellate

court findings on similar challenges.

1. The Court of Appeal correctly held that the marriage statutes treat men and women exactly the same.

As this Court held in *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 37 [219 Cal.Rptr. 133, 707 P.2d 195], "public policy in California mandates the equal treatment of men and women." Under the equal protection clause, "a sovereign may not subject men and women to disparate treatment." *Michelle W. v. Ronald W.* (1985) 39 Cal.3d 354, 364 [216 Cal.Rptr. 748, 703 P.2d 88]. Merely mentioning men and women in a statute does not constitute discrimination. Instead, to discriminate means to make distinctions or show partiality or prejudice toward a particular group. *Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th 537, 559-560 [101 Cal.Rptr.2d 653, 12 P.3d 1068]. Consequently, this Court has overturned laws on the grounds of sex discrimination only when the laws singled out men or women as a class for unequal treatment. In *Sail'er Inn*, this Court found that a statute which prevented women from working as bartenders violated equal protection because it denied women the right to pursue a profession while men had no such limitation. *Sail'er Inn,* 5 Cal.3d at 17-19. Similarly, a statute that created a conclusive presumption of dependency on the part of women so that widows but not widowers could receive death benefits was found to be impermissible

sex-based discrimination. *Arp v. Worker's Comp. Appeals Bd.* (1977) 19 Cal.3d 395, 398-399 [138 Cal.Rptr. 293, 563 P.2d 849].

The United States Supreme Court has similarly limited findings of sex-based discrimination to statutes that singled out men or women for unequal treatment. A law that excluded women from attending the Virginia Military Institute was found to violate equal protection. *United States v. Virginia*(1996) 518 U.S. 515, 519-520. Similarly, a policy that prevented men from attending a nursing school at a state university was found to constitute impermissible sex-based discrimination. *Mississippi Univ. For Women v. Hogan* (1982) 415 U.S. 718, 719.

By contrast, the marriage statutes at issue here do not single out either men or women for differential treatment and do not subject either men or women to unfavorable treatment vis-a-vis the other sex. The marriage statutes merely create a definition that mentions men and women as the necessary participants in the institution of marriage. Men and women are treated exactly the same. A man can marry a woman but cannot marry a man; A woman can marry a man but cannot marry a woman. Neither men nor women can marry a person of the same sex, so neither men nor women are prejudiced against or granted a privilege that is not available to the other sex. As the Court of Appeal properly held, there is no authority for the proposition that a law which

merely mentions the sex of the parties without according differential treatment should be subject to strict scrutiny. *In re Marriage Cases* (2006) 143 Cal.App.4th 873, 915 [49 Cal.Rptr. 675].

2. *Other State appellate courts have rejected similar claims that defining marriage as the union of one man and one woman discriminates on the basis of sex.*

The Court of Appeal's finding that the marriage statutes do not discriminate based upon sex is consistent with the findings of other state appellate courts that have considered similar challenges. The Washington Supreme Court rejected a claim that Washington's Defense of Marriage Act ("DOMA"), which, like Family Code §308.5, defines marriage as the union of one man and one woman, discriminated on the basis of sex. *Andersen v. King County* (Wash. 2006) 138 P.3d 963. The Washington court found that "Men and women are treated identically under DOMA; neither may marry a person of the same sex. DOMA therefore does not make any 'classification by sex,' and it does not discriminate on account of sex." *Id.* at 988. The *Andersen* case dealt not only with an equal protection claim, but also a claim under Washington's Equal Rights Amendment. The Washington court explained that the basic principle behind the E.R.A. is that both sexes be treated equally under the law. *Id.* at 989.

Laws which render benefits to one sex could in most cases be

> retained, and extended to everyone. Laws which restrict and deny rights to one sex would be eliminated. Thus, the ERA was described as preventing favoritism of or discrimination against sex-based classes. DOMA does not draw any classifications based on sex. It does not render benefits to just one sex, nor does it restrict or deny rights of one sex.

Id. The Washington court also rejected the plaintiffs' claim that the United States Supreme Court's decision overturning anti-miscegenation laws, *Loving v. Virginia* (1967) 388 U.S. 1, supported plaintiffs' allegation that Washington's DOMA violated Washington's E.R.A. *Id.* The *Andersen* court noted that the anti-miscegenation laws unjustifiably placed racial restrictions on marriage, but DOMA merely defined a right that pre-existed in common law. *Id.*

Other courts have similarly rejected claims that *Loving* supports a finding that statutes defining marriage as the union of one man and one woman discriminate on the basis of sex. The New York Court of Appeals upheld New York's marriage statutes by rejecting a claim that defining marriage as the union of one man and one woman was analogous to the invidious discrimination found in anti-miscegenation laws. *Hernandez v. Robles* (2006) 7 N.Y.3d 338, 361.

> If we were convinced that the restriction plaintiffs attack were founded on nothing but prejudice – if we agreed with the plaintiffs that it is comparable to the restriction in *Loving v. Virginia* (388 U.S. 1 [1967]), a prohibition on interracial marriage that was plainly "designed to maintain White

> Supremacy" (*id.* at 11) – we would hold it invalid, no matter how long its history. As the dissent points out, a long and shameful history of racism lay behind the kind of statute invalidated in *Loving*. But the historical background of *Loving* is different from the history underlying this case. Racism has been recognized for centuries – at first by a few people, and later by many more – as a revolting moral evil. This country fought a civil war to eliminate racism's worst manifestation, slavery, and passed three constitutional amendments to eliminate that curse and its vestiges. *Loving* was part of the civil rights revolution of the 1950's and 1960's, the triumph of a cause for which many heroes and many ordinary people had struggled since our nation began.

Id. at 360-361. The history behind the traditional definition of marriage, however, "is of a different kind." *Id.* at 361.

> The idea that same-sex marriage is even possible is a relatively new one. Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex. A court should not lightly conclude that everyone who held this belief was irrational, ignorant or bigoted. We do not so conclude.

Id.

Similarly, the Minnesota Supreme Court held that the statute invalidated in *Loving* was not analogous to the state marriage law. *Baker v. Nelson* (1971) 291 Minn. 310, 314, *appeal dismissed for want of substantial federal question*, (1972) 409 U.S. 810."Virginia's antimiscegenation statute, prohibiting interracial marriages, was invalidated solely on the grounds of its patent racial discrimination."*Id.* "*Loving* does indicate that not all state restrictions upon the

right to marry are beyond reach of the Fourteenth Amendment. But in common sense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex." *Id.* In *Nelson*, the Minnesota Supreme Court said that Minnesota's laws defining marriage as the union of one man and one woman did not violate equal protection or due process under the United States Constitution. *Id.* As Justice Kennard said, the *Nelson* case represents binding precedent that a state law restricting marriage to opposite-sex couples does not violate the federal Constitution's guarantees of equal protection and due process of law. *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1126 [17 Cal.Rptr.3d 225, 95 P.3d 459](Kennard, J., concurring). The United States Supreme Court has explained that a dismissal on the ground that an appeal presents no substantial federal question is a decision on the merits, establishing that the lower court's decision on the issues of federal law was correct. *Id.* at 1126-1127 (citing *Mandel v. Bradley* (1977) 432 U.S. 173, 176; *Hicks v. Miranda* (1975) 422 U.S. 332, 344). Such summary decisions "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Id.* at 1127. Consequently, the summary decision in *Nelson* prevents lower courts and public officials from reaching the conclusion that defining marriage as the

union of one man and one woman violates the equal protection or due process guarantees of the United States Constitution. *Id.* Justice Kennard noted that the binding force of such a summary disposition remains in effect until the United States Supreme Court instructs otherwise, and the high Court has not expressly overruled *Nelson. Id.*

The Vermont Supreme Court agreed that it is a mistake to rely upon *Loving* to invalidate state marriage laws. *Baker v. State* (1999) 170 Vt. 194, 215 n.13. In *Loving,* "the high court had little difficulty in looking behind the superficial neutrality of Virginia's anti-miscegenation statute to hold that its real purpose was to maintain the pernicious doctrine of white supremacy." *Id.*

> Our colleague argues, by analogy, that the effect, if not the purpose, of the exclusion of same-sex partners from the marriage laws is to maintain certain male and female stereotypes to the detriment of both. To support the claim, she cites a number of antiquated statutes that denied married women a variety of freedoms, including the right to enter into contracts and hold property.
> The test to evaluate whether a facially gender-neutral statute discriminates on the basis of sex is whether the law "can be traced to a discriminatory purpose." [*Personnel Administrator of Massachusetts v.]Feeney*, 442 U.S. [256] at 272, 99 S.Ct. 2282 [(1979)]. The evidence does not demonstrate such a purpose. It is one thing to show that long-repealed marriage statutes subordinated women to men within the marital relation. It is quite another to demonstrate that the authors of the marriage laws excluded same-sex couples because of incorrect and discriminatory assumptions about gender roles or anxiety about gender-role confusion. That evidence is not before us.

Id. Therefore, the Vermont marriage laws do not discriminate on the basis of

sex because they "do not single out men or women as a class for disparate treatment, but rather prohibit men and women equally from marrying a person of the same sex." *Id.*

Similarly, as the Court of Appeal properly held, California's statutes that define marriage as the union of one man and one woman do not single out either sex for disparate treatment, but merely memorialize the longstanding recognition that marriage is an institution based upon the fundamental differences between the sexes. As Professor Wardle observed:

> The heterosexual dimensions of the relationship are at the very core of what makes "marriage" what it is, and why it is so valuable to individuals and to society. The union of two persons of different genders creates a union of unique potential strengths and inimitable potential value to society. It is the integration of the universe of gender differences – profound and subtle, biological and cultural, psychological and genetic – associated with sexual identity that constitutes the core and essence of marriage. Just as men and women are different so a union of two men or of two women is not the same as the union of a man and a woman.[35]

Defining marriage as the union of one man and one woman simply acknowledges that human beings are comprised of two sexes – male and female – and that society has built an institution upon the integration of those two sexes. The definition is silent as to what roles the respective sexes are to play within the marriage, including which partner is to own property, earn a

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[35] Lynn D. Wardle, *The "End" of Marriage*, 44 FAM. CT. REV. 45, 53 (2006).

living or raise the children. Defining marriage as the union of one man and one woman neither creates nor perpetuates sex-role stereotypes as did the laws struck down in *Sail'er Inn* and *Arp.* Therefore, it does not discriminate on the basis of sex and is subject only to rational basis review.

B. Defining Marriage As The Union Of One Man And One Woman Does Not Impermissibly Discriminate On The Basis Of Sexual Orientation.

The New York Court of Appeals' conclusion regarding New York's marriage statute cogently answers these Plaintiffs' claims that California's marriage statutes discriminate on the basis of sexual orientation.

> In this respect, the Domestic Relations Law is facially neutral: individuals who seek marriage licenses are not queried concerning their sexual orientation and are not precluded from marrying if they are not heterosexual. Regardless of sexual orientation, any person can marry a person of the opposite sex. Certainly, the marriage laws create a classification that distinguishes between opposite-sex and same-sex couples and this has a disparate impact on gays and lesbians. However, a claim that a facially-neutral statute enacted without an invidious discriminatory intent has a disparate impact on a class (even a suspect class, such as one defined by race) is insufficient to establish an equal protection violation.

Hernandez v. Robles (2006) 7 N.Y. 3d 338, 376-377. Similarly, the Family Code sections at issue in this case do not address sexual orientation. The parties are not asked to state their sexual orientation when they apply for a marriage license, but are only asked whether one of them is a male and one is a female, and if they meet the age and relational requirements for marriage.

Defining marriage as the union of a man and a woman does not single out homosexuals for disfavored treatment, or discriminate against a suspect class, and therefore is constitutional so long as it satisfies the rational basis test.

1. Defining Marriage as the union of one man and one woman does not single out homosexuals for disfavored treatment.

As Mr. Blankenhorn observed, "marriage is institutionally deaf, blind and dumb" to sexual orientation. It doesn't ask tell, require, record, stipulate, accept, judge, or reject on the basis of individual sexual desire."[36] A man and a woman who are of legal age, unmarried and not closely related can get married in California regardless of their sexual orientation. A man who would prefer to marry a man or a woman who would prefer to marry a woman cannot satisfy their preferences, but then neither can a person who is already married, a person who prefers to marry someone under 18 or a person who prefers to marry a close relative. Defining marriage as the union of one man and one woman has a disparate effect on each of these people, but that does not mean that the definition is a violation of equal protection. The mere fact that a state law affects certain people differently does not mean that the law violates equal protection without a further showing that there is no legitimate justification for the differential effect. *See, e.g., Bd. of Supervisors v. Local Agency Formation*

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[36] Blankenhorn at p. 179.

Commission, (1992) 3 Cal.4th 903, 914 [13 Cal.Rptr. 2d 245, 838 P.2d 1198] (finding no equal protection violation in a state law that limited the voting rights of residents living in counties affected by proposed municipal incorporations). "When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern." *Personnel Administrator v. Feeney* (1979) 442 U.S. 256, 272. Since defining marriage as the union of one man and one woman is rationally based, the fact that certain people are unable to exercise their preferences for marriage partners does not create an equal protection violation.

Plaintiffs erroneously claim that defining marriage as the union of one man and one woman violates equal protection because it excludes 100 percent of homosexuals from entering marriage. In fact, sexual orientation is wholly irrelevant to the question of defining marriage as the union of one man and one woman. Plaintiffs' contrary conclusion is based upon their erroneous premise that marriage consists of the "right to marry whomever one chooses" and a misrepresentation of the parameters of the marriage law. As discussed in detail above, this Court's use of the term "marry the person of one's choice" in *Perez v. Sharp,* (1948) 32 Cal.2d 711, did not alter the fundamental definition of marriage, reflected in the Family Code, as the union of one man and one woman. *See Marvin v. Marvin* (1976)18 Cal.3d 660, 684 (confirming that

marriage is the joining of one man and one woman). Furthermore, the marriage laws do not, as Plaintiffs claim, make marriage licenses "available in this State to any unmarried person who is 18 or older and is capable of consenting to and consummating a marriage." (CCSF Brief, pp. 46-47). A person seeking a marriage license must not only be unmarried and over the age of 18, but also not closely related to the other party and desiring to marry another human being of the opposite sex. In other words, contrary to Plaintiffs' argument, marriage is **not** "offered to everyone – but only so long as they are heterosexual." In fact, Plaintiffs establish the fallacy of their argument when they describe how Cecelia Manning, a lesbian and one of the named Plaintiffs, married a homosexual man. (CCSF Brief p. 50). Ms. Manning clearly was able to get married even though she is homosexual. While she might not have been happy in her marriage, she was not excluded from marriage because of her sexual orientation.

Marriage is the union of one man and one woman – not the union of a person and whomever else he or she chooses – and does not exclude any homosexuals, let alone 100 percent of homosexuals, as Plaintiffs claim. Numerous groups of people cannot exercise their preferences in choosing a marriage partner , including minors, those who desire multiple partners, those who want to marry close family members and those who want to marry

someone of the same sex. Defining an institution necessarily involves excluding individuals or groups from the definition. The mere fact of exclusion does not create actionable discrimination without proof that the exclusion was motivated by animus toward the excluded group or some other improper purpose. *See Warden v. State Bar* (1999) 21 Cal.4th 628, 649-650 [88 Cal.Rptr.2d 283, 982 P.2d 154] (explaining that an equal protection violation requires more than merely an allegation that a certain group is not included in a definition). This Court's and other courts' consistent recognition of the primacy of the marriage relationship as the joining of one man and one woman for the perpetuation of society illustrates that no such improper motive underlies the definition of marriage as the union of one man and one woman.

2. *Court rulings invalidating laws discriminating against homosexuals do not require strict scrutiny analysis or invalidation of the definition of marriage as the union of one man and one woman.*

Plaintiffs point to decisions striking down criminal sodomy laws and laws excluding homosexuals from employment as justification for strict scrutiny analysis and invalidation of the marriage statutes. However, as is true with their analogy to rulings striking down anti-miscegenation laws, there is no comparison between the invalidated legislative schemes and the marriage statutes. Therefore, as the Court of Appeal properly held, the marriage statutes

are not subject to strict scrutiny and invalidation on the grounds that they discriminate against a suspect class. *In re Marriage Cases* (2006) 143 Cal.App.4th 873, 919.

The Court of Appeal properly stated that finding a disparate impact is only the first step in a two step process of determining whether a legislative classification violates equal protection. *Id.* The second step requires determining whether the legislation impinges upon a fundamental right or whether it affects a "suspect class." *Id. See also, Sail'er Inn Inc. v. Kirby* , (1971) 5 Cal.3d 1, 17. The Court of Appeal found that Plaintiffs were seeking to exercise an alleged "right to same-sex marriage," which is not a fundamental right,[37] so it then went on to consider whether sexual orientation was a "suspect class" for equal protection purposes. *In re Marriage Cases*, 143 Cal.App. 4th at 919.

The Court of Appeal correctly found that there is no precedent for classifying sexual orientation as a suspect class. *Id.* at 922-923. Even the Supreme Court case of *Lawrence v. Texas*, (2003) 539 U.S. 558, 578, which overturned laws criminalizing sodomy, did not classify homosexuals as a suspect class. "[T]he Supreme Court has never ruled that sexual orientation is

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[37] The question of whether the marriage statutes infringe upon a fundamental right is addressed in Section II C.

a suspect classification for equal protection purposes." *Citizens for Equal Protection v. Bruning*, (8th Cir. 2006) 455 F.3d 859, 865. All of the federal courts of appeal that have considered the issue have held that homosexuals are not a suspect class.[38] In addition, even state courts that held that homosexuals had a right to either civil unions or marriage did not find that they constituted a suspect class. *See Baker v. State*, (1999) 170 Vt. 194 (under the state constitution's common benefits clause, plaintiffs seeking same-sex marriage are entitled to benefits and obligations like those accompanying marriage); *Goodridge v. Department of Public Health* , (Mass. 2003) 798 N.E. 2d 941(finding that denying marriage to same-sex couples violates equal protection under the rational basis test).

Similarly, this Court has struck down policies that arbitrarily discriminate against homosexuals, but has not determined that homosexuals constitute a suspect class. *See e.g., Gay Law Students Assn. v. Pacific*

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[38] *See Lofton v. Sec'y of Dep't. of Children and Family Servs.*, (11th Cir. 2004) 358 F.3d 804, *cert. denied*, 531 U.S. 1081 (2005); *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati* , (6th Cir.1997) 128 F.3d 289; *Thomasson v. Perry*, (4th Cir.1996) 80 F.3d 915; *Steffan v. Perry,* (D.C. Cir.1994) 41 F.3d 677; *High Tech Gays v. Defense Indus. Sec. Clearance Office*, (9th Cir.1990) 895 F.2d 563; *Woodward v. United States,* (Fed. Cir.1989) 871 F.2d 1068; *Town of Ball v. Rapides Parish Police Jury*, (5th Cir.1984) 746 F.2d 1049; *Rich v. Sec'y of the Army*, (10th Cir.1984) 735 F.2d 1220; *Able v. United States*, (2d Cir.1998) 155 F.3d 628; *Richenberg v. Perry*, (8th Cir.1996) 97 F.3d 256.

Telephone and Telegraph Co. (1979) 24 Cal.3d 448, 474 [156 Cal.Rptr. 14, 595 P.2d 592]. (striking down a telephone company policy that prohibited the hiring of homosexuals); *Stouman v. Reilly* (1951) 37 Cal.2d 713, 718 [234 P.2d 969] (reversing an administrative decision which would have required bars and restaurants to refuse to serve homosexuals in order to keep their liquor licenses). These decisions were not based upon a finding that homosexuals were a specially protected "suspect" class, but upon the premise that equal protection "does not preclude the state from drawing any distinctions between different groups of individuals but it does require that, at a minimum, persons similarly situated with respect to the legitimate purpose of the law receive like treatment." *Brown v. Merlo* (1973) 8 Cal.3d 855, 861[106 Cal.Rptr.388, 506 P.2d 212]."'The Equal Protection Clause ... den[ies] to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute.'" *Id.* (citation omitted). Therefore, a policy or statute that prohibited homosexuals from working for the telephone company violated equal protection because sexual orientation is unrelated to a person's employment qualifications. *Gay Law Students*, 24 Cal.3d at 474. Similarly, a regulation that prohibited restaurants from serving homosexuals violated equal protection because sexual orientation is unrelated to a person's

ability to patronize a restaurant. *Stouman*, 37 Cal.2d at 718.

None of these decisions created a new suspect class of sexual orientation, and this Court should reject the Plaintiffs' pleas to do so here. Defining marriage as the union of one man and one woman might disparately affect homosexuals in that they cannot exercise their preference to marry someone of the same sex. That differential effect is not *ipso facto* an illegitimate distinction since defining marriage as the union of one man and one woman is the acknowledgment that marriage is a social institution aimed at bridging the sexual divide to provide for the perpetuation of society. Such distinctions are permitted under the equal protection clause, so there is no impermissible discrimination. Consequently, as the Court of Appeal concluded, there is no justification for creating a new suspect classification of sexual orientation for equal protection analysis. *In re Marriage Cases*, 143 Cal.App. 4th at 923. Consequently, the statutes defining marriage as the union of one man and one woman are subject to rational basis review.

C. Defining Marriage As The Union Of One Man And One Woman Does Not Deprive Homosexuals Of A Fundamental Right.

All of the parties and the Court of Appeal agree that marriage is a fundamental liberty interest protected by the state and federal constitutions. The disagreement arises when Plaintiffs define marriage as the right to join

with whomever one chooses regardless of sex and assert that any attempt to define the participants in marriage infringes upon that fundamental right. The Court of Appeal rightly rejected Plaintiffs' assertions and held that defining marriage as the union of one man and one woman does not infringe upon a fundamental right.

1. The Court of Appeal properly identified the right sought by Plaintiffs as the right to same-sex marriage and properly concluded that there is no such fundamental right protected by the California Constitution.

When embarking on an analysis of a fundamental right, the court must first carefully and specifically define the right. *Dawn D. v. Superior Court* (1998) 17Cal.4th 932, 940 [72 Cal. Rptr.2d 871, 952 P.2d 1139].

> Judicial restraint in the area of defining fundamental rights is especially important because "[b]y extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court."

Id. at 939 (citing *Washington v. Glucksberg* (1997) 521 U.S. 702, 720). Consequently, courts are generally "reluctant to expand the catalog of rights protected as fundamental." *Glucksberg*, 521 U.S. at 720. That is particularly true since "only rights that are 'objectively, deeply rooted in this Nation's

history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed,' are regarded as fundamental." *Id.* at 720-721, *Dawn D.*, 17 Cal.4th at 940. Citing these precedents, the Court of Appeal held that Marriage "has traditionally been understood to describe only opposite-sex unions." *In re Marriage Cases*, 143 Cal.App.4th at 909. "Respondents, who are as free as anyone to enter such opposite-sex marriages, clearly seek something different here." *Id.* at 910. That "something different" – the right being sought by Plaintiffs – is the right to same-sex marriage, not simply marriage." *Id.* That right is not deeply rooted in the history of California or the United States. *Id.* at 911. In fact, with the exception of a two-year old ruling in Massachusetts, same-sex marriage "has never existed before" and so cannot be considered "deeply rooted." *Id.* "The novelty of this interest, more than anything else, is what precludes its recognition as a constitutionally protected fundamental right." *Id.*

The United States Supreme Court's ruling outlawing criminal sodomy does not change the conclusion. *Lawrence v. Texas* (2003) 539 U.S.558 utilized rational basis to invalidate Texas' law that criminalized private consensual homosexual acts between adults. The Court specifically stated that it was not addressing "whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.* at 578. In her

concurring opinion, Justice O'Connor more pointedly stated that invalidation of the anti-sodomy law "does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review," and suggested that "preserving the traditional institution of marriage" could be a legitimate state interest for distinguishing between homosexuals and heterosexuals. *Id.* at 585 (O'Connor, J. concurring). Therefore, rather than opening the door toward recognition of same-sex marriage, the *Lawrence* opinion further strengthened the concept that defining marriage as the union of one man and one woman does not impermissibly discriminate against homosexuals.

Decades of precedent memorialize what society established hundreds of years ago – a fundamental right of marriage defined as the union of one man and one woman. A man and a woman who are over the age of 18, unmarried, and not closely related can marry each other regardless of whether they are heterosexual or homosexual. Respondents, who are over the age of 18, unmarried and not closely related, can marry a person of the opposite sex. Consequently, as the Court of Appeal held, Respondents are not deprived of the fundamental right to marry. What Respondents are not permitted to do is to marry someone of the same sex. That undefined union is not a fundamental right under the California or United States Constitution. Therefore, denying

Respondents the right to "marry" a person of the same sex does not infringe upon a fundamental constitutional right.

2. *Other state appellate courts have consistently identified the right at issue as the fundamental right of marriage, not the unrestricted right to marry anyone a person chooses, and have found that defining marriage as the union of one man and one woman does not deprive homosexuals of a fundamental right.*

No federal or state court has done what Plaintiffs are asking this Court to do – find that there is a fundamental right to "same-sex marriage." Even the four justices of the Massachusetts Supreme Judicial Court did not find a fundamental right to marriage for same-sex couples. *See Goodridge v. Department of Public Health* (Mass. 2003) 798 N.E. 2d 941, 961 (stating that it was not necessary to reach fundamental right issue in light of finding that no rational basis existed for denying same-sex couples right to marry under state constitution). The New Jersey Supreme Court, which like the Vermont Supreme Court, determined that same-sex couples had to be given the same rights and benefits as married opposite-sex couples found that "same-sex marriage"is not a fundamental right under the state Constitution. *Lewis v. Harris* (N.J. 2006) 188 N.J. 415, 441. The New Jersey court's findings echo those of the Court of Appeal in this case:

> Despite the rich diversity of this State, the tolerance and goodness of its people, and the many recent advances made by gays and lesbians toward achieving social acceptance and equality under the law, we cannot find that a right to same-sex marriage is so deeply rooted in the traditions, history, and conscience of the people of this State that it ranks as a fundamental right. When looking for the source of our rights under the New Jersey Constitution, we need not look beyond our borders. Nevertheless, we do take note that no jurisdiction, not even Massachusetts, has declared that there is a fundamental right to same-sex marriage under the federal or its own constitution

Id. Similarly, the Vermont Supreme Court recognized that "marriage" must remain between one man and one woman when it held that the Vermont Constitution required that same-sex couples be afforded the same benefits, but did not require the state to issue marriage licenses to same-sex couples. *Baker v. State*, (1999) 170 Vt. 194. "The evidence demonstrates a clear legislative assumption that marriage under our statutory scheme consists of a union between a man and a woman." *Id.* at 204.

The New York Court of Appeal also found, as did the Court of Appeal in this case, that the proper identification of Plaintiffs' claim is one seeking the right to same-sex marriage, not the fundamental right to marry. *Hernandez v. Robles* (2006) 7 N.Y. 3d 338, 363. Properly characterized, it is clear in this case, as it was clear in *Hernandez,* that defining marriage as the union of one man and one woman does not restrict the exercise of a fundamental right. *See Id.* Utilizing the Supreme Court's analysis in *Glucksberg,* the *Hernandez* court

clarified that the right sought by plaintiffs was not the fundamental right to marry, but the right to marry a person of the same sex. *Id.* "While many U.S. Supreme Court decisions recognize marriage as a fundamental right protected under the Due Process Clause, all of these cases understood the marriage right as involving a union of one woman and one man (*see e.g. Turner v. Safley,* 482 U.S. 78 (1987); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942))." *Id.* at 369 (Graffeo, J., concurring). "[T]o ignore the meaning ascribed to the right to marry in these cases and substitute another meaning in its place is to redefine the right in question and to tear the resulting new right away from the very roots that caused the U.S. Supreme Court and this Court to recognize marriage as a fundamental right in the first place." *Id.* With these principles in mind, the *Hernandez* court found "the right to marry someone of the same sex . . . is not 'deeply rooted'; it has not even been asserted until relatively recent times." *Id.* at 362. The *Hernandez* court rejected the plaintiffs' attempt to analogize their case to *Lawrence v. Texas*. "Plaintiffs do not, as the petitioners in *Lawrence* did, seek protection against state intrusion on intimate, private activity. They seek from the courts access to a State-conferred benefit that the Legislature has rationally limited to opposite-sex couples." *Id.* at 363. "We conclude that, by defining marriage as it has, the New York Legislature

has not restricted the exercise of a fundamental right." *Id.*

Washington's Supreme Court similarly found no fundamental right to same-sex marriage based upon the principles set forth in *Glucksberg*. *Andersen v. King County* (Wash. 2006) 138 P.3d 963, 979. "The vast majority of states historically and traditionally have contemplated marriage only as opposite-sex marriage, and the majority of states, including Washington, have recently reaffirmed this understanding and tradition." *Id.* "Federal decisions have found the fundamental right to marry at issue only where opposite-sex marriage was involved. *Loving, Zablocki*, and *Skinner* tie the right to procreation and survival of the race." *Id.* Even cases that did not specifically link marriage to procreation, such as *Turner v. Safley*, 482 U.S. 78 (1987), did not change the fact that the fundamental right to marriage is anchored in the tradition of marriage as the union of one man and one woman. *Id.* "Plaintiffs have not established that at this time the fundamental right to marry includes the right to marry a person of the same sex." *Id.* The court noted that several Washington state statutes and municipal codes provide protection to homosexuals. *Id.* "That some laws provide such protections show change is occurring in our society, but community standards at this time do not show a societal commitment to inclusion of same-sex marriage as part of the fundamental right to marry." *Id.* The Washington court further noted that there

is no authority supporting a right to same-sex marriage. *Id.*

The Arizona Court of Appeals similarly explained that "[a]lthough same-sex relationships are more open and have garnered greater social acceptance in recent years, same-sex marriages are neither deeply rooted in the legal and social history of our Nation or state nor are they implicit in the concept of ordered liberty." *Standhardt v. Superior Court* (Ariz. Ct. App. 2004) 77 P.3d 451, 459. While "a homosexual person's choice of life partner is an intimate and important decision . . . not all important decisions sounding in personal autonomy are protected fundamental rights. . . . The history of the law's treatment of marriage as an institution involving one man and one woman, together with recent, explicit reaffirmations of that view, lead invariably to the conclusion that the right to enter a same-sex marriage is not a fundamental liberty interest protected by due process." *Id.* at 459-60. *See also, Dean v. District of Columbia* (D.C. 1995) 653 A.2d 307 (same-sex marriage is not a fundamental right); *Morrison v. Sadler* (Ind 2005) 821 N.E.2d 15 (Indiana Constitution does not require judicial recognition of same-sex marriage); *Jones v. Hallahan* (Ky. 1973) 501 S.W.2d 588, 590 (finding no constitutional sanction or protection of the right of marriage between persons of the same sex); *Baker v. Nelson* (1971) 291 Minn. 310 (marriage has always

been a union of a man and a woman).[39]

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[39] These are a few examples of state and federal court cases that have upheld marriage as the union of one man and one woman against claims that same-sex couples are being denied certain rights. *See e.g.*, Arizona: *Standhardt v. Superior Court ex rel County of Maricopa*, 77 P.3d 451 (Ariz. App. 2003); Arkansas: *May v. Daniels*, (2004) 359 Ark. 100; Colorado: *Adams v. Howerton*, 673 F.2d 1036 (9th Cir.), *cert. denied,* 458 U.S. 1111 (1982) (male America citizen and male Australian alien who had been ceremonially "married" by a minister in Colorado does not qualify alien as citizen's spouse); Connecticut: *Kerrigan v. State* – presently under consideration by Supreme Court of Connecticut; *Rosengarten v. Downes*, 802 A.2d 170 (Conn. App. Ct.), *cert. granted in part but dismissing case as moot upon death of the party*, 806 A.2d 1066 (Conn. 2002) (a Vermont civil union is not "marriage" recognized under this state because the union was not entered into between one man and one woman); District of Columbia: *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995) (marriage statute prohibited clerk from issuing license to same-sex couple and same-sex marriage is not a fundamental right protected by the Due Process Clause); Florida: *Wilson v. Ake*, (M.D. Fla. 2005) 354 F. Supp. 2d 1298; *Frandsen v. County of Brevard*, (Fla. Ct. App. 2001), 800 So. 2d 757, 759, 760 *rev. denied*, 828 So. 2d 386 (Fla. 2002) (classifications based on sex are not subject to strict scrutiny, noting that the Constitution Revision Commission refused to add the term "sex" to the Florida constitution so as to avoid any possibility that Florida courts might conclude the provision required recognition of same-sex marriages); *Kantaras v. Kantaras*,(Fla. Ct. App. 2004) 884 So.2d 155 (rejecting transsexual marriage based on Florida DOMA which bans same-sex marriage); Georgia: *Burns v. Burns* (Ga. App. 2002) 560 S.E.2d 47, *reconsideration denied, cert. denied* (2002) (a Vermont civil union is not marriage, and even if it were, Georgia would not recognize it as such, because the state authorizes only the union of one man and one woman and prohibits same-sex marriage); Hawaii: *Baehr v. Lewin* (Haw. 1993) 852 P.2d 44, *aff'd*, 950 P.2d 1234 (Haw. 1997) (authorizing strict scrutiny for marriage classifications but decision was overruled by constitutional referendum); Illinois: *In re Estate of Hall* (Ill. App. 1998) 707 N.E.2d 201, 206(challenge to statute proscribing same-sex marriage was moot and petitioner was never legally married – "We cannot retroactively redefine petitioner and Hall's relationship as a lawful marriage or even confer the benefits of a legal marriage upon the relationship. If we did, we would essentially be resurrecting common law marriage . . ."; Indiana: *Morrison v. Sadler* (Ind 2005) 821 N.E.2d 15 Iowa: *Varnum v. Brien* pending in Iowa District Court; Kansas: *In*

re Estate of Gardiner (Kan. 2002) 42 P.3d 120(a post-operative male-to-female transsexual is not a woman within the meaning of the statutes recognizing marriage, and thus a marriage of a male-to-female transsexual to another male is void); Kentucky: *Jones v. Hallahan* (Ky. 1973) 501 S.W.2d 588 (a same-sex union is not recognized as marriage); Louisiana: *Forum for Equality PAC v. McKeithan*, (La.2005) 893 So.2d 738; *Forum for Equality PAC v. New Orleans,* (La. 2004) 886 So.2d 1084; Maryland: *Conaway v. Deane* -- presently before Court of Appeals; Minnesota: *Baker v. Nelson* (Minn. 1971) 191 N.W.2d 185, 186 (upholding statute which authorizes marriage between persons of the same sex, stating "The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis" and recognizing "there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex."); Nebraska: *Citizens for Equal Protection v. Bruning* (8th Cir. 2006) 455 F.3d 859 (upholding constitutional amendment defining marriage as the union of one man and one woman); New Jersey: *M.T. v. J.T.* (N.J. App. 1976) 355 A.2d 204 (male transsexual who underwent sex-reassignment surgery may not be considered female for marital purposes); *Lewis v. Harris* (N.J. 2006) 188 N.J. 415 (No fundamental right to same-sex "marriage," but legislature must develop scheme to grant rights to same-sex partners). New York: *Hernandez v. Robles* (2006) 7 N.Y. 3d 338; *Anonymous v. Anonymous*, (1971) 325 N.Y.S.2d 499 (a marriage between two males was a nullity notwithstanding that "husband" believed "wife" was a female at the time of the ceremony, and notwithstanding that "she" had subsequent sex surgery); *Storrs v. Holcomb* (1996) 645 N.Y.S.2d 286 ("same-sex marriage . . . is not presently recognized under the laws of any state of the Union", the "long tradition of marriage, understood as the union of male and female, testifies to a contrary political, cultural, religious and legal consensus [opposed to same-sex marriage] concluding that New York does not recognize or authorize same-sex marriage and that the City Clerk correctly refused to issue the license."); *In re Estate of Cooper* (N.Y. Fam. Ct. 1990) 564 N.Y.S.2d 684, 688 ("the state has a compelling interest in fostering the traditional institution of marriage (whether based on self-preservation, procreation, or nurturing and keeping alive the concept of marriage and family as a basic fabric of our society), as old and as fundamental as our entire civilization, which institution is deeply rooted and is not authorized);Ohio: *In re Ladrach* (Ohio Probate Court 1987) 513 N.E.2d 828("There is no authority in Ohio for the issuance of a marriage license to consummate a marriage between a post-operative male-to-female transsexual

The Court of Appeal correctly concluded that defining marriage as the union of one man and one woman does not deprive Plaintiffs of a fundamental right. *In re Marriage Cases*, 143 Cal.App.4th at 912. "Because marriage in this state has always been defined, implicitly or explicitly, as the union of opposite-sex individuals, the fundamental right respondents (Plaintiffs) urge us to recognize requires a redefinition of the term 'marriage.'" *Id.* at 912-913. The Court of Appeal rightly concluded that "Courts in this state simply do not have authority to redefine marriage." *Id.* at 913. This Court must reach the same conclusion and refuse to apply strict scrutiny to statutes that define marriage

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person and a male person"); Oregon: *Li v. Oregon* (2005) 338 Or. 376; Pennsylvania: *De Santo v. Barnsly* (Pa. Super. Ct. 1984) 476 A.2d 952 (two persons of the same sex cannot contract a common-law marriage); Texas: *Littleton v. Prange* (Tex. App. 1999) 9 S.W.3d 223, *cert. denied*, 531 U.S. 870 (2000) (ceremonial "marriage" between a man and a transsexual born as a man, who was surgically and chemically altered to have the physical characteristics of a woman, is not valid); Vermont: *Baker v. State* (Vt. 1999) 744 A.2d 864(holding that while the Vermont constitution requires that same-sex couples be afforded the same benefits of traditional marriage, the constitution does not require the state to issue a same-sex marriage license); Washington: *Andersen v. King County* (Wash. 2006) 138 P.3d 963 (declaring statutes defining marriags the union of one man and one woman constitutional); *Singer v. Hara* (Wash. App. 1974) 522 P.2d 1187, 1192(statutory prohibition of same-sex marriage does not violate state constitution).

as the union of one man and one woman.

III. CENTURIES OF HISTORICAL AND SOCIAL EXPERIENCE AS WELL AS LEGAL PRECEDENT ESTABLISH EMINENTLY RATIONAL STATE INTERESTS IN DEFINING MARRIAGE AS THE UNION OF ONE MAN AND ONE WOMAN.

Defining marriage as the union of one man and one woman establishes instead of impairs the fundamental right of marriage. Defining marriage as the union of one man and one woman does not discriminate on the basis of sex or sexual orientation and does not violate the rights or privacy or free expression. Therefore, the marriage statutes are subject to rational basis review. *D'Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1, 16. Under that standard, the marriage statutes are presumed to be constitutional and can only be invalidated if they bear no rational relationship to a conceivable legitimate state purpose. *Id.* The state interests upon which the social institution of marriage has been constructed far exceed this standard. In fact, state's interests in maintaining the definition of marriage are so compelling, that they would satisfy even the stringent strict scrutiny standard.

A. Fostering And Preserving Responsible Procreation Remains A Key State Interest In Defining Marriage As The Union Of One Man And One Woman.

The Attorney General's cavalier dismissal of the state's interest in fostering responsible procreation does not mean that the interest fails to exist. Indeed, since it is an interest that transcends legal recognition, nothing that the

Attorney General, nor any other party, can say can change the fact that marriage and procreation are inextricably linked. *See e.g., Baker v. Baker* (1859) 13 Cal. 87, 94. ("The public is interested in the marriage relation and in the maintenance of its integrity, as it is the foundation of the social system.").

1. The link between marriage and procreation has not been broken by the advent of assisted reproduction.

Since the early days of statehood, this Court has recognized that marriage and procreation are inextricably linked. *See Baker v. Baker*; *De Burgh v. De Burgh* (1952) 39 Cal.2d 858, 864 (Since the family is the core of our society, the law seeks to foster and preserve marriage); *Marvin v. Marvin* (1976)18 Cal.3d 660, 684 ("The joining of the man and woman in marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime."). Plaintiffs and the Attorney General claim that the advent of assisted reproduction technology, which makes it possible for same-sex couples to raise children, means that the link between marriage and procreation has been broken. Nothing could be further from the truth.

Marriage scholar William Duncan aptly summarizes why this Court must reject the claim that the link between marriage and procreation has

become irrelevant.

> Our law and culture have always understood marriage as the primary vehicle for the creation of a family. In spite of technological changes and shifting sexual mores, it is still the case that the only way for conception to occur, absent third-party intervention, is in a relationship between a man and a woman. This is true even when the parties do not intend their relationship to result in the conception of a child.[40]

By contrast, a sexual relationship between same-sex partners cannot result in conception, so only the intervention of a third party makes procreation or adoption possible.[41] With same-sex relationships, procreation can never be "unintended."

> Thus, as regards the state's interest in procreation, same- and opposite-sex couples are in very different positions. The state has an interest in all opposite-sex couples because all are theoretically capable of procreation. With same-sex couples, no state interest in procreation is raised by their relationship unless some outside intervening circumstance creates a procreative capacity.[42]

Quoting Bertrand Russell, David Blankenhorn notes that "it is through children alone that sexual relations become of importance to society, and worthy to be taken cognizance of by a legal institution. Thus the main purpose

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40 William C. Duncan, *The State Interests in Marriage*, 2 AVE MARIA L. REV. 153, 165 (2004).

41 *Id.*

42 *Id.* at 166.

of marriage is to replenish the human population of the globe."[43] Mr. Blankenhorn explains that the connection between marriage and procreation is not an outmoded concept that can be discarded with the dawn of technology. Instead, scores of anthropological studies have demonstrated that the link between marriage and procreation is an integral and necessary part of human development.[44]"For anthropologists working from an evolutionary perspective, the linkage between marriage and sex could hardly be plainer – in part because for these scholars both sex and marriage are inextricably linked to procreation, which is the starting point for the study of human evolution and of human groups."[45]

Other marriage scholars affirm the continuing importance of the link between marriage and procreation. Professor George Dent wrote that "[v]ery few social institutions are found in all cultures throughout history. Heterosexual marriage is one of the few. This fact alone argues that heterosexual marriage is important to the survival of a culture." [46] Maggie Gallagher summarizes it best: "Societies need babies. It is a truism frequently

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43 Blankenhorn at p. 17 (quoting Bertrand Russell, M ARRIAGE AND MORALS (London: George Allen and Unwin Ltd., 1929) pp 125, 189).

44 *Id.* at 93.

45 *Id.*

46 George W. Dent, Jr. *Traditional Marriage: Still Worth Defending*, 18 BYU J. PUB. L. 419, 428 (2004).

forgotten by large complex societies: only societies that reproduce survive."[47] Obviously, the state has an interest in ensuring for the survival of society. Consequently, it is eminently rational for the state to give particular recognition and bestow rights and benefits upon the union that is necessary to create future generations. The fact that technology has developed to assist in reproduction does not lessen the legitimacy of giving particular recognition to the union of a man and a woman.

2. State and federal courts addressing similar challenges to marriage statutes have re-affirmed the link between marriage and procreation despite new assisted reproduction technologies.

State and federal courts facing comparable challenges to marriage statutes have rejected similar claims that assisted reproduction technology has broken the link between marriage and procreation. In *Andersen* the Washington Supreme Court held that "[u]nder the highly deferential rational basis inquiry, encouraging procreation between opposite-sex individuals within the framework of marriage is a legitimate government interest furthered by limiting marriage to opposite-sex couples." *Andersen v. King County* (Wash. 2006) 138 P.3d 963, 982.

> [A]s *Skinner* [*v. Oklahoma*, 316 U.S. 535 (1942)] , *Loving* [*v.*

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[47] Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 LA.L. REV. 773, 789 (2002)

> *Virginia*, 388 U.S. 1 (1967)], and *Zablocki* [*v. Redhail*, 434 U.S. 374 (1978)] indicate, marriage is traditionally linked to procreation and survival of the human race. Heterosexual couples are the only couples who can produce biological offspring of the couple. And the link between opposite-sex marriage and procreation is not defeated by the fact that the law allows opposite-sex marriage regardless of a couple's willingness or ability to procreate. The facts that all opposite-sex couples do not have children and that single-sex couples raise children and have children with third party assistance or through adoption do not mean that limiting marriage to opposite-sex couples lacks a rational basis. Such over- or under-inclusiveness does not defeat finding a rational basis.

Andersen,138 P.3d at 982-983."We conclude that limiting marriage to opposite-sex couples furthers the State's interests in procreation and encouraging families with a mother and father and children biologically related to both." *Id.* at 985.

Similarly, Judge Graffeo of the New York Court of Appeals noted that:

> The binary nature of marriage-its inclusion of one woman and one man-reflects the biological fact that human procreation cannot be accomplished without the genetic contribution of both a male and a female. Marriage creates a supportive environment for procreation to occur and the resulting offspring to be nurtured. Although plaintiffs suggest that the connection between procreation and marriage has become anachronistic because of scientific advances in assisted reproduction technology, the fact remains that the vast majority of children are conceived naturally through sexual contact between a woman and a man.

Hernandez v. Robles (N.Y. 2006) 7 N.Y. 3d 338, 370 (Graffeo, J. concurring).

The Eighth Circuit Court of Appeals agreed with the State of Nebraska

that "the many laws defining marriage as the union of one man and one woman and extending a variety of benefits to married couples are rationally related to the government interest in 'steering procreation into marriage.'" *Citizens for Equal Protection v. Bruning* (8th Cir. 2006) 455 F.3d 859, 867. The *Bruning* court noted that the state could rationally find that "[b]y affording legal recognition and a basket of rights and benefits to married heterosexual couples, such laws 'encourage procreation to take place within the socially recognized unit that is best situated for raising children.'" *Id.* "Whatever our personal views regarding this political and sociological debate, we cannot conclude that the State's justification 'lacks a rational relationship to legitimate state interests.'" *Id* at 867-868.

Indiana's Court of Appeals similarly found that "the legislative classification of extending marriage benefits to opposite-sex couples but not same-sex couples is reasonably related to a clearly identifiable, inherent characteristic that distinguishes the two classes: the ability or inability to procreate by 'natural' means." *Morrison v. Sadler*, 821 N.E. 2d 15, 25 (Ind. Ct. App. 2005).

> What does the difference between "natural" reproduction on the one hand and assisted reproduction and adoption on the other mean for constitutional purposes? It means that it impacts the State of Indiana's clear interest in seeing that children are raised in stable environments. Those persons who have invested the significant time, effort, and expense associated with assisted

> reproduction or adoption may be seen as very likely to be able to provide such an environment, with or without the "protections" of marriage, because of the high level of financial and emotional commitment exerted in conceiving or adopting a child or children in the first place.
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> By contrast, procreation by "natural" reproduction may occur without any thought for the future. The State, first of all, may legitimately create the institution of opposite-sex marriage, and all the benefits accruing to it, in order to encourage male-female couples to procreate within the legitimacy and stability of a state-sanctioned relationship and to discourage unplanned, out-of-wedlock births resulting from "casual" intercourse. Second, even where an opposite-sex couple enters into a marriage with no intention of having children, "accidents" do happen, or persons often change their minds about wanting to have children. The institution of marriage not only encourages opposite-sex couples to form a relatively stable environment for the "natural" procreation of children in the first place, but it also encourages them to stay together and raise a child or children together if there is a "change in plans."

Id. The Indiana court explained that the state's interest is not necessarily to encourage and promote "natural procreation" at the expense of other forms of becoming parents. *Id.* Instead, the state's interest in defining marriage as the union of one man and one woman "encourages opposite-sex couples who, by definition, are the only type of couples that can reproduce on their own by engaging in sex with little or no contemplation of the consequences that might result, i.e. a child, to procreate responsibly." *Id.* "The institution of opposite-sex marriage both encourages such couples to enter into a stable relationship before having children and to remain in such a relationship if children arrive during the marriage unexpectedly." *Id.* Redefining marriage to include same-

sex couples "would not further this interest in heterosexual 'responsible procreation.'" *Id.* Consequently, Indiana's law defining marriage as the union of one man and one woman satisfies the rational relationship test. *Id.*

The Arizona Court of Appeals similarly found that the institution of marriage provides the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other. *Standhardt v. Superior Court* (Ariz. Ct. App. 2003) 77 P.3d 451, 463. The *Standhardt* court rejected plaintiffs' arguments that defining marriage as the union of one man and one woman is not rationally related to the state's interest in fostering responsible procreation because opposite-sex couples are not required to procreate in order to marry.

> Allowing all opposite-sex couples to enter marriage under Arizona law, regardless of their willingness or ability to procreate, does not defeat the reasonableness of the link between opposite-sex marriage, procreation, and child-rearing. First, if the State excluded opposite-sex couples from marriage based on their intention or ability to procreate, the State would have to inquire about that subject before issuing a license, thereby implicating constitutionally rooted privacy concerns. Second, in light of medical advances affecting sterility, the ability to adopt, and the fact that intentionally childless couples may eventually choose to have a child or have an unplanned pregnancy, the State would have a difficult, if not impossible, task in identifying couples who will never bear and/or raise children. Third, because opposite-sex couples have a fundamental right to marry, *Loving* [*v. Virginia*], 388 U.S. at 12, 87 S.Ct. 1817, excluding such couples from marriage could only be justified by a compelling state interest, narrowly tailored to achieve that interest, *Glucksberg*[*v. Washington*], 521 U.S. at 721, 117 S.Ct.

> 2258, which is not readily apparent. For these reasons, the State's decision to permit all qualified opposite-sex couples to marry does not defeat the reasonableness of the link between opposite-sex marriage, procreation, and child-rearing.

Id. at 462. The *Standhardt* court also rejected the argument that linking marriage and procreation is not reasonable because same-sex couples also raise children who would benefit from the stability provided by marriage. *Id.*

> Likewise, although some same-sex couples also raise children, exclusion of these couples from the marriage relationship does not defeat the reasonableness of the link between opposite-sex marriage, procreation, and child-rearing. Indisputably, the only sexual relationship capable of producing children is one between a man and a woman. The State could reasonably decide that by encouraging opposite-sex couples to marry, thereby assuming legal and financial obligations, the children born from such relationships will have better opportunities to be nurtured and raised by two parents within long-term, committed relationships, which society has traditionally viewed as advantageous for children. Because same-sex couples cannot by themselves procreate, the State could also reasonably decide that sanctioning same-sex marriages would do little to advance the State's interest in ensuring responsible procreation within committed, long-term relationships.

Id. at 462-463. "We hold that the State has a legitimate interest in encouraging procreation and child-rearing within the marital relationship, and that limiting marriage to opposite-sex couples is rationally related to that interest." *Id.* at 463-464.

In his dissent in *Goodridge v. Department of Public Health* (Mass. 2003) 798 N.E. 2d 941, Justice Cordy explained that the Legislature could

rationally conclude that:

> So long as marriage is limited to opposite-sex couples who can at least theoretically procreate, society is able to communicate a consistent message to its citizens that marriage is a (normatively) necessary part of their procreative endeavor; that if they are to procreate, then society has endorsed the institution of marriage as the environment for it and for the subsequent rearing of their children; and that benefits are available explicitly to create a supportive and conducive atmosphere for those purposes. If society proceeds similarly to recognize marriages between same-sex couples who cannot procreate, it could be perceived as an abandonment of this claim, and might result in the mistaken view that civil marriage has little to do with procreation: just as the potential of procreation would not be necessary for a marriage to be valid, marriage would not be necessary for optimal procreation and child rearing to occur. In essence, the Legislature could conclude that the consequence of such a policy shift would be a diminution in society's ability to steer the acts of procreation and child rearing into their most optimal setting

798 N.E.2d at 1003 (Cordy, J. dissenting).

Numerous other federal and state courts have confirmed the continuing validity of the link between procreation and marriage. *See e.g., Adams v. Howerton* (9th Cir. 1982) 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff'd*, 673 F.2d 1036("The state has a compelling interest in encouraging and fostering procreation of the race."); *Dean v. District of Columbia* (D.C. 1995) 653 A.2d 307, 337 (finding that this "central purpose . . . provides the kind of rational basis . . . permitting limitation of marriage to heterosexual couples"); *Baker v. Nelson* (1971) 291 Minn. 310, *appeal dismissed for want of a*

substantial federal question, 409 U.S. 810 (1972) ("The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis").

The link between marriage and procreation remains as relevant today as it did in the years before assisted reproduction. Protecting and strengthening that link is a critical state interest, and retaining the definition of marriage as the union of one man and one woman is rationally related to that interest.

B. Defining Marriage As The Union Of One Man And One Woman Promotes The Optimal Environment For the Rearing Of Children.

The state's interest in responsible procreation includes not only an interest in having children born into a marriage relationship, but also an interest in promoting the optimal environment for the rearing of children. Numerous courts have recognized that the state purpose of furthering procreation where both the mother and father are present to raise the child is at least rational, if not compelling. As Justice Powell said:

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. The law does not create families, it creates a structure in which family life can be legally recognized and protected. Redefining marriage by court decree would change this orientation. It would shift the legal posture of the state from recognizing a naturally recurring relationship (the joining of men and women in a relationship open to creating new life) to creating the institution (any two people whom the law chooses

> to recognize). The state would become the creator of families and thus turn the family into a mechanism for imposing state values on individuals.

Bellotti v. Baird (1979) 443 U.S. 622, 638 (1979) (plurality opinion) (quoting *Prince v. Massachusetts* (1944) 321 U.S. 158, 166). Similarly, the Washington Supreme Court held that "the legislature was entitled to believe that providing that only opposite-sex couples may marry will encourage procreation and child-rearing in a 'traditional' nuclear family where children tend to thrive." *Andersen v. King County* (Wash. 2006) 138 P.3d 963, 983. The New York Court of Appeals discussed in detail how defining marriage as the union of one man and one woman is rationally related to the state's interest in promoting the welfare of children.

> First, the Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships. Heterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not. Despite the advances of science, it remains true that the vast majority of children are born as a result of a sexual relationship between a man and a woman, and the Legislature could find that this will continue to be true. The Legislature could also find that such relationships are all too often casual or temporary. It could find that an important function of marriage is to create more stability and permanence in the relationships that cause children to be born. It thus could choose to offer an inducement-in the form of marriage and its attendant benefits-to opposite-sex couples who make a solemn, long-term commitment to each other. The Legislature could find that this rationale for marriage does not apply with comparable force to same-sex couples. These couples can become parents by adoption, or by artificial insemination or

> other technological marvels, but they do not become parents as a result of accident or impulse. The Legislature could find that unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples, and thus that promoting stability in opposite-sex relationships will help children more. This is one reason why the Legislature could rationally offer the benefits of marriage to opposite-sex couples only.
>
> There is a second reason: The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like. It is obvious that there are exceptions to this general rule-some children who never know their fathers, or their mothers, do far better than some who grow up with parents of both sexes-but the Legislature could find that the general rule will usually hold.

Hernandez v. Robles (N.Y. 2006) 7 N.Y.3d 338, 359-360. Notably, the plaintiffs in *Hernandez* argued, as do the Plaintiffs here, that "a home with two parents of different sexes has no advantage, from the point of view of raising children, over a home with two parents of the same sex." *Id.* at 360. The Court responded, "Perhaps they are right, but the Legislature could rationally think otherwise," which is all that is required under rational basis review. *Id.*

Even the Massachusetts Supreme Judicial Court agreed that marriage is central to the welfare of the community and that "marital children reap a measure of family stability and economic security based on their parents' legally privileged status that is largely inaccessible, or not as readily

accessible, to nonmarital children." *Goodridge v. Dep't of Public Health* (Mass. 2003) 798 N.E.2d 941, 956 - 957. In his dissent, Justice Cordy expounded upon this aspect of marriage:

> The marital family is also the foremost setting for the education and socialization of children. Children learn about the world and their place in it primarily from those who raise them, and those children eventually grow up to exert some influence, great or small, positive or negative, on society. The institution of marriage encourages parents to remain committed to each other and to their children as they grow, thereby encouraging a stable venue for the education and socialization of children.[citations omitted].More macroscopically, construction of a family through marriage also formalizes the bonds between people in an ordered and institutional manner, thereby facilitating a foundation of interconnectedness and interdependency on which more intricate stabilizing social structures might be built.

Id. at 996 (Cordy, J. dissenting). "It is difficult to imagine a State purpose more important and legitimate than ensuring, promoting, and supporting an optimal social structure within which to bear and raise children. At the very least, the marriage statute continues to serve this important State purpose." *Id.* at 997. Justice Cordy noted that under rational basis review, the court is required to make deferential assumptions about the Legislature's decision-making.

> We must assume that the Legislature (1) might conclude that the institution of civil marriage has successfully and continually provided this structure over several centuries (2) might consider and credit studies that document negative consequences that too often follow children either born outside of marriage or raised in households lacking either a father or a mother figure, and

> scholarly commentary contending that children and families develop best when mothers and fathers are partners in their parenting ; and (3) would be familiar with many recent studies that variously support the proposition that children raised in intact families headed by same-sex couples fare as well on many measures as children raised in similar families headed by opposite-sex couples; support the proposition that children of same-sex couples fare worse on some measures; or reveal notable differences between the two groups of children that warrant further study.

Id. at 998-999. The Legislature "might consider and credit studies that document negative consequences that too often follow children either born outside of marriage or raised in households lacking either a father or a mother figure, and scholarly commentary contending that children and families develop best when mothers and fathers are partners in their parenting." *Id.* at 999.

> Taking all of this available information into account, the Legislature could rationally conclude that a family environment with married opposite-sex parents remains the optimal social structure in which to bear children, and that the raising of children by same-sex couples, who by definition cannot be the two sole biological parents of a child and cannot provide children with a parental authority figure of each gender, presents an alternative structure for child rearing that has not yet proved itself beyond reasonable scientific dispute to be as optimal as the biologically based marriage norm.

Id. at 999-1000. The prospect of such a rational conclusion is all that is needed for rational basis review.

Among the research alluded to by Justice Cordy are studies which have

found that defining marriage as the union of one man and one woman maintains boundaries that foster the social, physical and emotional development of children.[48] Studies have also consistently shown that children of married couples are more likely to do well in school than do children of same-sex couples, thus furthering the state's interests in helping children become desirable future citizens and in decreasing the need for public assistance.[49] "Married couples seem to offer the best environment for a child's social and educational development." [50] In addition, one study indicated that "[s]ame-gender sexual orientation is significantly associated with each of the suicidality measures"gauged in the study.[51] Specifically, "gay, lesbian, and bisexual young people are at increased risk of mental health problems, with these associations being particularly evident for measures of suicidal behavior and multiple disorder[s]."[52] Studies have also shown that children raised by

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48 *See* J. Nicolosi, A PARENTS' GUIDE TO PREVENTING HOMOSEXUALITY 22 (Downers Grove, Ill.: InterVarsity Press 2002).

49 *See* Sarantakos, *Children in Three Contexts: Family, Education and Social Development*, CHILDREN AUSTRALIA 29 (1996).

50 *See id.*

51 Fergusson, Horwood, and Beautrais, *Is Sexual Orientation Related to Mental Health Problems and Suicidality in Young People?*, 56 ARCHIVES OF GEN. PSYCHIATRY 876 (Oct. 1999).

52 *See id.*

same-sex couples are more likely to be promiscuous and become homosexual themselves.[53]

In addition, numerous studies have found that children raised in single parent household are more likely to have physical, mental, emotional and social problems.[54] Studies show that children raised in single-sex households experience an increase in infant mortality, commit more crime and have higher delinquency rates.[55] As Ms. Gallagher noted, "Children of divorced or unwed parents have lower grades and other measures of academic achievement, are more likely to be held back and less likely to finish high school."[56]

As Professor Dent observed, "By every measure – physical and mental health, academic performance, social adjustment, and obedience to law – children raised by their biological parents who are married and live together fare better than other children."[57] "The evidence is so overwhelming that the marriage movement, which seeks to shore up traditional marriage, has

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53 *See* Riggs, *Coparent or Second-Parent Adoptions by Same-Sex Couples* (Letter to the Editor), 109 PEDIATRICS 1193-1194 (June 2002).

54 *See* Mathew D. Staver, SAME-SEX MARRIAGE PUTTING EVERY HOUSEHOLD AT RISK 47 (Broadman & Holman, 2004).

55 *Id.*

56 Gallagher, *What is Marriage For*, at 787.

57 Dent at 428-429.

expanded beyond religious conservatives to include many moderates and liberals."[58] Professor Dent also said that parents – a mother and a father – are crucial for teaching norms, "not only for what they convey to their own children but also for what they contribute to their whole neighborhood. We have come to appreciate that what a child sees in her community can reinforce or undermine good norms."[59] "By conferring honor on marriage the law promotes that institution which maximizes the likelihood that parents will give their children good care. By contrast, recognizing same-sex marriage will sever the connection between marriage and child-rearing." [60] Professor Dent also disputed the private relationship premise which drives Plaintiffs' quest for marriage recognition.

> People find fulfillment in many human relationships, such as drinking buddies and bridge groups. However, the law generally leaves these to be handled privately. Marriage is different largely because of its importance to children, who cannot protect their own interests within the family as drinking buddies and members of bridge groups can.[61]

David Blankenhorn observed that "Marriage's main purpose is to make sure that any child born has two responsible parents, a mother and a fatherwho

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58 *Id.* at 429.

59 *Id.* at 430.

60 *Id.* at 431-432.

61 *Id.* at 432.

are committed to the child and committed to each other." [62] He referenced philosopher Sylvaine Agacinski's observation that;

> [E]ach child has a right to its "double origin." Humanity is divided into male and female. Each new child is born of one man (its father) and one woman (its mother). In a good society, the double origin of every child is recognized and respected. Unalterably denying or effacing a child's double origin in the name of adult freedom is morally wrong.[63]

It is not necessary that legislators, the parties or the Court agree with these scholars or the studies in order to satisfy the rational basis test. In addition, the fact that there might be other studies reaching different conclusions does not erase the presumption of constitutionality under rational basis review. It is sufficient to show that these and similar studies could provide the Legislature with a rational basis to decide that the state's interest in providing for the best interests of the child is best served by maintaining marriage as the union of one man and one woman.

C. Defining Marriage As The Union Of One Man And One Woman Fosters Equality And Relative Value Of The Sexes And Their Complementary Roles In Society.

Defining marriage as the union of one man and one woman also serves the important social function of fostering equality and optimal health and well-

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[62] Blankenhorn, at . 153.

[63] *Id.* at 197 (quoting Sylvaine Agacinski, *The Double Origin* in PURITY OF THE SEXES (New York: Columbia University Press, 2001) 99-110).

being between the sexes. As Professor Duncan explained,"marriage is necessary to bridge the differences between the sexes on a footing of equality for both."[64] Professor Duncan observed that "marriage provides two significant additional benefits to society which justify its preservation:"

> First, marriage provides an institution where men and women are valued equally. As currently understood, there can be no marriage without both sexes. Neither sex can be excluded without impairing the institution. This equality is not compelled by lawsuits, as has been the case with the integration of sex-segregated private clubs, but is intrinsic to the nature of the institution. Because the very nature of marriage requires equal participation by men and women, it sends a powerful message about the importance of each sex to society's fundamental unit. Related to this reality of sex equality in marriage is the message that the law of marriage conveys about the relative worth of men and woman, particularly in their roles as fathers and mothers. Redefining marriage to include same-sex couples is a legal endorsement of the fungibility of men and women, mothers and fathers. In other words, when the state says that "any two persons" are equivalent to a mother and father, it is also saying that a mother or a father makes no unique contribution to child well-being. In the United States there are 16,473,000 children living in mother-only homes and 3,297,000 children in father-only homes.In the face of these numbers, it is eminently reasonable for the state to shrink from sending a legal message that men (fathers) are not essential to marriage or that women (mothers) can be dispensed with without consequences. Marriage advances these state interests by acknowledging that a marriage cannot exist without both a man and a woman.[65]

Professor Wardle agrees that "the assumption that same-sex unions are

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64 Duncan at 171.

65 *Id.* at 171-172

fungible with marriages in terms of social policy is wrong."[66] "In reality, not all relationships are the same, and not all relationships are of equal value to children, to families, and to society."[67] "Marriage has an ethical or moral dimension lacking in other relationships that transfigures it into a truly unique institution and that can transform the individual men and women into caring and 'other-committed' husbands and wives, at the same time."[68] Professor Wardle observed that:

> The astounding thing about the argument for functional equivalence between marriage and other partnerships is that it has developed at a time in history when there is overwhelming evidence of the unique value and superior benefits of marriage compared to other adult intimate relationships. Married couples live longer, are healthier, report that they are happier, have lower rates of mental illness, have lower rates of substance abuse, earn more, save more, have more enjoyable sexual intercourse, experience less physical and emotional abuse.[69]

As is true with the studies cited immediately above, it is not necessary that the parties or the Court agree with Professor Duncan and Professor Wardle's conclusions, only that the studies provide a rational basis for defining marriage as the union of one man and one woman. As the Court of Appeal

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66 Wardle, *The "End" of Marriage* at 53.

67 *Id.* at 52.

68 *Id.*

69 *Id.*

said, "the question for purposes of rational basis review is indeed whether this system is irrational. We conclude that it is not." *In re Marriage Cases* (2006) 143 Cal.App.4th 873, 934. This Court must reach the same conclusion.

D. The State's Interests In Marriage Justify Maintaining Marriage As The Union Of One Man And One Woman Regardless Of Whether Alternative Legal Recognition Is Available To Homosexual Couples.

The Court of Appeal based its decision, in part, on the fact that same-sex couples had an essentially parallel institution available under the Domestic Partnership Act (AB 205). Plaintiffs have decried that conclusion, claiming that AB 205 relegates same-sex couples to a second-rate institution. Again attempting to analogize their situation to the situation faced by minorities and women in the 1960s and 1970s, Plaintiffs claim that creation of domestic partnerships by AB 205 is a return to the idea of "separate but equal" segregation. As is true with their analogy to the anti-miscegenation statutes, the analogy to segregated schools and facilities is based upon a faulty premise.

Plaintiffs rely upon school segregation cases such as *Brown v. Board of Education* (1954) 347 U.S. 483 and *United States v. Virginia* (1996) 518 U.S. 515 for their proposition that the creation of AB 205 domestic partnerships amounts to impermissible delegation of same-sex couples to a "separate but equal"institution. However, *Brown* and *Virginia* dealt with enactments that denied the parties a fundamental right based upon personal

characteristics that were irrelevant to the exercise of the fundamental right. In *Brown* and *Virginia*, the Supreme Court found that a person's race and sex, respectively, were irrelevant to their ability to obtain a public education. *Brown*, 347 U.S. at 493-494; *Virginia*, 518 U.S. at 548-550. Therefore, denying admittance to particular schools on the grounds of race or sex, whether by outright denial or creation of separate segregated institutions was unconstitutional. *Brown*, 347 U.S. at 494; *Virginia*, 518 U.S. at 548-550. These decisions are analogous to *Perez* and *Loving*, which struck down statutes that denied a man the fundamental right to marry a woman and a woman the fundamental right to marry a man based upon race, [70]but are dissimilar to the claims brought by Plaintiffs. As explained more fully above, defining marriage as the union of one man and one woman does not deny Plaintiffs of the fundamental right to marry. Unlike the minority and women students in *Brown* and *Virginia*, Plaintiffs have full access to the institution of marriage. They are not compelled to utilize a "separate but equal" institution in order to exercise the fundamental right to marry. They are not permitted to unite with a person of the same sex and demand that it be called marriage, any more than the plaintiffs in *Brown* and *Virginia* could join a health club and demand that it be called a public school. The plaintiffs in*Brown* and *Virginia*

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[70] *Loving v. Virginia* (1967) 388 U.S. 1, *Perez v. Sharp* (1948) 32 Cal.2d 711.

were unable to obtain a public education as defined by law because of their race or sex. Plaintiffs are not being denied access to marriage as defined by law at all, let alone because of their race, sex or sexual orientation. Plaintiffs do not like how the fundamental right is defined, but that does not correspond to a denial of the right. Since Plaintiffs have not been denied a fundamental right, the creation of AB 205 domestic partnerships does not amount to creation of an impermissible "separate but equal" institution.

As this Court said in *Koebke v. Bernardo Heights Country Club,* (2005) 36 Cal.4th 824, 844 n.5, " The policy favoring marriage is an affirmative policy that fosters and promotes the marital relationship and is not incompatible with some degree of legal recognition and protection for unmarried couples and individuals." Maggie Gallagher agrees that society's preference for the union of one man and one woman, as exemplified by the marriage statutes, does not preclude some sort of acknowledgment for other relationships.[71] However, that does not mean that it is inherently unfair for the state to distinguish between married couples and unmarried couples – whether heterosexual or homosexual.[72]

The state is entitled to maintain a separate legal scheme for opposite-sex

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71 Gallagher, *Rites, Rights, and Social Institutions*, at p. 237.

72 *Id.*

unions to respond to society's needs for an ordering of sexual relationships, the fostering of responsible procreation, the promotion of the optimal environment for child-rearing, and maximization of the equality of the sexes regardless of whether there are comparable rights available for same-sex couples. The validity of the institution of marriage is not dependent upon whether there are comparable rights available to same-sex couples. Consequently, the state was not required to create a parallel legal institution for same-sex couples and did not resurrect impermissible segregation when it chose to do so.

IV. DEFINING MARRIAGE AS THE UNION OF ONE MAN AND ONE WOMAN DOES NOT VIOLATE THE RIGHT OF PRIVACY.

While the California Constitution grants its citizens a broader right to privacy than does the United States Constitution, it does not permit the kind of wholesale deconstruction of marriage sought by Plaintiffs. While Article 1, section 1 of the California Constitution explicitly provides for a right of privacy, "not every act which has some impact on personal privacy invokes the protection of [our Constitution] . . . .[A] court should not play the trump card of unconstitutionality to protect absolutely every assertion of individual privacy." *Hill v. NCAA* (1994) 7 Cal.4th 1, 36. The right of privacy added to the California Constitution "did not purport to create any unbridled right of personal freedom of action," but was designed to safeguard certain intimate

and personal decisions from government intrusion via regulation. *Id.* As the Court of Appeal correctly found, the constitutional right to privacy protects the union of one man and one woman – *i.e.,* marriage – from intrusive and irrelevant regulations, but does not create an unbridled right of individuals to join with whomever they please and demand that the union be called marriage. *In re Marriage Cases* (2006) 143 Cal.App. 4th 873, 926.

Defining marriage as the union of one man and one woman "is not a case in which the state has taken away a person's right to get married," but "is a case in which people who have never had a legal right to marry each other argue that the institution unconstitutionally excludes them." *Id.* at 925. Plaintiffs are permitted to marry a person of the opposite sex just as is any other unmarried Californian over the age of 18. Consequently, there is no comparison between the marriage statutes and the anti-miscegenation statutes struck down in *Perez* and *Loving.* The statutes invalidated in *Perez* and *Loving* prevented a man from marrying a woman or a woman from marrying a man if they were of different races, and thereby imposed an intrusive and irrelevant governmental regulation into a personal decision. *See Perez v. Sharp* (1948) 32 Cal.2d 711; *Loving v. Virginia* (1967) 388 U.S. 1. Similarly, the regulation struck down in *Turner v. Safley* (1987) 482 U.S. 78, 95-96, prevented a man from marrying a woman or a woman from marrying a man if one of the parties

was a prisoner and therefore imposed an intrusive and irrelevant governmental regulation on a personal decision. No such intrusion is present in this case, as the marriage statutes do not prevent a man from marrying a woman or a woman from marrying a man.

Furthermore, defining marriage as the union between one man and one woman does not intrude upon private sexual conduct as did the criminal sodomy statutes struck down in *Lawrence v. Texas* (2003) 539 U.S. 558. In *Lawrence*, the Supreme Court recognized that there is a protected right of privacy in having sexual relations with a same-sex partner, but specifically disclaimed any attempt to expand that interest to sanction same-sex "marriage." *Id.* at 578. The Court made it clear that it was not addressing "whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.* Therefore, as the Court of Appeal concluded, *Lawrence* does not support Plaintiffs' claim that the right of privacy includes the right to marry a person of the same sex. *In re Marriage Cases*, 143 Cal.App.4th at 924-925.

The *Lawrence* decision is consistent with the concept of "automony" privacy – the ability to make intimate personal decisions or conduct personal activities without governmental intrusion – as developed by this Court. *See Hill v. NCAA*, 7 Cal.4th at 35. In *Hill*, this Court found an autonomy privacy

interest in being free from observation of urination during a drug test. *Id.* at 40-41. In *American Academy of Pedriatrics v. Lungren* (1997) 16 Cal.4th 307, 332-334 [66 Cal.Rptr.2d 210, 940 P.2d 797], this Court found that the right to autonomy privacy included being free from governmental intrusion in medical decisions. In *City of Santa Barbara v. Adamson* (1980), 27 Cal.3d 123, 137[164 Cal.Rptr. 569, 610 P.2d 436], this Court found that the autonomy right to privacy included being free from governmental intrusion in the choice of whom to share a residence with. The *Adamson* case did not, as Plaintiffs suggest, create a privacy right in "alternative family structures," but simply held that a city ordinance that limited the number of unrelated persons living in a single family home (aimed at reducing the instance of numerous college students renting rooms in a single family home) was an unwarranted invasion of privacy. *Id.* In each of these cases, the autonomy right to privacy meant that the state could not interfere with how the parties were conducting their lives.

By contrast, defining marriage as the union of one man and one woman does not interfere with how Plaintiffs conduct personal aspects of their lives. The marriage statutes do not prevent Plaintiffs from engaging in private sexual relationships, do not prevent Plaintiffs from residing with whomever they choose or otherwise prevent Plaintiffs from associating with any other person. Plaintiffs remain free to enter into a committed relationship with any one they

choose – they just cannot require that the state call the relationship "marriage" if it involves a same-sex partner. Since relationships between same-sex partners have never been called "marriage" in California, Plaintiffs cannot have an expectation of an autonomous privacy interest in that relationship.

As the Court of Appeal found, "[t]he right to be let alone from government interference is the polar opposite of insistence that the government acknowledge and regulate a particular relationship, and afford it rights and benefits that have historically been reserved for others." *In re Marriage Cases*, 143 Cal.App. 4th at 926. It is the latter scenario, not the right to be left alone, that Plaintiffs are seeking. Consequently, the Court of Appeal correctly held that there is no violation of the constitutional right to privacy. Therefore, as is true with the equal protection challenges, rational basis review is the appropriate standard, and, as discussed above, the marriage statutes easily satisfy that standard.

V. DEFINING MARRIAGE AS THE UNION OF ONE MAN AND ONE WOMAN DOES NOT EVEN IMPLICATE, LET ALONE VIOLATE, THE RIGHT TO FREEDOM OF EXPRESSION UNDER THE CALIFORNIA CONSTITUTION.

Similarly, Plaintiffs are not seeking protection from governmental interference with the right to free expression, which is what is protected under Article 1, section 2 of the California Constitution, but are insisting that this Court make a particular type of expression universally available. Defining

marriage as the union of one man and one woman does not prohibit Plaintiffs from associating with any other person, nor does it prevent Plaintiffs from marrying and being able to tell others that they are married. Plaintiffs can participate in marriage ceremonies where they publicly express their commitment to another person. As the Woo Plaintiffs concede, they are not prohibited from saying that they are "married," even if they are in a same-sex relationship. (Woo Plaintiffs Opening Brief, p. 66).

What Plaintiffs cannot do is they cannot compel the state or any public agency to say that they are "married" if they are in a same-sex relationship, because marriage is defined as the union of one man and one woman. Plaintiffs are not challenging a government-imposed limitation on a mode of expression, but are challenging how a term is defined. Neither the First Amendment to the United States Constitution nor Article 1, section 2 of the California Constitution establishes a right to redefine social institutions to suit particular tastes.

As is true in the equal protection context, the mere fact that defining marriage as the union of one man and one woman might have a differential effect on homosexuals' ability to call themselves "married" does not *ispo facto* constitute a constitutional violation. The mere fact that a statute or ordinance which does not directly address expressive conduct has an incidental effect on

parties who want to engage in certain expressive conduct does not render the law constitutionally invalid. *Gaudiya Vaishnava Soc. v. City of Monterey* (N.D. Cal. 1998) 7 F. Supp. 1034, 1044-1045. Therefore, "[i]f the state has legitimate reasons for limiting marriage to opposite-sex couples, then the unavailability for same-sex couples of this one form of expressing commitment – when all other expressions remain available – does not rise to the level of a constitutional violation." *In re Marriage Cases*, 143 Cal.App.4th at 927. As discussed above, the state has numerous legitimate reasons for defining marriage as the union of one man and one woman. There simply is no violation of the right of free expression.

CONCLUSION

California's Family Code sections defining marriage as the union of one man and one woman is not an anomalous, discriminatory deprivation of rights, but is the memorialization of a definition of a social institution. Thirty-nine other states have enacted similar statutory definitions which have withstood constitutional scrutiny.[73] In addition, 27 states have enacted constitutional

[73] Ala. Code § 30-1-19; Alaska Stat. § 25.05.013; Ariz. Rev. Stat. §§ 25-101, 25-112; Ark. Code § 9-11-107, 109 and 208; Colo. Rev. Stat. § 14-2-104; Del. Code tit. 13 § 101; Fla. Stat. §741.212; Ga. Code § 19-3-3.1; Haw. Rev. Stat. § 572-1, 1-3 and 1.6; Idaho Code §§ 32-201, 31-209; 750 Ill. Comp. Stat. § 5/212 and 5/213.1; Ind. Code § 31-11-1-1; Iowa Code § 595.2; Kan. Stat. § 23-101; Ky. Rev. Stat. § 402.020, 040 and 045; La. Civ. Code Art. 89 and 3520; La. Rev. Stat. § 9:272, 273 and 275; Me. Rev. Stat. tit. 19-A § 701; Md. Code Fam. § 2-201; Mich. Comp. Laws § 555.1 and 271; Minn. Stat. § 517.01

amendments that define marriage as the union of one man and one woman.[74]

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and .03; Miss. Code § 93-1.1; Mo. Ann. Stat. Const. art. § 33; Mo. Rev. Stat. § 451.022; Mont. Code § 40-1-401; Nev. Rev. Stat. § 122.020; N.H. Rev. Stat. § 457:1-2; N.C. Gen. Stat. § 51-1.2; N.D. Cent. Code § 14-03-01; Ohio Rev. Code § 3101.01; Okla. Stat. tit. 43 § 3.1; 23 Pa. Cons. Stat. § 1102 and 1704; S.C. Code § 20-1-15; S.D. Codified Laws § 25-1-1and 1-38; Tenn. Code § 36-3-113; Tex. Fam. Code § 2.001; Utah Code § 30-1-2; Va. Code § 20-45.2; Wash. Rev. Code § 26.04.010 and 020; W. Va. Code § 48-2-104 and 603; Wyoming has not adopted a DOMA or Constitutional Amendment, but Wy. Stat. Ann. § 20-1-101 defines marriage as a civil contract between a male and a female.

[74] Alaska, Art. I, §25 (1998); Alabama 2005-35 (2006); Arkansas Const. Amend. 83 (2004); Colorado Const. Amend. 43 (2006); Georgia Const. Art. I, §IV (2004); Hawaii Const. Art. I, §23 (1998); Idaho Const. Art. III, §28 (2006); Kansas Const. Art. 15, §16 (2005); Kentucky Const. §233A (2004); Louisiana Const. Art. XII, §15 (2004); Michigan Const. Art. I, §25 (2004); Mississippi Const. Art. 14, §263A (2004); Missouri Const. Art. 1, §33 (2004);Montana Const. Art. XIII, §7 (2004); Nebraska Const. Art. I, §29; Nevada Const. Art. I, §21 (2002); North Dakota Const. Art. XI, §28 (2004); Ohio Const. Art. XV, §11 (2004); Oklahoma Const. Art. 2 §35 (2004); Oregon Const. Art. XV §5A (2004); South Carolina Const. Art. XVII, §3A(2006); South Dakota Const. Art. XXI §9 (2006); Tennessee Const. Art. XI, §18 (2006); Texas Const. Art. I §32 (2005); Utah Const. Art I, §29 (2004); Virginia Const. Art. I, §15-A (2006); Wisconsin Const. Art. XIII, §13 (2006).

Based on these reasons, this Court should uphold the Court of Appeal's ruling finding that the marriage statutes are constitutional.

Dated: June 6 , 2007.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Answer Brief on the Merits has been prepared using proportionately double-spaced 13 point Times New Roman font. According to the "word count" feature of WordPerfect, which was used to prepare this document, the total number of words including footnotes but excluding the Table of Contents and Table of Authorities, is 22,138 words.

I declare under penalty of perjury under the laws of the State of California that this statement is true and correct.

Executed on June 6, 2007 at Lynchburg, Virginia.

Mary E. McAlister

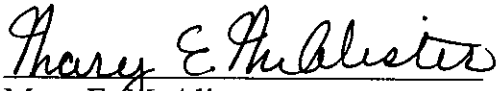
PROOF OF SERVICE

I, Mary E. McAlister, declare that I am over the age of eighteen and am not a party to this action. My business address is 100 Mountain View Road, Suite 2775, Lynchburg, Virginia 24502.

On June 6, 2007, I served the above Answer Brief on the Merits on the interested parties in this action in the manner indicated below:

X By Mail: I am readily familiar with the business practice for collection and processing correspondence for mailing with the United States Postal Service. I know that the correspondence was deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelopes were sealed, and with postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices, in the United States mail in Lynchburg Virginia (as indicated on the Service List).

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct; that this declaration is executed on June 6, 2007, in Lynchburg, Virginia.



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