SUPREME COURT OF THE STATE OF CALIFORNIA

Coordination Proceeding Special Title (Rule 1550(b)) **IN RE MARRIAGE CASES**	**Case No. S147999** Judicial Council Coordination Proceeding No. 4365 First Appellate District No. A110449 (Consolidated on appeal with Case Nos. A110540, A110451, A110463, A110651, A110652) San Francisco Superior Court Case No. 429539 (Consolidated for trial with San Francisco Superior Court Case No. 429548)

CONSOLIDATED REPLY TO ANSWER TO PETITION FOR REVIEW

The Honorable Richard A. Kramer
Superior Court for the City and County of San Francisco

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INTRODUCTION

All Petitioners and Respondents in the four coordinated cases who were not dismissed for lack of standing agree this Court should grant review because the constitutional issues are important and will not be resolved with finality until this Court decides them.[1] As the State Respondents acknowledge, these cases raise issues of "great statewide importance" that "should be decided by this Court to bring the greatest amount of finality and certainty to the issues presented." (State Consolidated Answer to Petitions for Review (State Ans.) 1.) The Court of Appeal, too, recognized the importance of the constitutional issues raised by these cases: "Obviously, the question is one of great significance, and it requires us to venture into the storm of a fierce national debate." (*In re Marriage Cases* (2003) 143 Cal. App. 4th 873, 889 (*Marriage Cases*).)

The State correctly observes that the right to marry "remains an issue of direct, personal importance to same-sex couples and their families." (State Ans. 2.) However, the issue is important not only to those people. Allowing the State to single out one group of citizens and "completely exclude [them] from a crucial social institution, without basis in any characteristic of the group that distinguishes it for any relevant purpose" in deference to "traditional bias" demeans not only the targeted group but *all* of our State's citizens. (*Marriage Cases*, *supra*, 143 Cal.App.4th at p. 873 (conc. and dis. opn. of Kline, J.).) And if our courts accept traditional majority sentiment (including bias) as a basis for excluding one group from

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[1] See Petitions for Review filed by the City and County of San Francisco (City), Rymer and Frazer, Clinton, Equality California (intervenor in the Clinton and Tyler cases), and Tyler and the Answer filed by the State.

a state-sanctioned institution, then no person or group can rely on our courts or constitution to protect their rights as citizens. If, as Vice President Richard Cheney has stated, "[f]reedom means freedom for everyone," the converse is also true. (J. Rutenberg, Cheney Pregnancy Stirs Debate On Gay Rights, New York Times (Dec. 7, 2006) p. 1.)

Only the two organizations whose cases the Court of Appeal dismissed for lack of standing have urged the Court to decline review of the constitutional issues.[2] The Campaign for California Families (CCF) argues that the Court should deny review because the constitutional rulings of the Court of Appeal were correct. (CCF Answer to Petitions for Review (CCF Ans.) 3-26.) Proposition 22 Legal Defense and Education Fund (Fund) argues that Petitioners have failed to seek review "of the most fundamental holding of the Court of Appeal: ***the term 'marriage' has a meaning***." (Answer of the Fund Opposing Petitions for Review on Merits (Fund Ans.) 4.) The Fund also argues that the Petitions fail to address another issue that the Fund deems critical — the scope of Family Code section 308.5. (Fund Ans. 7.) Finally, the Fund contends one of the Petitioners, Equality California, should be judicially estopped from relying on the domestic partnership statute (Fam. Code, § 297.5) as the basis for its argument that excluding same-sex couples from marriage violates California's public policy. (Fund Ans. 9-10)

Neither CCF's arguments about why, in its view, the Court of Appeal's decision is correct, nor the Fund's arguments about how the issues in the case should be characterized or who should be able to argue what point, speak to Petitioners' primary argument: that the Court should grant

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[2] See Answers filed herein by the Fund and CCF.

review to settle an important question of law. Nor does CCF or the Fund explain why, given the obvious importance of these issues, we can expect a sharply split decision from an intermediate court to be accepted as definitive or final. Acceptance is particularly unlikely because the majority relied on the premise that courts lack power to find constitutional violations where a statutory definition is involved or the issue is "controversial" — a premise that upends centuries of constitutional jurisprudence. In the end, the only way the issues raised in these cases will be finally resolved is if this Court squarely confronts them and fulfills the obligation of the judiciary to apply constitutional principles logically and fairly — whether the result is "controversial" or not.

DISCUSSION

I. CCF'S ENDORSEMENT OF THE COURT OF APPEAL'S DECISION DOES NOT UNDERMINE THE IMPORTANCE OF THE ISSUES OR THE NEED FOR FINALITY.

A. The Court Of Appeal's Conclusion That The Judiciary Is Powerless To Strike Down The Marriage Exclusion Is A Reason For Granting, Not Denying, Review.

In the opening portion of the *Marriage Cases*, the two justices in the majority discussed their perceived limits on their authority. These limits, which those two justices believed rendered the court *powerless* to hold the marriage laws unconstitutional, derived from four facts: (1) that "California has not deprived its gay and lesbian citizens of a right they previously enjoyed"; (2) "that our society has historically understood 'marriage' to refer to the union of a man and a woman"; (3) that the marriage exclusion is embodied in a statutory definition; and (4) that the constitutional issues they were asked to decide are controversial. (*Marriage Cases*, *supra*, 143 Cal. App. 4th at pp. 889-90.) For these

reasons, the two justices concluded the court lacks the power to decide the constitutional issues in Petitioners' favor. (*Id.* at p. 890.)

Of course, those justices went on to address and purportedly decide the constitutional issues in favor of the State Respondents. Thus, the majority opinion stands for the proposition that the judiciary has the power to hold the marriage exclusion *is* constitutional, but lacks the power to hold that it is *not*.

CCF argues this Court should not grant review because this conclusion "is consistent with the precedents of this Court, the United States Supreme Court and the high courts of other states." (CCF Ans. 4.) Nothing could be further from the truth. The Court of Appeal's view of its constitutional role contradicts centuries of federal and state law precedents. The role of the courts as arbiters of constitutional matters has been established since *Marbury v. Madison* (1803) 5 U.S. (1 Cranch) 137, 175-78. And since our State formed a tripartite constitutional form of government structurally similar to the federal system over 150 years ago, it has been clear that the California judiciary also bears the solemn responsibility to strike down legislation that conflicts with constitutional norms at the expense of a political minority:

> The separation of powers doctrine articulates a basic philosophy of our constitutional system of government; it establishes a system of checks and balances to protect any one branch against the overreaching of any other branch. Of such protections, *probably the most fundamental lies in the power of the courts to test legislative and executive acts by the light of constitutional mandate and in particular to preserve constitutional rights, whether of individual or minority, from obliteration by the majority. . . .* Because of its independence and long tenure, the judiciary probably can exert a more enduring and equitable influence in safeguarding fundamental constitutional rights than the other two branches of government, which remain subject to the will of a contemporaneous and fluid majority. (*Bixby v. Pierno*

(1971) 4 Cal.3d 130, 141; see also *In re Horton* (1991) 54 Cal.3d 82, 97.)

CCF cites no California cases where courts have expressly excused themselves from their obligation of judicial review because the cases involved rights that had not previously been recognized or because the persons seeking them had long been excluded from exercising them. Nor do they provide authority for the proposition that statutory definitions — whether longstanding, traditional or otherwise — are immune from judicial review. And while there are no doubt cases where courts avoided deciding constitutional issues because they were controversial, in no case has this or any other California court explicitly held that it must deny a properly presented constitutional claim for that reason.

The majority's retreat from its constitutional responsibility behind notions that it cannot correct a constitutional wrong that has been visited upon a segment of society for a long time or that it should not uphold the constitution and reject a statute if it displeases some or maybe a majority of the populace is not a reason this Court should deny review. On the contrary, it is one more reason the Court should hear the case.

B. CCF's Arguments That The Court Of Appeal Correctly Rejected Petitioners' Constitutional Arguments Provide No Basis For Denying Review.

CCF spends most of its Answer arguing that the Court of Appeal ruled correctly on the constitutional claims Petitioners raised. The City addresses the four claims it raised below[3] and discusses briefly why it believes the majority erred. But whether one agrees or disagrees with the Court of Appeal's ruling is beside the point. There is no question that the

[3] The City did not assert a first amendment (freedom of association) challenge, and thus does not address that issue.

constitutional challenges raise serious issues, as demonstrated by the fact that two of the four judges who have ruled on them concluded that the marriage exclusion violates the California Constitution—Judge Richard Kramer who addressed them in the Superior Court, and Justice Anthony Kline who dissented on appeal. While CCF halfheartedly suggests that the law in this area is "well settled," nothing could be further from reality. And even CCF does not contend the issues are unimportant. The importance and seriousness of the issues require review whether one agrees with Judge Kramer and Justice Kline on the one hand, or Justices McGuinness and Parilli on the other.

1. The Liberty Interest At Stake

CCF contends the majority in the *Marriage Cases* correctly ruled that the right or liberty interest at issue is not the right to marry, but instead a subspecies of right that it called "same-sex marriage." CCF further contends the majority correctly held that the latter right was not "fundamental" because it is not deeply rooted in our nation's or State's history. (CCF Ans. 9-13.) As CCF points out, the majority relied on language in *Washington v. Glucksberg* (1997) 521 U.S. 702 admonishing courts to define asserted liberty interests narrowly in evaluating whether they are fundamental for substantive due process purposes. (CCF Ans. 10.) But in *Glucksberg*, the U.S. Supreme Court simply rejected a broad formulation of the right at stake — the right to choose how to die — in favor of a more precise description — the right to commit suicide with assistance. (*Glucksberg,* at pp. 722-723.) This formulation did not refer to who had or lacked the right; rather it focused on the actual right to be exercised, which was to have a physician assist a patient who wanted to commit suicide.

Moreover, insofar as the Court of Appeal read *Glucksberg* to endorse a definition of a liberty interest that references who is included or excluded from it, such an approach was recently repudiated by the U.S. Supreme Court in *Lawrence v. Texas* (2003) 439 U.S. 558. *Lawrence* overruled *Bowers v. Hardwick* (1986) 478 U.S. 186, in which the court had held there was no fundamental right to "homosexual sodomy." *Lawrence* squarely rejected *Bowers*' framing of the right, stating *Bowers* "fail[ed] to appreciate the extent of the liberty interest at stake." (*Lawrence*, at p. 567.) *Lawrence* then divorced the framing of the right from the class seeking access to it, describing it as the "autonomy" interest of *all* persons — whether homosexual or heterosexual — in making "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." (*Id.* at p. 574.) Similarly, in his dissent in *Bowers*, which *Lawrence* adopted (*id.* at p. 578), Justice Stevens rejected the idea that this liberty interest could exist only for heterosexuals and not for homosexuals (*Bowers*, at p. 218). The idea that one group of citizens "do[es] not have the same interest in `liberty' that others have" is "plainly unacceptable":

> Although the meaning of the principle that "all men are created equal" is not always clear, it surely must mean that every free citizen has the same interest in "liberty" that the members of the majority share. (*Id.* at pp. 218-19.)

Consistent with *Lawrence*'s holding that constitutional liberty interests cannot be defined differently for different classes of persons are all earlier cases involving the right to marry, including this Court's decision in *Perez v. Sharp* (1948) 32 Cal. 2d 711 and the U.S. Supreme Court's decisions in *Loving v. Virginia* (1967) 388 U.S. 1, *Zablocki v. Redhail* (1978) 434 U.S. 374, and *Turner v. Safely* (1987) 482 U.S. 78. As Justice

Kline pointed out in the *Marriage Cases*, none of these cases can be squared with the majority's conclusion that the liberty right or interest at stake here is "same-sex marriage" rather than simply marriage. (*Marriage Cases*, *supra*, 143 Cal.App.4th at pp. 950-56, 960, 968) *Perez* and *Loving* did not define the liberty interest or right as "interracial marriage" or the "right of Negroes or Asians to marry whites." Nor did *Zablocki* define the right as the right of deadbeat parents to marry or *Turner* define it as "inmate marriage." Rather, all of these cases recognized that the right to marry exists not just for some groups or classes of persons but for all. Indeed, *Perez* and *Loving* establish that the choice of whom to marry is a core element of that fundamental right.

CCF contends the majority rightly distinguished *Perez* because it addressed a racial barrier to marriage and racial classifications are inherently suspect. But this distinction is untenable:

> *Zablocki* [and *Turner*] establish[] that the right to marry is constitutionally protected even where restriction on the right is not based on race or membership in some other suspect class. As the court [in *Zablocki*] stated, "[a]lthough *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance *for all individuals*." (*Marriage* Cases, *supra*, 134 Cal.App.4th at p. 752, italics added (conc. & dis. opn. of Kline, J.).)

In the end, the majority believed that because marriage has always been limited to heterosexuals, courts lack the power or the duty to think beyond that. (See *Marriage Cases*, *supra*, 143 Cal.App.4th at pp. 890, 907-908, 910.) Justice Kline, however, reviewed the case law that establishes that marriage is a fundamental constitutional right, evaluated the attributes that make that right fundamental, and considered whether something about same-sex couples renders them unable to partake in those attributes. (*Id.* at

pp. 950-954.) Justice Kline did not say the fundamental right to marry — a liberty interest we all share — can never be limited by state law; he only concluded that the state must justify restrictions on that right by showing a compelling need. (*Id.* at p. 956.)

In short, the majority's holding that the right at issue in these cases is not the universally shared right to marriage, but a separate and "new" right to "same-sex marriage" lacks support in logic or the law and cannot be squared with well-established substantive due process jurisprudence.[4]

2. The Privacy Clause Claim

The majority acknowledged that the privacy clause protects the right to make "highly personal decisions," including the choice of one's spouse. (*Id.* at p. 925.) Despite this, the majority concluded that the privacy clause is not implicated here, because the State does not preclude gay men and lesbians from entering into *relationships* with their chosen partners; instead, it merely denies those relationships "the tangible and intangible benefits marriage provides." (*Id.* at p. 926.) In other words, the majority believed that because marriage is a publicly-recognized relationship, it is not protected by the privacy clause. This reflects a fundamental misunderstanding of the constitutional right to privacy in California.

The initiative by which the privacy clause became an express provision of our Constitution was based on a ballot pamphlet that described the interests the clause protects as "encompass[ing] a variety of rights involving private choice in personal affairs," including " 'our expressions,

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[4] This same error infects the majority's analysis of the privacy clause claim, which, as CCF acknowledges, rests on the false premise that what Petitioners seek is not marriage but some new and expanded right. (CCF Ans. 21-22.)

our personalities, our freedom of communion, and our freedom to associate with the people we choose.' " (*Robbins v. Superior Court* (1985) 38 Cal.3d 199, 212.) In *Robbins*, the challenged law conditioned the plaintiffs' right to receive public assistance benefits on their willingness to reside in a publicly subsidized homeless shelter. As the Court explained, the law left the plaintiffs "with the painful choice either to give up their privacy and their control over fundamental aspects of their lives or to endure the hardship of subsisting without income or general assistance benefits." (*Id.* at p. 207.) The law in *Robbins* did not deprive the plaintiffs of their right to make decisions about where, with whom, and how they would live; it simply denied them public benefits unless they agreed to substitute the state's decision about those things for their own. But that, in itself, implicated the right to privacy. And this Court held that conditioning public welfare benefits on the foregoing of the right to choose how, where, and with whom to live infringed the constitutional right to privacy and could not stand absent a showing of compelling need and no less onerous alternatives.[5]

The marriage exclusion operates the same way. It tells gay men and lesbians that they may only enjoy the benefits of marriage if they relinquish their right to live in a committed, intimate relationship with the person of their choice and instead marry someone of the opposite sex. The majority's holding in the *Marriage Cases* that the privacy clause is not implicated by the marriage laws' conditioning of the "tangible and intangible benefits" of marriage on gay men and lesbians' choosing as a life partner someone other

[5] *Robbins* affirmed the grant of a preliminary injunction, holding that the plaintiffs had shown a strong likelihood of prevailing on the merits of their privacy clause claim. (*Robbins*, at p. 218.)

than the person of their choice is irreconcilable with *Robbins* and should be reviewed by this Court.[6]

3. The Equal Protection Claims

CCF argues that the Court of Appeal correctly held that the marriage laws do not discriminate based on gender because they do not disadvantage men over women or vice versa. But the argument that the marriage laws treat men and women "equally" because neither men nor women can marry another person of the same gender disregards the nature of the right at stake. As this Court recognized in *Perez*, "[t]he right to marry is the right of *individuals*, not of . . . groups." (*Perez, supra*, 32 Cal.2d at p. 716.) The "essence" of that individual right is "freedom to join in marriage *with the person of one's choice*." (*Id.* at p. 717.) Thus when a woman is precluded from marrying the person of her choice simply because her chosen partner is a women, that is gender discrimination. She is not being treated the same as a man, who could marry the woman she wishes to marry. The reason

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[6] The majority also cited *Ortiz v. Los Angeles Police Relief Assn.* (2002) 98 Cal.App.4th 1288, 1306-1307, 1312, describing it as "concluding [that] termination of employee due to her choice of spouse was an actionable invasion of privacy, but finding it justified by legitimate employer interests." (*Marriage Cases, supra*, 143 Cal.App.4th at p. 925.) But *Ortiz* proves our point that the State may only condition a public benefit on the relinquishment of the right to privacy in compelling circumstances. "[U]nder the state Constitution," *Ortiz* noted, "the right to marry and the right of intimate association are virtually synonymous." (*Ortiz*, at p. 1303.) Although the court ultimately concluded that the State could, on the facts of that case, condition employment on the employee's decision *not* to marry a prison inmate, it recognized that imposing such a condition *does* implicate the right to privacy, and the state must justify the imposition of that condition. Similarly, the issue in this case is whether the State may condition the benefits of marriage on the relinquishment of the right to maintain a committed, intimate relationship with a member of the same sex.

she is treated differently from a man is *her* gender and the gender of the person she wishes to marry.

Perez rejected the idea that the equal protection clause sanctions any law that is neutral as to its treatment of different groups:

> A member of any of these races may find himself barred by law from marrying the person of his choice *and that person to him may be irreplaceable*. Human beings are bereft of worth and dignity by a doctrine that would make them as interchangeable as trains. (*Perez, supra*, 32 Cal.2d at p. 725, italics added.)

The Court of Appeal attempted to distinguish *Perez* and *Loving*, decided 19 years later, because they involved racial classifications rather than gender classifications. (*Marriage Cases, supra*, 143 Cal.App.4th at p. 916.) But the majority's distinction is only meaningful if gender classifications are more acceptable under our State Constitution than racial classifications. This Court's precedents say otherwise. For decades this Court has viewed gender classifications as suspect and held them to the same strict scrutiny as race-based classifications. (*Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 564 ["We long ago concluded that discrimination based on gender violates the equal protection clause of the California Constitution (art. 1, § 7, subd. (a)) and requires the highest level of scrutiny"]; *Sail'er Inn v. Kirby* (1971) 5 Cal. 3d 1, 17-18.) Since the marriage statutes involve a gender-based classification, the Court of Appeal erred in failing to apply strict scrutiny.

The majority also ignores another crucial element of equal protection analysis: gender classifications may not be based on outmoded stereotypes or "loose-fitting generalities" about the appropriate role of men and women. (*Craig v. Boren* (1976) 429 U.S. 190, 209.) The State's insistence that its citizens may only marry people of the opposite sex is based on outmoded

stereotypes about what a "real man" or a "real woman" ought to be. The Legislature has recognized as much with the passage of Assembly Bill No. 205, which affirms that same-sex couples are to be considered productive members of society, equally capable of maintaining loving, committed relationships and raising children.

Last, CCF claims the majority correctly declined to hold that discrimination against gay men and lesbians requires only the most deferential level of scrutiny. (CCF Ans. 17-20.) The majority acknowledged that the marriage laws' discrimination against homosexuals was intentional and targeted. (*Marriage Cases*, *supra*, 143 Cal.App.4th at pp. 898-899, 918-19; see also *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1076, fn. 11.) But because no California cases have yet decided this issue, because federal courts have not "seized on *Lawrence*" to revisit their earlier *Bowers*-based holdings that rational basis review was all that was required, and because the Superior Court did not make findings on the factors recognized as supporting strict scrutiny, it applied rational basis review. (*Marriage Cases*, at pp. 921-922.) It did so even though it acknowledged that at least two of the three factors relevant to the suspect classification analysis — that gay men and lesbians have experienced a history of societal discrimination and that their sexual orientation bears no relation to their ability to perform or contribute to society — are met. (*Id.* at p. 922.)

The majority's error lies in the fact that no decision of this Court has held that the third factor, immutability, is a prerequisite to a finding that a particular group constitutes a suspect class. In fact, on several occasions this Court has analyzed whether a group should be considered a suspect class without even discussing whether it possesses an immutable trait.

(See, e.g., *Bowens v. Superior Court* (1991) 1 Cal.4th 36, 42 ["The determination of whether a suspect class exists focuses on whether [t]he system of alleged discrimination and the class it defines have [any] of the traditional indicia of suspectness: [such as a class] saddled with disabilities, or subjected to a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process," internal quotations omitted.) Indeed, in *Purdy & Fitzpatrick v. State* (1969) 71 Cal.2d 566, 579-580, this Court held that non-citizens are a "suspect class" for equal protection purposes, even though citizenship is subject to change. Thus, while immutability is often a hallmark of a suspect class (because the immutable "difference" is often why a minority group is subject to irrational discrimination by the majority), it is hardly a prerequisite to a finding that a class is suspect.

As for the other two factors, the conclusion of all three Court of Appeal justices that they apply here cannot seriously be questioned. Discrimination against gay men and lesbians is pervasive and ongoing. And there is no connection between sexual orientation and the ability to perform in society. Accordingly, the Court of Appeal should have held that classifications based on sexual orientation are subject to strict scrutiny even though the trial court made no factual findings on "immutability."[7]

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[7] In any event, as Justice Kline explained in his dissent, sexual orientation is an "immutable trait" as a matter of law. (See City's Pet. 12.) But if this Court grants review and ultimately concludes that (i) a finding of immutability is required before a court may hold that sexual orientation discrimination should be subject to strict scrutiny, and (ii) such a finding cannot be made as a matter of law, the appropriate result would be to remand the case to the Superior Court for an evidentiary hearing on the suspect classification factors. The Court of Appeal contemplated this

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C. The Fund's Arguments About Which Issues Should Be Addressed Or How The Issues Should Be Articulated Provide No Basis For Denying Review.

The Fund argues that Petitioners missed an important issue that should be reviewed: whether Family Code section 308.5 addresses who can marry within the state and whether out-of-state marriages of same-sex couples will be recognized here. (Fund Ans. 7.) That issue, to be sure, is a part of the case as presented to the trial and appellate courts; however, it is subsumed within the question whether the marriage exclusion is constitutional. Specifically, Petitioners argued in the lower courts that section 300 is unconstitutional and that section 308.5, to the extent it applies to in-state marriages, is likewise unconstitutional.[8] Since the latter issue is subsumed by the former it is included in the issues upon which the City has requested this Court grant review. That said, the City has no objection to the Court explicitly indicating that it will grant review on this question, which is the subject of conflict among the Courts of Appeal.

The Fund also argues that review should be denied because Petitioners have failed to address a "fundamental holding of the Court of Appeal." (Fund Ans. 4.) The Fund contends the linchpins of the Court of

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possibility by issuing an unqualified reversal. (See also *Marriage Cases*, *supra*, 143 Cal.App.4th at p. 942 (conc. opn. of Parilli, J.) ["[I]f being gay or lesbian is an immutable trait or biologically determined, then we must conclude classification based on that status which deprives such persons of legitimate rights *is* suspect"].)

[8] The City believes that even if section 308.5 applies only to out-of-state marriages it is still unconstitutional. But if the Court holds that it applies only to out-of-state marriages it need not address that provision's constitutionality in this case. The focus of this litigation has been marriages in California.

Appeal's ruling are its holdings that marriage is, by definition, a union between a man and a woman and that courts lack authority to "redefine" marriage. These are not issues; they are arguments that formed components of the Court of Appeal's reasoning. They are also subsumed within the issues on which Petitioners have sought review — whether there is a fundamental right to marry, whether Californians have a constitutionally protected privacy right to choose whom to marry, whether denial of the right to marry the person of their choice violates the right of gay men and lesbians to equal protection under the law, and whether limiting marriage to one man and one woman constitutes impermissible gender discrimination.

The Fund, like CCF, is really arguing that the Court of Appeal's decision is correct, not that the issues are unimportant and do not need resolution by this Court. The City certainly does not agree that a "definitional" statute cannot be subject to constitutional challenge and is immune from judicial review. Likewise, the City does not agree that the longevity of an institution or its grounding in "tradition" insulates it from constitutional challenge. But whether Petitioners or Respondents are correct in their view of the courts' constitutional role is beside the point. Right now, this Court need only decide that the case is of sufficient importance to the people of this State to merit its thoughtful consideration and decision.[9] It is.

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[9] The Fund also argues that Petitioner Equality California should be judicially estopped from taking a position that the Fund contends is inconsistent with the position it took in another case. Even if the Fund were somehow right, it has nothing to do with whether this case is worthy of this Court's review.

II. THE COURT SHOULD REJECT CCF'S ATTEMPT TO OBTAIN REVIEW OF THE STANDING RULING THROUGH ITS ANSWER.

A. CCF Waived Its Right To Seek Review Of The Standing Ruling By Failing To Petition For Review.

After its lengthy discussion of why, in its view, the majority was correct on the merits, CCF "joined with" the Fund "in asking this Court to review the Court of Appeal's ruling that the claims raised by the Campaign and the Fund are not justiciable." (CCF Ans. 26.) But CCF filed an action and appeal (A110652) that is separate and distinct from the actions and appeals filed by the Fund (A110651) and other Petitioners (A110449, A110450, A110451 & A110463), and the Court of Appeal affirmed the judgment against CCF in *CCF's particular action*. Because neither CCF nor any of the Petitioners sought review of that judgment, CCF has waived its right to seek review of the standing ruling against it. (*Woods v. Young* (1991) 53 Cal.3d 315, 333 (conc. opn. of Baxter, J.); see also Cal. Rules of Court, rule 28(e).) The deadline for this Court ordering review in the absence of a petition for review has passed.[10] (See Cal. Rules of Court, rule 28.2(c)(1).) Accordingly, even if this Court granted review on the standing ruling, it should do so only in the Fund's case (A110651), not CCF's case (A110652).

B. Even If CCF Had Not Waived Its Right To Seek Review, This Court Should Deny Review Because The Ruling Correctly Applied Well Settled Law.

In any event, for the reasons stated in the City's Answer, this Court need not review the standing rulings. Although CCF insists it still has a claim for injunctive relief, it does not identify what conduct a court could possibly enjoin in the context of this litigation. There is no taxpayer

[10] The Court of Appeal decision was final on November 4, 2006.

standing because a taxpayer action "must involve an actual or threatened expenditure of public funds." (*Waste Management of Alameda County v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1240.) There is no "citizen suit" standing because this case does not involve an effort to compel the performance of a public duty. (*Green v. Obledo* (1981) 29 Cal.3d 126, 144.) And the law is clear that a group like CCF, which has no interest in the matter beyond the generalized interest held by every Californian, has no standing to seek a declaratory judgment regarding the constitutionality of the marriage exclusion. (*Coral Construction, Inc. v. City and County of San Francisco* (2004) 116 Cal.App.4th 6, 15 ["An action challenging a legislative act cannot be brought by any individual or entity that disagrees with it. . . . [A] party [must] prove by a preponderance of the evidence that it has suffered an invasion of a legally protected interest," internal quotations omitted.)

CONCLUSION

The Court should grant the Petitions of the City and the other Petitioners with standing, but should deny review of the Court of Appeal's affirmance of the judgments against CCF and the Fund for lack of standing.

Dated: December 11, 2006

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CITY AND COUNTY OF SAN FRANCISCO

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 5,451 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on December 11, 2006.

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PROOF OF SERVICE

I, MONICA QUATTRIN, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action. I am employed at the City Attorney's Office of San Francisco, City Hall, Room 234, 1 Dr. Carlton B. Goodlett Place, San Francisco, California, 94102.

On December 11, 2006, I served the attached:

CONSOLIDATED REPLY TO ANSWER TO PETITION FOR REVIEW

on the interested parties in said action, by placing a true copy thereof in sealed envelope(s) addressed as follows:

SEE ATTACHED SERVICE LIST

and served the named document in the manner indicated below:

☒ **BY UNITED STATES MAIL**: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

☐ **BY EXPRESS SERVICES OVERNITE**: I caused true and correct copies of the above documents to be placed and sealed in envelope(s) addressed to the addressee(s) and I caused such envelope(s) to be delivered to EXPRESS SERVICES OVERNITE for overnight courier service to the office(s) of the addressee(s).

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

Executed December 11, 2006, at San Francisco, California.

MONICA QUATTRIN

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City and County of San Francisco v. State of California, et al.
San Francisco Superior Court Case No. CGC-04-429539
consolidated with
Woo v. Lockyer
San Francisco Superior Court Case No. CPF-04-504038

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Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco
San Francisco Superior Court Case No. CPF-04-503943
consolidated with
Thomasson, et al. v. Newsom, et al.
San Francisco Superior Court Case No. CGC-04-428794

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