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)

# PETITIONER CITY AND COUNTY OF SAN FRANCISCO'S OPENING BRIEF ON THE MERITS


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## ISSUES PRESENTED

1. Does the exclusion of lesbians and gay men from marriage discriminate on the basis of sexual orientation in violation of the Equal Protection Clause of the California Constitution?

2. Does the exclusion of lesbians and gay men from marriage discriminate on the basis of gender in violation of the Equal Protection Clause of the California Constitution?

3. Does the exclusion of lesbians and gay men from marriage violate the fundamental right to privacy guaranteed by the California Constitution?

4. Does the exclusion of lesbians and gay men from marriage violate the fundamental right to marry the person of one's choice guaranteed by the California Constitution?

## INTRODUCTION

After a long and shameful history of state-sponsored persecution of homosexuality, California public policy now provides that lesbians and gay men should be treated as equals in virtually every respect. The law considers them equally capable of working, serving on juries, maintaining loving relationships, and raising children.

But with respect to marriage—the right that defines more than any other what it means to be part of a family—California still treats lesbians and gay men as second-class citizens. By excluding them from society's most cherished and revered institution, the State announces to same-sex couples, and their children, that they are not worthy of the same dignity and respect as heterosexuals. Indeed, the marriage exclusion tells lesbians and gay men that they are less worthy than child abusers, or sex offenders, or

convicts in prison for murder. Because after all, those people *do* have the right to get married.

In other words, the State is speaking from both sides of its mouth: lesbians and gay men are equals, yet they are inferior. This is the very embodiment of irrationality. And there is only one explanation for California's schizophrenic policy: lesbians and gay men are excluded from marriage *precisely because* this institution is considered so sacred. While Californians may have been comfortable conferring other, less important rights on lesbians and gay men, they were not, at the time the marriage exclusion was adopted, comfortable making them fully equal members of society. But under California's equal protection guarantee, the very fact that the marriage exclusion was adopted out of discomfort with lesbians and gay men renders it invalid, regardless of what level of judicial scrutiny is applied.

It is true that a separate domestic partnership scheme has been created to soften the sting of the marriage exclusion, but that does not cure the constitutional violation. To the contrary, confining same-sex couples to this obviously second-rate institution only reinforces in the public mind the well-entrenched inferior status of same-sex couples. This not only stigmatizes lesbians and gay men but fosters discrimination against them and their families.

Imagine if a State that historically denied women the right to a university education tried to cure the constitutional violation by creating segregated universities for them. Those separate institutions might provide benefits not previously available, but nobody could seriously argue that they would render the original exclusion constitutional. The same is true here – the Court should reject the State's antiquated "separate-but-equal" theory.

If the Court does not strike down the marriage exclusion under rational basis review, it should do so under strict scrutiny, because lesbians and gay men constitute a suspect class for equal protection purposes. Over the decades, the California judiciary has already acknowledged the existence of the two central factors in the suspect class inquiry: (i) lesbians and gay men have suffered a long history of societal and state-sponsored discrimination; and (ii) the discrimination they suffer is based on traits that bear no relation to their ability to contribute to society. Another factor courts sometimes consider—whether the discrimination is based upon an immutable trait—also cuts in favor of strict scrutiny, because sexual orientation is so fundamental to personhood that one cannot possibly be expected to change it.

The court should also apply strict scrutiny because the marriage exclusion discriminates on the basis of sex: an individual is denied the right to marry based on his or her prospective spouse's gender. That the marriage exclusion does not grant *preferences* to men or women does not make it sex-neutral. A truly sex-neutral statute treats all people exactly the same regardless of sex. Thus, a statute prohibiting consideration of a parent's sex in awarding child custody rights would be sex-neutral because all people would enjoy the exact same rights. But if a statute were to assign custody rights to the parent who is of the same sex as the child, it most assuredly would not be sex-neutral because actual custody rights would differ based on sex, even though, in a sense, one could characterize it as treating the sexes comparably. In the same way, actual marriage rights differ based on sex, so the marriage exclusion is subject to strict scrutiny.

The marriage exclusion also violates the right to personal autonomy protected by the privacy clause of the California Constitution in two ways.

First, the right to personal autonomy includes the right to marry, and the marriage exclusion effectively denies lesbians and gay men that right. Second, even setting aside the "right to marry," the marriage exclusion imposes an unconstitutional condition on lesbians and gay men: they may enjoy the tangible and intangible benefits of marriage only if they force themselves to marry someone of the opposite sex, thereby relinquishing their right to intimately associate with the person they truly love.

Finally, the marriage exclusion violates the liberty clause of the California Constitution, because it denies lesbians and gay men the right to marry. The majority below concluded otherwise by framing the question as whether there is a fundamental right to "same-sex marriage." But by defining the right with reference to the group excluded from exercising it, the majority ran afoul of both United States and California Supreme Court precedent. Past courts have not treated marriage claims by interracial couples as involving the right to "mixed race marriage," by a prisoner as the right to "prisoner marriage," or by a parent delinquent on child support as "deadbeat parent marriage."

Nor would a holding that lesbians and gay men enjoy the fundamental right to marry open the door to claims by people who wish to partake in polygamy or incest. Such people are not denied access to the institution of marriage altogether; they are only prevented from marrying multiple partners or close relatives. As even the majority below acknowledged, lesbian and gay men are totally denied access to marriage, because marriage to a member of the opposite sex is nothing but a demeaning sham for them. It is lesbians and gay men alone who are excluded from the sacred institution of marriage altogether.

In the end, the majority rejected all the above arguments because it believed it lacked the power to strike down the marriage exclusion. It felt it was required to hew its constitutional analysis to tradition, lest it disturb the will of the popular majority on a controversial matter. This approach was inconsistent with California's long and proud tradition of judicial independence. California courts have a personal obligation to conduct a substantive constitutional inquiry without reference to the controversial nature of the issues presented. Such an inquiry can lead to only one conclusion: the marriage exclusion is unconstitutional. For this reason, we respectfully request that the Court declare the marriage exclusion found in Family Code sections 300, 301, and 308.5[1] unconstitutional, and order the State to grant same-sex couples marriage licenses on the same terms as opposite-sex couples.

## STATEMENT OF FACTS

The State relies heavily on history and tradition to justify the exclusion of lesbians and gay men from marriage. But in making this argument, the State fails to acknowledge the primary "tradition" upon which the marriage exclusion is based: a long and shameful history of discrimination that rendered lesbians and gay men invisible until recently. The State also fails to recognize that the "tradition" of marriage is actually one of evolution—the institution has steadily changed over time to become more equitable and inclusive.

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[1] All further statutory references are to the Family Code unless otherwise indicated.

## I. THE HISTORY OF DISCRIMINATION AGAINST LESBIANS AND GAY MEN.

### A. The Origins Of Discrimination In The United States.

Discrimination against homosexuals is not a natural phenomenon. In many parts of the world and at many points throughout history, societies have treated same-sex relationships with dignity. Most commonly cited is ancient Greece, but for most of history same-sex relationships were also accepted and sometimes honored across much of the world, including China, Japan, India, Africa and many indigenous cultures in the New World. (See generally Crompton, Homosexuality & Civilization (2003) (Crompton); Fone, Homophobia: A History (2000) (Fone); Naphy, Born to be Gay: A History of Homosexuality (2004) (Naphy).)

In the West, however, societies began to turn against homosexuality a few centuries prior to the first millennium. (Crompton at 33-34; Naphy at 32-33.) This eventually developed into a full-fledged campaign of bloody state-sponsored persecution. Governments hunted down their lesbian and gay citizens, burning them alive, drowning them, or castrating them publicly. (Crompton at 201, 246-47, 293-97, 462-68; Naphy at 82-83, 98; Fone at 174, 194). One law from Spain, which was representative of the way governments sought to stamp out homosexuality, stated: "Although it offends us to speak about a thing which it is very undesirable to talk about . . . [nevertheless] because this evil sin sometimes comes about when a man lusts after another to sin with him against nature, we order that whoever commits such a sin shall both of them, as soon as it has been discovered, be castrated before all the people, and after three days, shall be suspended by the legs until they die, and never shall be taken down." (Crompton at 200, internal quotations omitted.)

By the Enlightenment, some countries began to take a different view. In 1791, France repealed its sodomy law altogether, and many countries followed suit. (*Id.* at 501, 528.) England, however, ramped up its persecution of homosexuals. During the late 1700's and early 1800's, public hangings for sodomy increased fivefold. (Naphy at 200.) William Blackstone stated in his Commentaries on the Laws of England (1765-1769)—perhaps the single greatest influence on American law in the late 18th and early 19th centuries—that sodomy is a crime "of so dark a nature that the accusation if false deserves a punishment inferior only to the crime itself." (Crompton at 529.) The very mention of it, he wrote, "is a disgrace to human nature," and should be indicted only as "a crime not fit to be named." (*Ibid.*)

**B. Discrimination In Early America.**

There is clear evidence of animus and discrimination against lesbians and gay men in America before the late 1800's, but it is less abundant than evidence from more recent periods. That is because lesbians and gay men were, in large part, invisible. The opprobrium directed towards same-sex intimacy required people to hide their relationships. And the government sought to keep homosexuality invisible, fearing public awareness would cause it to spread.

The Puritans set the tone. John Winthrop, governor of Massachusetts Bay colony, approved of the execution of a sodomy offender, calling him a "monster in human shape." (Katz, Gay American History: Lesbians & Gay Men in the U.S.A. (1992) 22 (Katz).) New Haven colony prescribed the death penalty for any woman who would "change the naturall [sic] use into that which is against nature." (*Id.* at 23.) "5 beastly

Sodomiticall boys" were sent back to England for trial and presumably hanging. (Fone at 328.)

After the Revolution, convictions continued. (Benemann, Male-Male Intimacy in Early America: Beyond Romantic Friendships (2006) 205 (Benemann).) The charges were usually for vagrancy or lewd acts, with only opaque references to homosexual conduct; the crimes were "prosecuted under a different guise . . . to avoid public discussion of unspeakable practices." (*Id.* at 205; Fone at 73-76.)

If persecution made it imperative for lesbians and gay men to hide, the relative privacy of early American life allowed some to do so. In Virginia, men dramatically outnumbered women. Because people could not grow crops on their own, men formed partnerships, living on and working the land together. (Benemann at 12; Demos, A Little Commonwealth, Family Life in Plymouth Colony (1970) 78 (Demos).) Romantic relationships that developed could be concealed in this setting. The same was true in newly-opened territories, "where nuclear families were few and the expectation of marriage was temporarily suspended." (Benemann at 14.)

### C. The "Discovery" of Homosexuality.

Until some time after the Civil War, society did not identify people as "gay" or "straight." Society conceived of sodomists as it did thieves or murderers—people who had committed a crime. *Anyone* might, under the right circumstances, be tempted to do so. (See, e.g., Duberman, et al., eds., Introduction to Hidden from History: Reclaiming the Gay & Lesbian Past (1989) 8 (Duberman); Benemann at ix-x.)

By the late nineteenth century, the "concept of the homosexual as a distinct category of person developed." (RA 226.)[2] This was prompted by cities growing large enough to develop visible homosexual subcultures. (Duberman at 9; Benemann at 199-222.) It was later furthered by the field of medicine, which began to "study" this newly-identifiable group. (*Ibid*; see also Fone at 347.) But psychiatry did not just objectively conclude that lesbians and gay men had "different" sexual identities. Rather, it handed down moral judgments, labeling them as "perverts" and "natural objects of disgust to normal men and women." (*Ibid.*) Homosexuality became an affliction that needed "treatment"—castration, shock and aversion therapy and lobotomy. (Katz at 134-201; Fone at 406.) The American Psychiatric Association did not withdraw its classification of homosexuality as a mental illness until 1973. (RA 227.) The attitudes of the medical establishment reflected and reinforced those of the larger society, which continued to treat lesbians and gay men as the diseased perverts the medical establishment now confirmed them to be.

One chilling example took place at Harvard. In 1920, Harvard student Cyril Wilcox confessed to his brother Lester that he had been involved in a relationship with another man in Boston. That night, Cyril killed himself. (Wright, Harvard's Secret Court: The Savage 1920 Purge of Campus Homosexuals (2005) 1-19 (Wright).) Convinced his brother had been corrupted by perverts, Lester read his brother's correspondence,

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[2] The following abbreviations are used for the record cites: City's Respondent's Appendix [A110449] (RA); Appellant's Appendix [A110449] (AA); Exhibits in Support of Respondent's Unopposed Motion to Augment the Record on Appeal [A110651] (Exhs. ISO Unopposed Mot. to Augment); and Reporter's Transcript (RT).

confronted the lover, obtained from him a list of students who kept company with the two, and took the information to Harvard's administration. Harvard put together a secret court, which summoned and interrogated students in dark, windowless rooms. (*Id.* at 95-106.) Fourteen were expelled for being, or associating with, homosexuals. (*Id.* at 137.) The university wrote to each student's parents and proceeded, for 30-plus years, to inform prospective employers that "Harvard cannot show any confidence in this individual." (*Id.* at 142.) This doomed most of these individuals to quiet lives of mediocrity, at best. One committed suicide when he learned he would be interrogated; another killed himself immediately following his interrogation; and another did so ten years later. (*Id.* at 136, 201, 203.) The records of the secret court and its victims were kept hidden until 2002. (*Id.* at 276.)

By the turn of the nineteenth century, the medical establishment confronted lesbianism in earnest. One influential book identified four degrees of deviance, ranging from women who were merely more susceptible to lesbian advances to those "masculine" lesbians who represented "the extreme grade of degenerative homosexuality." (Duberman at 269; see also Fone at 346, 349-350.) Opprobrium towards lesbianism was also bound up with the rise of a new class of women who had begun to establish themselves in professional and academic worlds and to fight for equality. (Duberman at 265.) These women were "educated, ambitious, and, most frequently, single." (*Ibid.*) This did not sit well with the mainstream, for whom feminism, lesbianism and equality were all "unnatural, related in disturbing and unclear ways to increased female criminality, insanity, and 'hereditary neurosis.' " (*Id.* at 271-72.) Lesbians were ostracized for failing to comport with society's view of what it meant

to be a "real woman." Non-lesbians who fought for women's equality were branded and ostracized as lesbians.

World War II was a key moment for lesbians and gay men. Many were removed from isolated rural areas and placed, for the first time, in settings with large groups of people of the same sex. Inevitably they were exposed to others with similar sexual identities. (Berube, Coming Out Under Fire 147 (1990) (Berube).) This allowed them to discover who they were—but with grave consequences. The military, taking its cue from the field of psychiatry, determined that "inverts" must be eradicated from the armed services. (*Ibid.*) Witch hunts followed, resulting in the dishonorable discharge of thousands of capable service members, depriving them of their honor and of military benefits. The early 1950's saw 2,000 discharges for homosexuality per year. (RA 230-31.)

Also in the 1950's, the entire federal government conducted a similar witch hunt. A Senate subcommittee report, entitled "Employment of Homosexuals and Other Perverts in Government," concluded:

> the presence of a sex pervert in a Government agency tends to have a corrosive influence on his fellow employees. These perverts will frequently attempt to entice normal individuals to engage in perverted practices. This is particularly true in the case of young and impressionable people who might come under the influence of a pervert. Government officials have the responsibility of keeping this type of corrosive influence out of the agencies under their control . . . . One homosexual can pollute a Government office. (RA 231.)

In 1953, President Eisenhower issued an executive order requiring the discharge of homosexuals from all federal employment—civilian and military. Thousands were fired or forced to resign. (RA 231-22.) The order also required federal contractors to ferret out and discharge

homosexual employees. The FBI used the order to initiate widespread surveillance against lesbians and gay men. (RA 231-32; see Katz at 92-93.)

Meanwhile, the armed forces "deposited lesbians and gay men, sometimes hundreds at a time, in San Francisco . . . . Unable or unwilling to return home in disgrace to family and friends, they stayed to carve out a new gay life." (Duberman at 459.) But while they were able to establish communities in large cities, the State continued to persecute them. By 1966 California was one of only five states where a person could be imprisoned for life for committing sodomy. (*Project: The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County* (1966) 13 U.C.L.A. L.Rev. 643, 675 (Project).)

In 1959, Mayor George Christopher was accused of allowing San Francisco to become "the national headquarters of the organized homosexuals in the United States." (Duberman at 462.) City government responded by stepping up repression of gay men: felony convictions went from zero in the first half of 1960, to 29 in the next six months, to 76 in the first six months of 1961. (*Ibid.*) Police regularly swept gay bars, charging 40 to 60 men and women per week with misdemeanors. (*Ibid.*) By October 1961, the Department of Alcohol and Beverage Control had revoked the liquor licenses of many of the City's gay bars. (*Ibid.*) Book store owners were arrested for selling material that extolled same-sex love. (*Id.* at 461; see also RA 227-29.)

In Los Angeles, the police Vice Squad used decoys to draw out homosexual solicitations from random people. (Project, 13 U.C.L.A. L.Rev. at 692-93.) Vice Squad members peered into homes and vehicles to catch people engaging in same-sex conduct. (*Id.* at 707-08.) They targeted

lesbian and gay bars, disrupting them every half hour to check identification and arresting departing patrons for misdemeanors like jaywalking if they lacked evidence to arrest them for lewd conduct. (*Id.* at 718-19.)

**D. Progress.**

The first known gay rights group formed in Germany late in the nineteenth century. (Marcus, Making Gay History: The Half-Century Fight for Lesbian and Gay Equal Rights (2002) 3 (Marcus).) That movement was crushed by the Nazis, who murdered more than 20,000 gay men in concentration camps. (Fone at 210; Marcus at 3.) Later, the postwar German government compensated most people liberated from the camps. But many gay survivors were actually transferred to prison. The "compensation" they received was credit for time served in the camps. (Naphy at 210.)

The modern gay rights movement in this country began in the midst of the military purges, police harassment, and federal witch hunts of the 1950's and 1960's. (Fone 392.) It remained relatively quiet in comparison to other movements of the time, because lesbians and gay men often "absorbed views of themselves as immoral, depraved, and pathological individuals. . . . Such a self-image would hardly propel men and women into a cause that required group solidarity and the affirmation of their sexuality, nor would it encourage them to entertain the idea that their efforts might create a brighter future." (Marcus at 73, internal quotations omitted.) As late as 1966, articles in national publications like Time Magazine argued that homosexuality "is a pathetic little second-rate substitute for reality, a pitiable flight from life" and a "pernicious sickness." (*Ibid.*) The government censored gay rights materials and arrested people

who distributed them. (RA 230.) Hollywood studios, under pressure from religious leaders, adhered to a code that prohibited inclusion of gay and lesbian characters, discussion of homosexual issues, or even the "inference" of "sex perversion" in films. (*Ibid.*) Gay actors, like Rock Hudson, and the studios for which they worked, went to extraordinary lengths to conceal their homosexuality. This contributed to the continued invisibility of lesbians and gay men in American culture.

But on June 27, 1969 a galvanizing event took place. Police raided the Stonewall Inn, a gay bar in Greenwich Village. (Fone at 407.) Instead of dispersing as they had done before, bar patrons fought back, exchanging blows with the police. Three nights of rioting followed, representing the first time the gay and lesbian community literally "fought back" against centuries of state-sponsored persecution. (*Ibid.*)

Following Stonewall, progress accelerated. In California, it was spurred largely by the courts. The California Supreme Court—unlike the political branches—recognized that the government may not revoke a bar's liquor license because its patrons are gay (*Stoumen v. Reilly* (1951) 37 Cal.2d 713, 715) or revoke a teacher's certification for being gay (*Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 235), or refuse to hire persons because they are gay (*Gay Law Students Assn. v. Pacific Telephone and Telegraph Co.* (1979) 24 Cal.3d 458, 474-75). Judicial respect for the dignity of lesbians and gay men allowed them to begin to live more openly in California than other states, and eventually gain some representation in legislative bodies and protection from discrimination. By contrast, decades

later many federal and state courts elsewhere continue to deny lesbians and gay men dignity and equality.[3]

In 1977, San Francisco Supervisor Harvey Milk became the first openly gay elected official of any large city in the nation. (Milk, Harvey, Encyclopedia Britannica Online, at <http://www.search.eb.com/eb/article-9396017> [as of Mar. 30, 2007].) In 1978, the City enacted legislation he sponsored prohibiting sexual orientation discrimination in employment, housing, and public accommodations. (RA 284-85.) That same year, a political rival who had fought against this agenda of equality assassinated Milk, along with San Francisco Mayor George Moscone. But emboldened by Milk's example, other lesbians and gay men ran and were elected to the San Francisco Board of Supervisors. And in 1989, the City became one of the first in the nation to recognize domestic partnerships. (*Id.* at 289.)

The State Legislature trailed behind San Francisco and the California Supreme Court. The first openly gay California legislator was not elected until 1994,[4] and legislative gains followed. In 1999, echoing *Gay Law Students*, the Legislature added sexual orientation to the classes protected by the Fair Employment and Housing Act. (Gov. Code, § 12940.) In 2005, codifying earlier court decisions, it added sexual orientation to the Unruh

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[3] (See, e.g., *Lofton v. Sect. of the Dept. of Children & Family Services* (11th Cir. 2004) 358 F.3d 804 [denying adoption]; *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati* (6th Cir. 1997) 128 F.3d 289 [upholding law prohibiting anti-discrimination provisions]; *Shahar v. Bowers* (11th Cir. 1997) 114 F.3d 1097 [denying employment]; *Ex parte H.H.* (Ala. 2002) 830 So.2d 21] [denying custody]; *Weigand v. Houghton* (Miss. 1999) 730 So.2d 581 [same]; *Bottoms v. Bottoms* (1995) 249 Va. 410 [same].)

[4] (See <http://dist23.casen.govoff.com> [as of Mar. 30, 2007] [Biography of Sheila Kuehl].)

Civil Rights Act. (Civ. Code, § 51.) In 1999 it created a registration system for same-sex couples denominated "domestic partnership." In 2001 and again in 2003, it conferred additional rights and imposed further obligations on domestic partners. (Fam. Code, §§ 297 et seq.)

While California's evolving recognition of the humanity of its gay and lesbian citizens is in step with many other nations (see RA 331-832), the federal government and most of the country lags far behind. It was almost 30 years after California repealed its sodomy law that the U.S. Supreme Court finally recognized that prosecuting lesbians and gay men for their sexual relationships violates the federal Constitution. (*Lawrence v. Texas* (2003) 539 U.S. 558; see Eskridge, *Challenging The Apartheid Of The Closet: Establishing Conditions For Lesbian and Gay Intimacy, Nomos, And Citizenship, 1961-1981* (1997) 25 Hofstra L.Rev. 817, 848-849 [California repeal of sodomy law]. And 28 years after this Court held the California Constitution prohibits it, the federal government has yet to ban sexual orientation-based employment discrimination.

### E. The Persistence Of Discrimination

With progress has come backlash. In 1977, singer Anita Bryant initiated a national campaign to repeal a Dade County anti-discrimination ordinance, pronouncing that homosexuals were "human garbage." (*Lofton v. Sect. of the Dept. of Children & Family Services* (11th Cir. 2004) 377 F.3d 1275, 1302 (dis. opn. of Barkett, J. from denial of rehearing en banc).) Bryant promoted the myth that gay teachers would molest school children and use the ordinance as protection. (*Ibid.*)

Bryant's campaign set off a wave of anti-gay ballot measures. Voters in San Jose, Santa Clara, Irvine, St. Paul, Wichita, Eugene, Tacoma, Tampa, Cincinnati and Lewiston repealed local anti-discrimination laws.

(Adams, *Is it Animus or a Difference of Opinion? The Problems Caused by the Invidious Intent of Anti-Gay Ballot Measures* (1998) 34 Willamette L. Rev. 449, 458-60.) Her campaign also was influential in the movement in California to amend the marriage statutes to explicitly exclude same-sex couples. (RA 1121-22.) In the 20 years from 1961 to 1981, as the gay rights movement developed, more anti-gay laws were passed than repealed. (Eskridge at 823.)

More recently, in the wake of the Massachusetts Supreme Court's decision in *Goodridge v. Dept. of Public Health* (2003) 440 Mass. 309, holding that the exclusion of lesbians and gay men from marriage violated the Massachusetts' Constitution, measures to ban same-sex marriage were submitted to voters in 28 states, and only one was rejected.[5] In response to a similar ruling by the Hawaii Supreme Court (*Baehr v. Lewin* (1993) 74 Haw. 530, superseded by Haw. Const., art. I, § 23), Congress in 1996 passed the Defense of Marriage Act (28 U.S.C. § 1738C)—an unmistakable announcement that same-sex relationships are not to be accorded any federal rights, much less equal dignity with opposite-sex relationships.[6]

Since enactment of the "don't ask/don't tell" policy in 1993, discharges of lesbians and gay men doubled between 1994 and 2000

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[5] Kay, *Symposium on Law In The Twentieth Century: From the Second Sex to the Joint Venture:An Overview Of Women's Rights And Family Law In the United States During the Twentieth Century* (2000) 88 Cal.L.Rev. 2017, 2027 (Kay I).

[6] By contrast, other nations have begun to recognize the equal dignity of same-sex couples. Lesbians and gay men may marry in the Netherlands, Belgium, Canada, South Africa and Spain, and Israel's High Court of Justice has that same-sex marriages from elsewhere must be recognized. (See <http://en.wikipedia.org/wiki/Same-sex_marriage> [as of Mar. 30, 2007]; see also RA 343-832.)

(Marcus at 360) as did harassment of gay soldiers (Fone at 415). The military dismissed almost 10,000 lesbian and gay service members between 1994 and 2003. (General Accounting Office, Military Personnel: Financial Costs and Loss of Critical Skills Due to DOD's Homosexual Conduct Policy Cannot Be Completely Estimated 4 (2005).)

Hate crimes against lesbians and gay men increased in the late 1990's. A bomb exploded in a lesbian bar in Atlanta; five black gay men were murdered in Washington; two lesbians were murdered "execution style" in Oregon; and the murder rate of gay men in Texas increased dramatically. (Fone at 413.) In Wyoming, Matthew Sheppard was bound, tied to a fence, beaten with a pistol and left to die because he was gay. (*Ibid.*) The FBI reports that 1,281 gay, lesbian or bisexual men were victims of hate crimes in 1996. By 2001, the number had increased to 1,664.[7]

The persecution continues in California as well. According to the FBI, 2,097 sexual orientation-based hate crimes were reported in California between 2000 and 2005. (Levit, *A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory* (2000) 61 Ohio St. L.J. 867, 874.) In 1999 Adam Colten was beaten senseless by three teenagers after coming out at his Novato high school. When he woke up hours later, he found the word "fag" carved into his arms and stomach. (*Ibid.*) On a yearly basis, over 200,000 California students suffer harassment based on actual or perceived sexual orientation. (California Safe Schools Coalition, et al., Safe Place to Learn: Consequences of Harassment Based on Actual or Perceived Sexual

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[7] <http://www.fbi.gov/ucr/ucr.htm#hate> [as of Mar. 30, 2007].

Orientation and Gender Non-Conformity and Steps for Making Schools Safer 1 (2004); see RA 326-29.)

Given the treatment to which these young people are subjected through their formative years, it is perhaps not surprising that most studies show roughly 30 percent of gay or bisexual youth have attempted suicide and that such youth are 2-3 times more likely to do so than heterosexual youth. (Russell and Joyner, *Adolescent Sexual Orientation and Suicide Risk: Evidence from a National Study* (2001) 91 American. J.. Pub. Health 1276.) Nor is it surprising that gay youth are far more likely to suffer from depression and substance abuse. (*Id.* at 1280.) Or that between 20 and 40 percent of all homeless youth identify as gay, bisexual or transgender, having often been kicked out of their homes or forced to flee from violence. (Nicholas Ray, An Epidemic of Homelessness (2006) 1-2.)[8]

All of this shows that the State is correct when it contends the marriage exclusion is the product of tradition. But while we can be proud of many of the traditions we inherited from the western world, this is not one of them.

## II. THE EVOLUTION OF MARRIAGE IN THE UNITED STATES.

Civil marriage is a heavily regulated institution that is separate from religious and other traditions. Far from retaining the same definition and meaning over the years, it has evolved significantly – often at the behest of the judiciary. At every stage, people expressed fears that change would destroy marriage. But they were wrong. If past courts had taken the

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[8] <http://www.thetaskforce.org/press/releases/prHY_013007> [as of Mar. 30, 2007].

approach advocated by the State here—namely, preserve tradition to avoid upsetting people—marriage would no longer be meaningful.

### A. Civil Marriage Has Evolved Continuously Throughout Our History, And The Judiciary Has Played A Major Role In That Evolution.

#### 1. State Control And Regulation Of Marriage.

We inherited much about our culture and laws from England including some relating to marriage. But the earliest colonists made changes. In Europe there had been battles between monarchies and churches over control of marriage, and by the seventeenth century churches and their ecclesiastical courts controlled the institution. Colonists, many of whom fled here to escape religious persecution, chose secular government control over marriage, and marriage continues to be controlled and regulated by the states—not by religious institutions—to this day.[9] States thus control access to marriage, set entry and exit requirements, and prescribe the rights and obligations that flow from it. (Cott at 28.) Like other states, California asserted legal dominion over civil marriage from the outset. Our State's first constitution provided: "No contract of marriage, if otherwise duly made, shall be invalidated for want of conformity to the requirements of any religious sect." (Cal. Const., former appx. I, art. XI, § 12 [now Fam. Code § 420(c)].) As this provision demanded, California has always treated marriage as a civil law matter, leaving individuals free to apply their own customs and religious beliefs in the context of their

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[9] (See RA 242; Kay I at 2024-2025; Cott, Public Vows, A History of Marriage and the Nation (2000) 27-29 (Cott); Feldman, Divided By God (2005) 103-04; Demos at 162.)

marriages but declining to enforce or entangle itself in religious or customary norms not embodied in the civil law.[10]

**2. Coverture.**

One tradition that did cross the Atlantic was the doctrine of coverture, which "turned the married pair legally into one person—the husband." (Cott at 11.) Coverture meant husbands had virtually complete legal control over wives' property, assets *and* persons. The husband controlled where the couple lived and whether and when the wife could leave home for any purpose. He controlled his wife's labor and earnings. He had the right to punish her physically, to coerce her to engage in sexual intercourse, and effectively to compel her to bear and raise as many children as he could beget. (Hasday, *Contest and Consent: A Legal History of Marital Rape* (2000) 88 Cal. L.Rev. 1373, 1389-92, 1397-99 (Hasday); see RA 246-47.) Coverture and its vestiges have eroded over time in America. (RA 247-49; Kay I at 2018-19; *Trammel v. United States* (1980) 445 U.S. 40, 52.)

One departure from coverture involved married women's property. Many states adopted Married Women's Property Acts and Married Women's Earnings Acts in the mid-19th century. (Cott at 52-54.) California, while under Spanish rule, adopted a community property system under which married women owned and controlled their separate property. And when delegates to California's first Constitutional Convention debated

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[10] See, e.g., *In re Marriage of Shaban* (2001) 88 Cal.App.4th 398; *In re Marriage of Weiss* (1996) 42 Cal.App.4th 106; *In re Marriage of Dajani* (1988) 204 Cal.App.3d 1387, 1390; *In re Marriage of Fereshteh and Vryonis* (1988) 202 Cal.App.3d 712; *In re Marriage of Noghrey* (1985) 169 Cal.App.3d 326; *In re Marriage of Murga* (1980) 103 Cal.App.3d 498, 505.

whether to retain the civil law-based concept of community property, one objected that guaranteeing women ownership of their separate property was "contrary to . . . nature," which, like the common law, "put her under the protection of man." (Grodin, et al., *The California State Constitution: A Reference Guide* (1993) 6 (Grodin).) Another complained that it would "rais[e] [the wife] from the condition of head clerk to partner." (*Ibid.*) Ultimately the delegates chose a community property regime, providing that property owned by the wife before marriage or acquired afterward by gift would be her separate property. (Cal. Const., former appx. I, art. XI, § 14; see *George v. Ransom* (1860) 15 Cal. 322, 323.) Rebuffing the first Legislature's later attempt to retreat from this change and substitute principles of coverture (*see* Grodin at 28, fn.31, 58), this Court exercised its independence, honoring the constitutional community property law and striking down the legislation. (*George*, at 322; see also *Wilson v. Wilson* (1968) 36 Cal. 447, 454; *Alexander v. Bouton* (1880) 55 Cal. 15, 19.)

**3. Divorce.**

Another departure from coverture, and from the ecclesiastical rules prevalent in England (see Kay I at 2024-26; Cott at 47), was the states' treatment of divorce. Initially colonies and states dealt with divorce ad hoc, with legislatures granting private bills of divorce (see Kay I at 2025). By the late 1700s, many states had adopted statutes specifying grounds for divorce and conferring jurisdiction on civil courts. (*Id.* at 2026; Cott at 47-48.) Divorce was allowed only for reasons such as cruelty, adultery or desertion, but it was available in most states. (Cott at 48; Hasday, 88 Cal. L.Rev. at 1373, 1387.) In ensuing decades "judicial divorce spread almost everywhere and most states expanded the statutory grounds." (Cott at 49.)

With jurisdiction over marital dissolution, the courts—including this one—played an increasing role in development of the law governing marriage.

Early laws allowing and expanding grounds for divorce were intensely debated. (See *id.* at 2025, 2026-27; Cott 50-51.) Feminists believed that divorce was necessary so women could shape their own destinies and escape from abusive marriages that enslaved them. (Kay I at 2027-28 & fn. 58.) Anti-divorce advocates equated divorce with "moral dryrot," suggested it would throw the whole community "into a general prostitution" (Friedman, A History of American Law (1985) 206), and called for a federal Constitutional amendment to ban it. (Schaffner, *The Federal Marriage Amendment: To Protect The Sanctity Of Marriage Or Destroy Constitutional Democracy* (2005) 54 American U. L.Rev. 1487, 1509-11 (Shaffner).)

Divorce laws were liberalized again during the twentieth century, with California leading the way (see Kay I at 2039-62). In 1952, this Court effectively abolished the defense of recrimination, which disallowed divorce if both parties were at fault. (*De Burgh v. De Burgh* (1952) 39 Cal.2d 858, 868-869.) The California Legislature incorporated the *De Burgh* standard—which permitted divorce when the marital relationship had broken down—when it enacted the nation's first no-fault divorce law in 1969. (Kay I at 2050-56 & fn. 217; see Kay, *Equality and Difference: A Perspective On No-Fault Divorce And Its Aftermath* (1987) 56 U. Cin. L.Rev. 1 (Kay II).) The rest of the nation followed, and by 1987 every state had some type of no-fault divorce law. (Kay II at 5-6; Cott at 205-06.)

Further reforms involving post-divorce arrangements like child custody, child support, alimony and division of marital assets also followed. (Cott at 206.) Custom had been to award custody of children,

especially young children, to the mother and to impose child support on the father. Again, California "led the way in abandoning a maternal preference [in custody], moving in 1972 to a gender-neutral standard." (Scott, *Pluralism, Parental Preference and Child Custody* (1992) 80 Cal. L.Rev. 615, 620, fn.10; see *In re Marriage of Carney* (1979) 24 Cal. 3d 725, 736-37) This Court struck down the common law rule that the father possesses the primary right to have the child bear his surname, rejecting the father's argument that "rules preferring the paternal surname are justified because they formalize long-standing custom." (*In re Marriage of Schiffman* (1980) 28 Cal.3d 640, 646-47.)

**4. Miscegenation laws.**

Prohibitions on interracial marriage dated back to colonial times, and in California, to the beginning of its statehood. (*Perez v. Sharp* (1948) 32 Cal.2d 711, 719 (plur. opn. of Traynor, J.); *id.* at 746-48 (dis. opn. of Shenk, J.).) They existed in "as many as forty-one states and territories at some time in their history." (RA 245.) "Miscegenation laws had sought to preserve white women as marriage partners for white men, while preventing African-American women, who not infrequently bore children fathered by white men, from making legal claims based on the relationship." (Kay I at 2035.) These laws were also "designed to stigmatize the former slaves and their descendents by preventing the mixing of their blood with that of their white fellow countrymen." (*Id.* at 2036; RA 245.)

Reform in this area was, again, accomplished through the courts. In 1948 this Court was the first in the country to strike down a miscegenation law. (*Loving v. Virginia* (1967) 388 U.S. 1, 6, fn.5, citing *Perez*.) When it did so, segregation was legal, a majority of states had miscegenation laws

on their books (*Perez*, 32 Cal.2d at 747 (dis. opn. of Shenk, J.)), the U.S. Supreme Court had upheld a law punishing interracial adultery more harshly than intra-racial adultery (*Pace v. Alabama* (1883) 106 U.S. 583, 585), and all other courts to consider miscegenation laws had upheld them (*Perez*, at 742, 748-53 (dis. opn. of Shenk, J.)).

This Court's landmark decision in *Perez* "sparked debate in other states about changing marriage laws to reflect society's evolving views about racial equality." (RA 246.) In ensuing years, about half the states that had such laws on the books repealed them. When the Supreme Court finally outlawed them 19 years after *Perez*, its decision affected only 16 states. (*Loving*, 388 U.S. at 6-7 & fn.5.)

### B. The Transformation Of Civil Marriage Has Enabled It To Retain Its Vitality.

This Court's role—in statutory interpretation, common law development, and constitutional review—was instrumental in *all* the areas discussed above. (See *De Burgh*, 39 Cal.2d 858; *Perez*, 32 Cal.2d 711; *George*, 15 Cal. 322.) In two of those cases, the Court rejected popular laws embodying longstanding traditions on constitutional grounds.

Many of these changes to marriage were not "readily welcomed" and were "difficult for some in society to accept." (RA 244.)

> Indeed, many features of marriage that we take for granted today, such as the ability of both spouses to act as individuals, marriage across the color line, or the possibility of divorce, were very much resisted as they were coming into being; opponents saw these new features as threatening to destroy the institution of marriage itself. (*Ibid.*)

But despite the worst fears of those resisting change, marriage has remained vital, important and deeply meaningful in our culture. Indeed,

> [m]arriage has been a successful civil institution precisely *because* it has been flexible, not static. Flexibility and adjustment in some features of marital

> roles, duties and obligations were necessary to preserve the value and relevance of marriage during centuries of dynamic change. (*Id.* 243-44, italics added.)[11]

The State's assertion that "tradition" supports the maintenance of the marriage exclusion widely misses the mark. The tradition of marriage is, in fact, one of steady evolution. And in that evolution, California, often through its courts, has been at the forefront.

## PROCEDURAL HISTORY

### A. The Marriage Cases.

On March 11, 2004, the City filed a Petition for Writ of Mandate and Complaint for Declaratory Relief against the State of California and the State Registrar of Vital Statistics. (S.F. Super. Ct. No. 429539 and Ct. App. No. A110449; *CCSF* action) It sought a declaration that section 308.5 does not apply to in-state marriages and that sections 300, 301 and 308.5 violate the California Constitution.[12] It also sought a writ of mandate ordering the

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[11] (See also Kay I at 2087-88 [describing evolution in family laws that have "facilitate[d] the emergence of women as autonomous individuals, able to choose the direction of their lives"], 2091 [suggesting that despite calls for a return to the 19th "century model" of "father-dominated, home-centered, mother-dependent, traditional family," family law must continue to respond to "the further evolving roles of women and men over the twentieth century"].)

[12] Section 300 provides: "Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary." This provision was gender-neutral until 1977, when the Legislature inserted the phrase "between a man and a woman" to ensure that no same-sex couple could make even a colorable claim to marriage.

Section 301 provides: "An unmarried male of the age of 18 years or older, and an unmarried female of the age of 18 years or older, and not otherwise disqualified, are capable of consenting to and consummating marriage." This provision, which is derived from former Civil Code Section 4101, was also gender-neutral before 1977.

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State Registrar to: (1) issue marriage license forms that do not discriminate against same-sex couples; (2) include marriages of same-sex couples in the state index; and (3) instruct local registrars throughout the state not to deny marriage licenses to same-sex couples. (RA 5.)

The next day, a group of lesbian and gay couples and organizations filed suit against the State asserting similar claims. (S.F. Super. Ct. No. 504038 and Ct. App. No. A110451; *Woo* action [now retitled *Rymer v. State*].) The trial court consolidated these cases for trial.

Later, another group sued the State in the same court, asserting similar constitutional claims (S.F. Super. Ct. No. 429548 and A110463; *Clinton* action). Meanwhile, lesbian and gay couples sued the County of Los Angeles asserting similar claims (L.A. Super. Ct. No. BS088506 and Ct. App. No. A110450; *Tyler* action.) The State was later added as a defendant.

### B. The Trial Court Proceedings.

#### 1. Coordination.

The State sought coordination of the *CCSF*, *Woo*, and *Tyler* actions and two earlier filed actions. The earlier actions, *Proposition 22 Legal Defense& Education Fund v. CCSF* (S.F. Super. Ct. No. 503943 and Ct. App. No. A110651; *Fund* action) and *Campaign for California Families v. Newsom* (S.F. Super. Ct. No. 428794 and Ct. App. No. A110652; *Campaign* action), challenged the City's issuance of marriage licenses to

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(footnote continued from previous page)

Section 308.5 provides: "Only marriage between a man and a woman is valid or recognized in California." This provision was adopted by initiative in March 2000 to prevent California from recognizing same-sex marriages performed out of state.

lesbian and gay couples. Those actions had been stayed pending this Court's decision in *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055. Once this Court decided *Lockyer*, the stay was lifted.

These five cases were coordinated. The *Clinton* action was later added by petition. The *Coordinated Marriage Cases*, assigned JCCP No. 4365, were assigned to Judge Richard A. Kramer.

**2. The City's efforts to create a full record.**

In a series of case management conferences, the City sought discovery and an opportunity to present evidence in the event that the strict scrutiny factors and the claimed justifications for the marriage exclusion were found to necessitate an evidentiary record. (See RT 29-33, 47-48, 53-54, 135-43, 153-54; City and County of San Francisco's Motion to Augment the Record, Ex. 1.) Judge Kramer believed that the case could be resolved without an evidentiary record. (See RT 150-52, 156-58.) He allowed the parties to submit declarations but indicated he did not believe he would need to consider them. (*Ibid.*) He stated that if factual issues became relevant he would conduct further proceedings, the parties could submit further evidence on disputed matters, and no party would be prejudiced by his decision to proceed first with the legal issues. (*Id.* 156-58.)

The City's declarations established that:

- Lesbians and gay men have experienced considerable discrimination throughout the history of our country and state (RA 223-38; see also *id.* 296-329);
- Homosexuality is a normal human variant and is unrelated to one's ability to perform in society (*id.* 256-57, 911-12);
- Sexual orientation is core to identity (*id.* 911);

- Lesbian and gay parents perform as well as heterosexual parents in raising children (*id.* 257-58, 911, 13-14);
- Lesbian and gay couples with and without children are demographically similar in all significant respects to their married heterosexual counterparts (*id.* 186-202);
- Denying lesbian and gay couples the right to marry has harmed them in myriad ways, stigmatizes them and their families and reinforces prejudice against them (*id.* 918-21, 959-64, 296-329);
- The marriage laws have evolved substantially over time, and marriage has not been destroyed by change (*id.* 239-52).

The State did not object to the City's evidence or submit evidence of its own.

**3. The trial court decision.**

On April 13, 2005, the trial court held that the marriage exclusion was unconstitutional. First, it concluded the exclusion does not rationally relate to a legitimate state purpose. (AA 112-22.) The court rejected the State's assertion that California's domestic partnership scheme made the exclusion rational. (AA 114-15.) It also rejected the Fund's and Campaign's assertions that the marriage exclusion furthered the state's interest in procreation. (AA 118-22.)

Second, the trial court concluded the marriage exclusion should be subject to strict scrutiny because it discriminates based on gender and infringes on the fundamental right to marry. (AA 122-27.) The court did not reach the City's other constitutional claims—sexual orientation discrimination and violation of the right to privacy. (AA 129.)

### C. The Court of Appeal Opinion.

The State, the Fund, and the Campaign appealed. The Court of Appeal consolidated the six cases, and unanimously held the Fund and Campaign lacked standing. In the other four cases, it reversed the trial court on the constitutional issues over a vigorous dissent. (*In re Marriage Cases* (2006) 143 Cal.App.4th 873.) The majority held that the marriage exclusion satisfies rational basis review and does not otherwise violate equal protection, due process, or the right to privacy.

But the majority did not simply hold that the marriage exclusion is constitutional; it concluded that the judiciary lacks the power to decide otherwise. It stated, "the courts may not compel the change respondents seek." (*Id.* at 913.) (See also *id.* at 931 [". . . it is not for the court to implement this change."].) Similarly, Justice Parilli stated in her concurring opinion: "The inequities of the current parallel institutions should not continue if one group of citizens is being denied state privileges and protections attendant to marriage because they were created with a sexual orientation different from the majority, if we are to remain faithful to our Constitution." (*Id.* at 942 (conc. opn. of Parilli, J.).) Nonetheless, "[i]f respect for the rule of law is to be maintained, courts must accept and abide by their limited powers." (*Ibid.*)

The majority gave a number of reasons for its view that it had the power to hold only for the State, and not for the City and other petitioners. First, the majority was clearly concerned that people have strong feelings about the issue of same-sex marriage. It repeatedly emphasized that the decision of the Massachusetts Supreme Judicial Court striking down that state's marriage exclusion was "controversial." (*Id.* at 908 n.16, 910-911.) It also highlighted that marriage is "a social institution of profound

significance to the citizens of this state, many of whom have expressed strong resistance to the idea of changing its historically opposite-sex nature." (*Id.* at 934; see also *id.* at 889.)

The majority was also concerned about the fact that the case involves a "definition," and believed it did not have the power to change a definition so grounded in custom and tradition. It stated: "Were we to expand the definition of marriage to include same-sex unions, we would overstep our bounds as a coequal branch of government." (*Id.* at 913.) The current definition, the court emphasized, "has existed throughout history and . . . continues to represent the common understanding of marriage in most other countries and states of our union . . . ." (*Id.* at 931; see also *id.* at 910, 911.)

Finally, the majority believed it was required to defer to the political branches and the will of the popular majority: "The Legislature and the voters of this state have determined that 'marriage' in California is an institution reserved for opposite-sex couples, and it makes no difference whether we agree with their reasoning." (*Id.* at 936.) "Respect for the considered judgment of the Legislature and the voters," the majority asserted, "is especially warranted where the issue is so controversial and divisive as is the question whether gays and lesbians should be permitted to marry their same-sex partners." (*Id.* at 937.)

Justice Kline's dissenting opinion argued that the marriage exclusion violates equal protection, the right to personal autonomy, and the right to liberty. On the power of the judiciary to address these issues, the dissent took issue with the majority's apparent belief that it lacked the power or institutional competence to hold for the petitioners:

> What Justice Jackson said in [*West Virginia State Board of Education v. Barnette* (1943) 319 U.S. 624,

> 638], about the Bill of Rights, can also be said about the inalienable rights protected under article 1, section 1 of the California Constitution: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." (*Marriage Cases*, 143 Cal.App.4th at 967 (conc. & dis. opn. of Kline, J.).)

The dissent pointed out that the majority's approach to judicial review was strikingly similar to the reasoning of the Virginia Supreme Court that was repudiated in *Loving v. Commonwealth* (Va. 1966) 147 S.E.2d 78, 82. (*Marriage Cases*, 143 Cal.App.4th at 950-51 (conc. & dis. opn. of Kline, J.)

## LEGAL DISCUSSION

### I. THE MARRIAGE EXCLUSION IS NOT RATIONALLY RELATED TO A LEGITIMATE GOVERNMENTAL INTEREST.

Under the California Constitution, the rational basis test has real meaning, especially in the equal protection context. The Court must engage in "*a serious and genuine judicial inquiry* into the correspondence between the classification and the legislative goals." (*Warden v. State Bar* (1999) 21 Cal.4th 628, 647, citations and internal quotations omitted.) This is a two-part analysis: there must be "some rationality in the nature of the class singled out" *and* "a rational relationship between the legislative goal and the class singled out for unfavorable treatment." (*Young v. Haines* (1986) 41 Cal.3d 883, 899-900, citations and internal quotations omitted.)

Identifying a legitimate purpose is not an abstract game in which any speculative hypothetical purpose will suffice. A classification cannot be justified by "invent[ing] fictitious purposes that could not have been within

the contemplation of the Legislature." (*Warden*, 21 Cal.4th at 648; see also *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1201.)

Once a legitimate purpose is identified, the court must consider whether the purpose supports the distinction between differently treated groups. (*Id.* at 1202, 1204.)

> "[E]ven in the ordinary equal protection case calling for the most deferential of standards, [courts must ascertain] the relation *between the classification adopted and the object to be attained.* The search for the link between classification and objective gives substance to the Equal Protection Clause.'" (*Id.* at 1201, italics added and internal quotations omitted.)

Finally, challenged legislation and the purposes proffered to support them cannot be considered in isolation:

> In determining the scope of the class singled out for special burdens or benefits, a court cannot confine its view to the terms of the specific statute under attack, but *must judge the enactment's operation against the background of other legislative, administrative and judicial directives which govern the legal rights of similarly situated persons.* (*Brown v. Merlo* (1973) 8 Cal.3d 855, 862, italics added.)

The marriage exclusion is irrational, and for that reason the Court need not reach the remaining questions in the case: whether the marriage laws should be subject to strict equal protection scrutiny, whether they violate the right to personal autonomy, or whether they infringe on fundamental liberty interests. If the Court concludes that the marriage exclusion is irrational and inconsistent with existing State policy towards lesbians and gay men, that is the end of the matter.

### A. The Marriage Exclusion Is Invalid Because It Singles Out An Unpopular Social Group Based On Characteristics That Have No Effect On The Welfare Of Others.

The California Constitution distinctly commands that *all* laws enacted to single out a social group based on individual characteristics that

do not affect the welfare of others are invalid. In this respect California's equal protection guarantee is stronger than the federal one, because such laws must fall even if the court could, *post hoc*, conjure up a legitimate purpose for them.

In *Parr v. Municipal Court* (1971) 3 Cal.3d 861, this Court addressed an ordinance that made it unlawful to (among other things) "sit on sidewalks or steps, or to lie or sit on any lawns." The legislative vehicle for the ordinance contained an "urgency clause" stating it was enacted in response to "an extraordinary influx of undesirable and unsanitary visitors to the City, sometimes known as 'hippies.' " (*Id.* at 862-63.) The fact that the ordinance targeted hippies alone rendered it invalid:

> "Laws are invalidated by the Court as discriminatory because they are expressions of hostility or antagonism to certain groups of individuals. . . . When and if the proscribed motives [of hostility and prejudice] replace a concern for the public good as the purpose of the law, there is a violation of the equal protection prohibition against discriminatory legislation." (*Id.* at 864, citations and internal quotations omitted.)

The Court looked beyond the neutral wording of the ordinance itself and found the discriminatory intent: "[W]e cannot be oblivious to the transparent, indeed the avowed, purpose and the inevitable effect of the ordinance in question: to discriminate against an ill-defined social caste whose members are deemed pariahs by the city fathers." (*Id.* at 870.)

The legislation challenged in *Parr* targeted a class that had *not* been held "suspect" for equal protection purposes. Nonetheless, the Court held it violated equal protection: "This court has been consistently vigilant to protect racial groups from the effects of official prejudice, and we can be no

less concerned because the human beings currently in disfavor are identifiable by dress and attitudes rather than by color. (*Id.* at 870.)[13]

The Court also made an observation that is particularly relevant here: laws enacted out of discomfort with a particular group are invalid in part because they encourage private discrimination against that group. "In assessing the probable impact of [the ordinance], we are mindful of the private discrimination against hippies which the ordinance will likely foster." (*Id.* at 869.) "If the presence of hippies in Carmel is to be discouraged, as the ordinance implies, residents of the city may perceive it to be their civic duty to cooperate in the campaign." (*Id.* at 870.)

More recently, the Court of Appeal applied the rule of *Parr* to invalidate a proposed initiative measure that repealed and banned local laws protecting lesbians, gay men and persons with HIV or AIDS from discrimination, which it found was "designed to encourage discrimination and promote bias against a selected class of citizens." (*Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal.App.4th 1013, 1030.) As the court there stated: "a law need not *require* discrimination to be invalid; *it is forbidden for the state to encourage it.*" (*Ibid.*; *accord Mulkey v. Reitman* (1966) 64 Cal.2d 529, 540, affd. (1967) 387 U.S. 369.)

This Court has also applied this rule to a public utility's blanket refusal to employ lesbians and gay men: "the California Constitution

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[13] See also *Mansur v. City of Sacramento* (1940) 39 Cal. App. 2d 426, 430 [legislative classification "must not rest upon the personal, physical, or even mental characteristics pertaining solely to the individual affected, but rather upon the *relation* which such individual may bear to society"]; *Ex Parte Finley* (1905) 1 Cal.App. 198, 207 [same].

precludes a public utility's management from automatically excluding all homosexuals from consideration for employment positions or, by the same token, from excluding any classification of persons because of personal whims or prejudices . . . ." (*Gay Law Students Assn.*, 24 Cal.3d at 474-75.) The Court did not consider whether any rational basis might exist for excluding homosexuals as a class from employment; the exclusion was in its view patently arbitrary because homosexuality is "unrelated to a worker's qualifications." (*Ibid.*)[14]

As the Court of Appeal acknowledged, the marriage exclusion—both when made explicit by the Legislature in 1977 and when extended to out-of-state couples by the voters in 2000—was specifically intended to exclude lesbians and gay men from marriage. (*Marriage Cases*, 143 Cal.App.4th at 918-19; see also RA 1023-1182 [legislative history of 1977 amendment to former Civil Code section 4100, later recodified as Family Code section 300]; RA 88-92 [ballot pamphlet materials for Proposition 22, later codified as Family Code section 308.5].) It is plain that majority sentiment toward homosexuals—whether described as animus, antipathy or simply discomfort—was the motivating factor behind these laws. When the State urges the Court to defer and to accept tradition as the purpose for the law, it is this majoritarian discomfort to which it asks the Court to defer.

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[14] It is in this respect that California's equal protection guarantee is stronger than its federal counterpart. Under federal law, government action plainly violates equal protection only if it has no conceivable purpose *other than* to harm a politically unpopular group. (See, e.g., *Romer v. Evans* (1996) 517 U.S. 620, 634.) In California, the *mere fact* that the law singles out an unpopular group based on characteristics that have no effect on others renders it invalid without consideration of other rationales.

This the Court may not do. For *Parr* makes clear that in this State, majority distaste for an unpopular group cannot justify a law and, on the contrary, requires that it be struck down. This is so whether the group has been recognized as a suspect class or is some other "ill-defined social caste" whose members a majority has come to view as "pariahs," like the people targeted by the ordinance struck down in *Parr*, 3 Cal.3d at 870.

### B. The Marriage Exclusion Is Utterly Irrational When Viewed Against The Backdrop Of Current State Laws And Public Policies.

The fact that the marriage exclusion was enacted out of discomfort with an unpopular social group is reason alone to strike it down. But the exclusion is also invalid because it is totally inconsistent with the State's current public policy towards lesbians and gay men.

California has the highest percentage of same-sex couples of any State in the nation. (RA 189.) Same-sex couples live in every California county. (RA 190.) They represent every race and age group, have household incomes comparable to their married counterparts, have served in the military in comparable numbers, and contribute to the economy to a comparable degree. (*Ibid.*) As of 2000, nearly a third of the State's same-sex couples were raising children under 18. (RA 191)

Our courts and Legislature have come, over time, to recognize the fundamental humanity of lesbians and gay men, and their right to equal treatment in economic, public and family life. Accordingly, in California sexual orientation discrimination is prohibited "in all business establishments of every kind whatsoever." (Civ. Code, § 51(b).) People may not discriminate against lesbians and gay men in employment, housing, insurance policies, or health care service plans. (See Stats. 1999, ch. 592; Gov. Code, §§ 12920, 12921, 12926, 12940, 12949, 12955; Ins.

Code, § 10140; Health & Safety Code, § 1365.5; Lab. Code, § 4600.6(g)(2); Cal. Code Regs., tit. 10, § 2632.4.) It is understood that sexual orientation has no effect on a person's ability to serve on a jury, nor should the sexual orientation of witnesses or defendants have any impact on a jury's deliberations. (Code Civ. Proc., §§ 204, 231.5; Pen. Code, § 1127h.)

California public policy also treats lesbians and gay men as equals in family matters. They are considered equally capable foster parents and adoptive parents. (Welf. & Inst. Code, §§ 16001.9(a)(23), 16013; Stats. 2003, ch. 331; Fam. Code, §§ 8600, 9000(b).) Under the domestic partner laws, lesbians and gay men may visit their partners in the hospital, adopt each others' children, use sick leave to care for each other, serve as administrators of each others' estates, make medical decisions for each other, participate in conservator proceedings involving a partner, and sue for wrongful death of a partner. (Stats. 1999, ch. 588 [AB 26]; Stats. 2001, ch. 893.)

In 2003, the Legislature adopted AB 205, which expanded state-provided tangible rights to same-sex couples to make them comparable to those of married spouses, and equalized the law relating to matters such as family leave and health care plans. (Stats. 2003, ch. 421; Fam. Code, § 297.5; Lab. Code, § 233, Ins. Code, §§ 3302, 3303; Health & Saf. Code, § 1374.58.) In adopting AB 205, the Legislature recognized the "longstanding social and economic discrimination" lesbians and gay men have faced, and found that despite it many lesbian and gay couples have formed "lasting, committed and caring relationships." (Stats. 2003, ch. 421, § 1(b).) It found that same-sex couples "share lives together, participate in their communities together, and many raise children and care for other

dependent family members together." (*Ibid.*) It found that "[e]xpanding the rights and creating responsibilities of registered domestic partners would further *California's interests* in promoting *family relationships* and protecting *family members* during life crises." (*Ibid.*, italics added; see also *id.*, § 1(a).) It stated its intent to "reduce discrimination on the bases of sex and sexual orientation in a manner consistent with the requirements of the California Constitution" and to "move closer to fulfilling the promises of inalienable rights, liberty, and equality contained in sections 1 and 7 of article 1 of the California Constitution." (Stats. 2003, ch. 421, §§ 1(a) & (b).)[15]

But despite recognizing that gay couples and families are equal to their heterosexual counterparts, the State does not permit gay people to *marry*. Thus, the State's laws and policies regarding lesbians, gay men and their families can best be described as schizophrenic. On the one hand, the State posits that lesbians and gay men should be allowed to work, participate in civic life and create families on equal terms with others. The decision to afford what are, in its view, sweeping legal protections to lesbian and gay couples reflects a legislative determination that gay people and their families are just as deserving of respect in the eyes of the law as other people and their families, i.e., that there is nothing the least bit harmful, undesirable or threatening to society about lesbian and gay relationships.

Yet at the same time, the State denies lesbians and gay men access to the most revered institution of all. This refusal to permit lesbians and gay

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[15] Notably it did not find that the legislation would *eliminate* discrimination or *fulfill* the Constitution's promises of liberty and equality; it understood the domestic partnership scheme fell short of that goal.

men to marry is based on a premise totally contrary to the public policies discussed above. It announces to the people of California—including, of course, gay people themselves and their children—that lesbian and gay relationships are in some manner less desirable, less meaningful, or less worthy than heterosexual ones (for whatever reason that might be). By excluding lesbians and gay men from the institution of marriage, the State prohibits the full integration of lesbian and gay families into the fabric of civil society. It denies the full humanity of gay people. This entirely erratic approach to public policy is the very definition of arbitrary.

### C. Neither Statutory Definitions Nor Laws Grounded In Custom, Tradition, And The Will Of The People Are Insulated From Invalidation Under The California Constitution.

Given the primacy of the California Constitution in safeguarding the rights of all Californians, the judiciary has a "personal obligation to exercise independent legal judgment in ascertaining the meaning and application of the state constitutional provisions." (*Com. to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 262, citation and internal quotations omitted.) This is particularly true in the area of "fundamental civil liberties," where the judiciary's "first referent" is the California Constitution, which is frequently construed more broadly than the federal Bill of Rights. (*People v. Longwill* (1975) 14 Cal.3d 943, 951, fn. 4; see also *People v. Belous* (1969) 71 Cal.2d 954, 963; *Serrano v. Priest* (1976) 18 Cal.3d 728, 764.)

> 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,