> 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, citations and internal quotations omitted.)

The majority below felt that the customs and traditions of marriage immunized the marriage exclusion from judicial invalidation under the rational basis test. What's more, the majority apparently felt that, in light of custom, tradition, the involvement of a statutory definition, and the controversial nature of the case, the judiciary is *powerless* to rule in favor of the petitioners. (*Marriage Cases*, 143 Cal.App.4th at 889, 908 n.16, 910-911, 913, 931, 936, 937; see also *id.* at 942 (conc. opn. of Parilli, J.) see also Discussion at pp. 30-31, *ante*.) In reaching these conclusions, the lower court shrank from its constitutional duty.

1. The judiciary has the power to strike down a statutory definition that violates the Constitution.

The majority's belief that it lacked the power to strike down a statutory definition was completely misguided. There is nothing unusual about a court reviewing a statutory definition and deciding that it is or is not constitutional.[16] Indeed, this Court recently rejected an argument that the State's differential treatment of persons convicted of similar criminal acts (intercourse with a minor and oral copulation with a minor) was immune from judicial review simply because the Legislature had defined the two acts as different crimes. The Court noted: "The decision of the Legislature

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[16] See, e.g., *People v. Wutzke* (2002) 28 Cal.4th 923, 926; *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1153; *Michael M. v. Superior Court* (1979) 25 Cal.3d 608; *Weber v. City Council of Thousand Oaks* (1973) 9 Cal.3d 950, 964-65.

to distinguish between similar criminal acts is itself a decision subject to equal protection scrutiny." (See *Hofsheier*, 37 Cal.4th at 1199.) That marriage has been statutorily defined to exclude same-sex couples does not lessen the judiciary's obligation to review that exclusion under the Constitution.

2. The judiciary has the power to strike down discriminatory laws even if they are based on custom and tradition.

The majority also expressed concern that courts lack power to strike down laws that incorporate longstanding social, cultural and religious norms. (143 Cal.App.4th at 910, 911, 913, 931) (see also *id.* at 941-942 (conc. opn. of Parilli, J.).) If the court had been asked to pass judgment on a pure matter of cultural or religious beliefs or traditions, its reluctance would have been well-founded. If the judiciary were asked to decide whether people should work on Sunday, or whether one parent should stay at home when couples have children, it would be right to refrain. On the other hand, if the judiciary were asked to consider whether a law prohibiting work on Sundays or requiring one member of each couple with children to remain at home violates fundamental liberty interests, it would be required to decide these issues according to the Constitution even though its decision might touch on matters of custom, religious tradition, or social policy.

The same is true for statutes governing civil marriage. The State does not prohibit religious denominations or ethnic or cultural groups from imposing their own norms on marriages within their congregations and communities, but it has separated the *legal* incidents of *civil* marriage from religious and custom-based marital norms. Thus, a community, even today, might not endorse or accept a marriage between individuals of different

faiths, ethnicities or cultural backgrounds, but that would not affect a couple's ability to obtain a civil marriage license from the State.

This is not to say that the states' marriage laws never reflect social or religious customs. On the contrary, they frequently do. After all, forty states at one time prohibited intermarriage between Caucasians and persons of other races, and four others lacked such laws only because their slave codes were so strong they did not need them. (RA 245; Cott at 40-41.) These laws dated back before the founding of the union and were deeply rooted in our nation's and State's tradition. (RA 245.) But when those laws were challenged as violating the liberty interests of individuals and their right to equality under the law, this Court recognized it was not compelled to uphold them simply because they embodied a custom and tradition that was as longstanding as this country. (*Perez,* 32 Cal.2d 711.)[17]

We do not ask the Court to decide this issue as a matter of social policy. Rather, we ask it to measure the marriage exclusion under the equal protection, privacy and liberty principles of our state Constitution. We recognize this is a controversial case, about which people have strong feelings and beliefs. This is true in part *because* marriage has roots that reach down deep into our history and culture. But that history does not and cannot insulate the civil form of marriage from judicial review.

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[17] Nor did this Court hesitate, in *Schiffman*, 28 Cal.3d at 646-647, to replace the longstanding common law rule giving husbands control over children's surnames to a gender-neutral rule based on the child's best interests.

3. Custom, tradition and the will of the people are not sufficient justifications under rational basis review.

Just as custom and tradition do not save discriminatory laws from judicial review, they do not allow such laws to pass the rational basis test. A contrary conclusion would effectively foreclose judicial review in any case in which the law that was challenged was not of recent vintage.

This Court has long held that the longevity of a practice "does not foreclose its reassessment in the light of the continued evolution of fundamental precepts of our constitutional system . . . ." (*In re Antazo* (1970) 3 Cal.3d 100, 109.) This is so both because "[c]onstitutional concepts are not static" (*Belous*, 71 Cal.2d at 967) and because "[a] change in conditions may invalidate a statute which was reasonable and valid when enacted" (*Perez,* 32 Cal.2d at 737 (conc. opn. of Carter, J.)).

In *Hofsheier*, the statute struck down by the Court required persons convicted of oral copulation with a minor to register as sex offenders but not "person[s] convicted of unlawful sexual intercourse with a minor." (*Hofsheier*, 37 Cal.4th at 1192.) The law had drawn this distinction since 1947, when voluntary oral copulation between adults was criminal while voluntary intercourse was not. (*Id.* at 1206.) The Court made clear that preservation of a tradition – no matter how embedded in the law – does not establish a rational basis. (*Ibid.*; see also *Del Monte v. Wilson* (1992) 1 Cal.4th 1009, 1023 [classification failed rational basis test even though "it has been part of the state's laws for many years, and has never before been judicially questioned"]; *Brown,* 8 Cal.3d at 869 ["The governing constitutional test . . . is whether a statute's classification bears a rational relation to a legitimate state interest; a classification which once was rational because of a given set of circumstances may lose its rationality if the relevant factual premise is totally altered"].) In short, there is no

"tradition exception" in the California Constitution, and this Court should not invent one for this case.

Tradition is especially ill-suited to justify statutory classifications challenged under equal protection.

> The function of the Equal Protection Clause is to protect disadvantaged groups against the effects of past and present discrimination by political majorities. It is not rooted in common law or status quo baselines or in Anglo-American conventions. The baseline is instead a principle of equality that operates as a criticism of existing practice. The clause does not safeguard traditions; it protects against traditions, however long standing and deeply rooted. (*Lawrence v. State of Texas* (Tx.Ct.App. 2001) 41 S.W.3d 349, 377, fn. 12 (dis. opn. of Anderson, J.), maj. opn. revd. *Lawrence,* 539 U.S. 558.)

This observation is particularly apt in the present case. Only a willful blindness can obscure the fact that the marriage exclusion is an outgrowth of a longstanding and deeply rooted tradition of prejudice and discrimination against homosexuals—a tradition sanctioned far too often by law and government. This tradition cannot be characterized as benign. The Court should not align itself with or defer to such a tradition.

The majority's reliance on the "will of the people" rationale as justification for the marriage law is even more obviously flawed. (*Marriage Cases*, 143 Cal.App.4th at 937.) The fact is, sometimes the People and their representatives commit constitutional errors, and that is why we have a Constitutional form of government. And when that happens—as it has in this case—it is the courts who are tasked with correcting the error. If, as the majority below opined, the mere fact that a statutory exclusion carries out "the expressed wishes of a majority of Californians" could justify it under rational basis review (*id.* at 935), such review would be meaningless and our Constitution would be of limited

value. But as this Court has said: "Constitutional questions are *not* determined by a consensus of current public opinion." (*Parr*, 3 Cal.3d at 870, italics added.) The courts may not therefore substitute the will of the people for constitutional scrutiny – even under rational basis review.

D. The Other Purposes Proffered For The Marriage Exclusion Make No Sense In View Of The Unrestricted Access To Marriage The State Affords All Other Consenting Adults.

The parties aligned with the State in these cases, as well as some amici in the court below, proffered various rationales for the marriage exclusion on which the State has not relied. Examples are assertions that heterosexual couples make better parents than lesbian and gay couples, or are more likely to have children, or are more likely to procreate by accident and fail to support the children they have. According to these groups, marriage either encourages society's optimal child-rearing arrangement, encourages child bearing, or serves as an incentive for heterosexuals to establish a family structure that will support their unplanned-for children. Some of these rationales have been accepted by other courts, but notably in jurisdictions whose public policies are decidedly different from California's—jurisdictions that do not even purport to recognize the full humanity of gay people or the legitimacy of their relationships and families. There is no support for these rationales in California law, which encourages and promotes formation by lesbian and gay couples of family relationships and now rejects the outdated stereotype that portrays gay couples as being unlikely to, or incapable of, having and raising children.

But there is another reason these proffered rationales make no sense under California law. Marriage licenses are available in this State to any unmarried person who is 18 or older and is capable of consenting to and

consummating a marriage. (§§ 300, 301.) Intent or ability to have children is not and has never been required. There is no screening mechanism that weeds out those adults who are not capable of or have no interest in becoming parents. Infertile people may marry. Prisoners without conjugal privileges may marry. A person who is on his or her deathbed may marry. In short, the State has never prevented non-procreative couples from marrying. Nor has it proposed or adopted an alternative domestic partnership scheme for such couples.

Nor, in granting marriage licenses, does the State inquire into a person's fitness as a spouse or a parent. People who have been divorced several times have the option to try again. Divorced persons with a history of serial adultery may marry. People who have committed and even been convicted of domestic violence may marry. Sex offenders and child abusers may marry.

And, finally, the State does not have a sexual behavior litmus test for marriage. A couple's sex life—whether conventional or unconventional, creative, boring, or nonexistent—is simply not the State's business.

In short, marriage is offered to everyone—but only so long as they are heterosexual. Thus, to suggest that lesbians and gay men are excluded because they are somehow less worthy or less fit is not only offensive to our State's public policy, it is irreconcilable with the marriage laws themselves. When measured against the reality of marriage in California, the exclusion of same-sex couples from that institution is an absolute anomaly that fails any meaningful test of rationality.

II. CALIFORNIA'S SEPARATE AND UNEQUAL REGIME FOR RECOGNIZING AND SUPPORTING LESBIAN AND GAY FAMILIES DOES NOT CURE THE CONSTITUTIONAL VIOLATION, BUT PROVES IT.

Throughout this case, the State has emphasized its provision of many of the legal rights and benefits of marriage to registered domestic partners, as if the domestic partnership laws somehow cured the constitutional defect in the marriage statutes. To the contrary. No matter how well-intentioned the domestic partnership laws have been, the fact that California uses a separate institution to replicate many of the legal benefits of marriage for gay men and lesbians, yet at the same time refuses to let them marry, highlights the arbitrariness of the marriage ban. Indeed, the closer domestic partnership comes to marriage in its tangible incidents, the more arbitrary the State's marriage exclusion becomes.

The marriage exclusion also reveals that the State has not yet taken to heart a painful lesson that should have been learned long ago: separate is not—and will never be—equal. Actions speak louder than words. When the State categorizes some types of people differently than others, it unavoidably and unmistakably teaches that those people are different from others in some substantial way—a way that matters. And that message has real consequences.

1. The maintenance of a separate regime stigmatizes same-sex couples and their children.

The tangible benefits and privileges that flow from marriage are not fully replicated by the domestic partnership scheme. In declining to treat lesbian and gay couples as married, the State denies them and their families recognition by other states, the federal government, other countries, and companies and persons not located in this State. To be sure, many jurisdictions may not recognize same-sex marriages from California.

Currently, the federal government would not. But others might, and the marriage exclusion denies same-sex couples the right to benefit from that recognition.

For example, the marriages of Massachusetts same-sex couples may be recognized by Rhode Island although the latter's marriage laws do not extend to such couples. (See *R.I. told to honor Mass. same-sex rules*, The Recorder (Fri. Feb. 23, 2007) 8.) Unlike a married same-sex couple from Massachusetts, no lesbian or gay couple from this state could ask or expect Rhode Island to treat their relationship as a marriage. Nor could a lesbian or gay couple from California expect Massachusetts, Canada, Spain, the Netherlands or any of the other countries that do (or will) allow their own same-sex couples to marry to accord their relationships the status and benefits of marriage.

California's separate regime also denies lesbians and gay men *within* the State of the instant recognition and universal understanding that comes with marriage. By calling the relationship something other than marriage, it imposes greater burdens on lesbian and gay families than all others even to obtain the tangible rights and benefits domestic partnership legally provides. It will take years before citizens of California become familiar with domestic partnership and its legal consequences. As a result, lesbians, gay men and their families will continue to have to advocate for themselves in a way no heterosexual married person need ever do just to access the rights and benefits the law promises them. Whether in dealing with their child's teachers, visiting their loved one in the hospital, preparing taxes, obtaining home loans, purchasing auto insurance, or signing up for family health benefits, lesbians and gay men will have to continue to explain the nature of their relationship to people unfamiliar with domestic partnership

and to request and demand their legal rights again and again. This is more than time-consuming and emotionally draining; it is demeaning. (See RA 321-23, 326.) It would be unnecessary if they could check the box that says "married."

Most important, however, exclusion of lesbian and gay couples from marriage denies them intangible benefits that only marriage can provide. Although this point may seem obvious, it is confirmed by the testimony offered in the proceedings below.

When Cecilia Manning worked at the telephone company years ago, all women who wished to be promoted had to be married. (RA 309.) "At the phone company, as well as lots of places in life, having a Mrs. at the beginning of your name was gold." (*Ibid.*) Recognizing the "importance of being married to the phone company, as well as . . . in our society," she "settled on marrying a gay man" who also needed to marry to further his career. (*Ibid.*) After only six months, "we could not stand it any longer and annulled our marriage." (*Ibid.*) But at the hearing, she asked the court if she could keep her married name. She did so because of the high esteem with which society views married people. (*Ibid.*) "There is something about the institution of marriage that is not only about the benefits that you get and the tax breaks that you get because you're married, but there's a homage, almost, that is paid by the rest of society because you are spouses." (*Id.* 313.)

Being married not only affects how others see those who enter into it, it affects how they see themselves.

> [R]esearchers have long understood that marriage as a social institution has a profound effect on the lives of the individuals who inhabit it. It has been described by social scientists as creating a situation in which individuals can experience their lives as making sense

> and having purpose and meaning, and as a source of self worth and a positive identity. (RA 917.)

(See also RA 293-94, 300-03, 305-07, 323-24.) Social science research shows "that being married enhances the social, psychological and physical well-being of men and women." (RA 907.) These effects do not just result from "being in an intimate relationship; most studies have found that married individuals generally manifest greater well-being than comparable individuals in heterosexual unmarried cohabiting couples." (*Id.* at 915.) Nor is this a result of happier persons being more likely to marry than unhappy persons; "[a]fter extensive study, . . . researchers have concluded that the benefits associated with marriage result largely from the institution itself rather than from self-selection." (*Id.*)

Further, by denying marriage and relegating lesbian and gay couples to a *separately named* and *separately administered* scheme created just for them, the State segregates them and their families from the rest of society, continuing to marginalize them. This separation sends a powerful message—one that reinforces in the public mind the already-entrenched inferior status of lesbians and gay men. The message is easily understood: the State will recognize, *but it will not honor*, lesbian and gay family relationships.

Helen Zia describes the impact of her 2004 marriage ceremony in San Francisco on herself, her partner Lia and their families:

> Love and affirmation poured forth from our families and friends. It was overwhelming. This was hugely different from when we became domestic partners, which really didn't mean anything to our families or friends. The kind of things family members said were both striking and moving. It wasn't that they hadn't loved us before; but their joy and excitement at being able to affirm our relationship was profound. . . . We started realizing something we had long felt—that while our families had known and accepted that we were together, marriage made it real. We have twelve

> nieces and nephews. All of them were thrilled. Marriage is a big deal to them. It brings the discussion of our relationship and our role in our larger families to an entirely different level. We are not just "living together." How can you explain domestic partnership or civil union to a child or even to an older person? These concepts mean nothing to most people and certainly not to children. (RA 301)

The consequences of the State's differential treatment of lesbian and gay couples on "all gay, lesbian and bisexual people, regardless of their relationship status" are profound and easily understood. (RA at 920.)

> When [same-sex] relationships are . . . accorded a different legal status from heterosexual relationships, the effect is to convey a societal judgment that committed intimate relationships with people of the same sex are inferior to heterosexual relationships, and that the participants in a same-sex relationship are less deserving of society's recognition than heterosexual couples. . . . *Prohibiting same-sex marriage delegitimizes the relationships that are the very core of a homosexual orientation and thereby compounds and perpetuates the stigma historically attached to homosexuality*. (RA 918, italics added.)

Relegating lesbian and gay couples to a lower legal stature also harms their children: "When same sex couples cannot marry, their biological children are born 'out of wedlock,' conferring a status that historically has been stigmatized as 'illegitimacy' and 'bastardy.' " (*Id.* at 921.) "Children of parents who are not married may be stigmatized by others, such as peers or school [personnel]." (*Ibid.*) "[C]hildren of same-sex couples may be secondary targets of stigma directed at their parents because of the parents' sexual orientation." (*Ibid.*)

Examples of this stigmatization abound in the record. The nine-year old child of one lesbian couple "begged" his moms to marry so he would not "be a bastard anymore." (RA 302) "In his mind, his parents' marriage not only legitimized them, it legitimized *him*." (*Ibid.*) Sixteen year old Michael Allen Quenneville, who "bugged" his two moms every chance he

had until they agreed to go to City Hall in 2004 and get married, said it this way.

> I wanted my parents to get married because marriage is the way to show the highest form of love to someone. It is a big deal to get married, and I see that all the time when people are getting married. And it's not just a big deal for straight people; it's a big deal for everyone. My parents deserve to show each other the highest form of love. . .
>
> I wanted my parents to get married not just because it's the highest form of love that you can show someone, but also because I wanted them to be happy and equal with everyone else. Even though they've been together for a very long time, they seem less equal in other people's eyes because they are not married. I have always seen my parents as equal, but I know that in this society people respect the institution of marriage. People respect people who make the commitment and get married. It's an acknowledgement of a relationship and it isn't the real thing until you get married. When my parents were able to get married it showed the world that they were in it for real. . . .
>
> I have a vague memory of my parents becoming domestic partners. I don't recall that it meant anything. Domestic partnership is not the same as marriage. It's less than marriage and everybody knows it. (RA 316-18.)

Sixteen-year-old Marina Gatto, who was raised by her two moms, has faced discrimination from students and teachers at her school and vandals in her neighborhood (RA 326, 328). When she and her moms found out in February 2004 that same-sex couples were being married at City Hall, they quickly traveled there from their home in San Carlos, arrived at 5:30 a.m. and waited in the cold, wrapped in sleeping bags and blankets. (*Ibid.*) Gatto describes how she felt:

> I was anxious the whole time because I had waited so long for this day. We have always been a family, worked to be a family, and finally the law was going to recognize that we were a family.
>
> . . . I often tell people that *we* got married . . . It was such an incredible thing to see that my Moms could finally be married and that *we could legally be*

> *accepted as a family.* When my Moms recited their vows we all started to cry because the impact of what this meant to us was overwhelming. (*Ibid.*, italics added.)

We recognize that allowing same-sex couples to marry will not automatically prevent their children from becoming outcasts based on their parents' sexual orientation. But there is no question that social marginalization of these children will diminish over time if the State accords their parents equal status. Conversely, the State's maintenance of a separate regime for lesbian and gay couples and their families fosters the very discrimination that the State has otherwise decried:

> State-sponsored differentiation between social groups signals to more socially powerful groups that there is something wrong with the segregated group, which in turn encourages discrimination against, and a hardening of ill will towards, the latter. In such cases, state-sponsored differentiation merges with the social history of denigration to extend the harms of exclusion, diminishing the human dignity not only of the perpetrated, but of the perpetrator. (RA 961; see also RA 918.)

This two-tiered system of families, with those headed by heterosexual couples accorded the honor and recognition of the traditional institution and those headed by same-sex couples accorded such obviously lower stature is, again, irreconcilable with the State's expressed policy interests. The Legislature has repeatedly recognized that lesbians, gay men and their children, even in California today, still suffer from both past and ongoing discrimination.[18] The State's strong public policy is to prevent and

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[18] See, e.g., Stats. 2006, ch. 550, § 2 (e), (f) [expressing concern about juror bias based on sexual orientation and panic defenses used to defend in hate crime cases on basis of victim's sexual orientation or gender identity]; Welf. & Inst. Code, § 9103 [finding: "lifelong experiences of marginalization," denial of benefits afforded married couples, and lack of family support networks "place lesbian, gay, bisexual, and
(continued on next page)

ameliorate the effects of such discrimination, not to exacerbate them by continued unequal treatment. The Legislature recognized when it adopted AB 205 that the domestic partner statute reduced but did not eliminate that discrimination. (See *ante*, at 39) It also specifically found, in passing the California Marriage License Nondiscrimination Act in 2005, that the marriage exclusion *continues* to discriminate against same-sex couples and their children by, among other things, "denying them the *unique* public recognition and affirmation that marriage confers on heterosexual couples." (Assembly Bill No. 849 (2005-2006 Reg. Sess.) as amended June 28, 2005, § 3(i).) As the legislators who supported this bill stated, the "legal distinctions between heterosexual and same-sex couples" created by the State's separate family law regimes "relegate lesbian, gay, and bisexual Californians to second class-status" and use "government power to stigmatize same-sex couples and their families with a brand of inferiority." (Office of Sen. Floor Analyses, Sen. Rules Com., Third Reading of Assem. Bill No. 849 (2005-2006 Reg. Sess.) as amended June 28, 2005, p. 15, italics added; citation and internal quotations omitted.) The Legislature itself thus correctly concluded that exclusion of same-sex couples from

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(footnote continued from previous page)
transgender (LGBT) seniors at high risk for isolation, poverty, homelessness, and premature institutionalization,"]; Stats. 2003, ch. 421 [referring to "longstanding social and economic discrimination" against "lesbian, gay, and bisexual Californians"]; Stats. 2000, ch. 43 ["Lesbians and gay men share the common perspective of having spent their lives in a sexual minority, either exposed to, or fearful of, persecution and discrimination"]; Stats. 2003, ch. 331, § 1(a) [finding "[f]oster children are harmed by" sexual orientation discrimination, "whether . . . directed at them or their caregivers"]; Stats. 1999, ch. 587 [amending Education Code to prohibit harassment and discrimination based on sexual orientation].

marriage is "arbitrar[y]" and "discriminatory." (Assembly Bill No. 849, as amended June 28, 2005, § 3(f).)[19]

2. The law does not permit the State to relegate lesbians and gay men to a second-rate institution.

The United States Supreme Court has held, in many different contexts, that it is unconstitutional to relegate minority groups to second-rate institutions, as the State has done here.

In *Sweatt v. Painter* (1950) 339 U.S. 629, the Court observed that a new law school established just for "Negroes" was not substantially equal to the University of Texas Law School, for two reasons. (*Id.* at 633-34.) First, on a tangible level, "[i]n terms of the number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior." (*Ibid.*) Second, there were intangible differences, which troubled the Court greatly:

> What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are *incapable of objective measurement but which make for greatness* in a law school. Such qualities, to name but a few, include *reputation* of the faculty, *experience* of the administration, *position and influence* of the alumni, *standing in the community*, *traditions* and *prestige*. It is difficult to believe that one who had a free choice between these law schools would consider the question close. (*Id.* at 634, italics added.)

Similarly, marriage exceeds, in both tangible and intangible respects, the separate and very new institution of domestic partnership. No one

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[19] Although he vetoed the marriage legislation for other reasons, the Governor did not take issue with these findings. (Governor's veto message to Assem. on Assem Bill. No. 849 (Sept. 29, 2005) Assem. J. (2005-2006 Reg. Sess.) 1.)

would seriously argue (and notably the State has not tried) that domestic partnership has the same "reputation," "standing in the community, traditions and prestige" as the institution of marriage. It is no answer to suggest that over time, a hundred or more years hence, domestic partnerships may acquire the prestige, reputation and standing in the community that the institution of marriage now holds. As in *Sweatt,* 339 U.S. at 635 "[i]t is fundamental that these cases concern rights which are *personal* and *present*." (Italics added.)

The State's argument is also reminiscent of *Plessy v. Ferguson* (1896) 163 U.S. 537, overruled by *Brown v. Bd. of Education* (1954) 347 U.S. 483. In that now infamous case, a Louisiana resident of mixed descent paid for a seat on the train between two Louisiana cities. (*Plessy*, at 541.) After taking a seat in a coach reserved for "persons of the white race," he was ordered to vacate that seat and move to a separate coach, designated for "persons of the colored race," and when he refused was ejected, imprisoned, and charged with a crime. (*Id.* at 541-42.) The majority rejected the defendant's argument that Louisiana's state-sanctioned system providing separate railway accommodations to those of different races "stamp[ed] the colored race with a badge of inferiority." (*Id.* at 543, 551.) Justice Harlan's dissent articulated the opposite view:

> Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. . . . [¶¶]
>
> The thin disguise of "equal" accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done. (*Id.* at 557, 562, italics added (dis. opn. of Harlan, J.).)

In the end, of course, Justice Harlan's view prevailed over that of the majority, whose opinion now serves its main function in textbooks as a

prominent reminder of legalized injustice. Although it took more than half century, during which many states continued to inflict harm on African American citizens under cover of the "separate but equal" doctrine (*see Price v. Civil Service Com.* (1980) 26 Cal. 3d 257, 286), the Supreme Court ultimately overruled *Plessy*, finding "[s]eparate educational facilities are *inherently* unequal." (*Brown v. Board of Education*, 347 U.S. at 494, italics added.) This recognition that separate facilities and systems are necessarily unequal has been applied to segregation in various contexts, based on race, gender and, more recently, disability.[20]

Just as "[e]very one kn[ew]" that the railroad car segregation statute at issue in *Plessy* "had its origin in the purpose . . . to exclude colored people from coaches occupied by or assigned to white persons," so here everyone knows the marriage exclusion was designed to discriminate against lesbians and gay men, while domestic partnership law only softens the sting. If today Louisiana did not allow African Americans to ride the trains at all, it could not remedy that constitutional violation by creating separate cars for them.

The State's rationale is also reminiscent of the arguments made in a more recent segregation decision. In *United States v. Virginia*, 518 U.S.

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[20] (See, e.g., *United States v. Virginia* (1996) 518 U.S. 515, 535; *Watson v.City of Memphis* (1963) 373 U.S. 526, 535; *Brown v. Louisiana* (1966) 383 U.S. 131, 139; *Johnson v. Virginia* (1963) 373 U.S. 61; *Turner v. City of Memphis* (1962) 369 U.S. 350, 353; *Burton v. Wilmington Parking Authority* (1961) 365 U.S. 715, 723; see also *Mississippi Univ. for Women v. Hogan* (1982) 458 U.S. 718, 727-728; *Communities for Equity v. Michigan High School Athletic Ass'n* (W.D. Mich. 2001), affd. (6th Cir. 2004) 377 F.3d 504; *Mulkey*, 64 Cal. 2d 529; *Jackson v. Pasadena City School Dist.* (1963) 59 Cal. 2d 876; *People ex rel. Deukmejian v. CHE, Inc.* (1983) 150 Cal.App.3d 123, 135.)

515, the Court rejected a "separate but equal" argument advanced by Virginia, which had a public military university (VMI) that admitted men only. Virginia argued—prescient of the State's claim here that removing the sex restriction threatens the very tradition of marriage—that women should be excluded from VMI because admitting women would somehow "downgrade VMI's stature, destroy the adversative system and, with it, even the school." (*Id.* at 542.) The Court rejected this claim out of hand, concluding that VMI's stated goal—"to produce 'citizen-soldiers,' individuals 'imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service, advocates of the American democracy and free enterprise system, and ready . . . to defend their country in time of national peril'"—"[s]urely" is "great enough to accommodate women, who today count as citizens in our American democracy equal in stature to men." (*Id.* at 545-46.) "There is no reason to believe that the admission of women capable of all the activities required of VMI cadets would destroy the Institute rather than enhance its capacity to serve the 'more perfect Union.' " (*Id.* at 557-58, citation omitted.)

In the controversy now before this Court, the Constitution again commands the State to include all of its citizens in legal institutions rather than segregate a minority group in a way that perpetuates the denial of full and equal citizenship. If this Court employs any meaningful test of rationality, the exclusion of same-sex couples from the institution of marriage will fail that test. The availability of domestic partnerships to same-sex couples does not cure the constitutional violation.

III. THE MARRIAGE EXCLUSION IS SUBJECT TO STRICT SCRUTINY BECAUSE IT DISCRIMINATES ON THE BASIS OF SEXUAL ORIENTATION

Even if a rational basis could somehow be found for the marriage exclusion, that would not render it constitutional. If legislation singles out a "suspect class," it is subject to strict scrutiny under the principles of equal protection embodied in the California Constitution. (*Purdy & Fitzpatrick v. State of California* (1969) 71 Cal.2d 566, 579-80.) Although this Court has not adopted a rigid test for determining whether a class is "suspect," there are two central touchstones: (1) the group has suffered a history of discrimination and stigmatization; and (2) the discrimination is based on characteristics that have no bearing on the group's ability to perform in society. (*Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 18-19.) Sometimes courts also consider whether the traits for which society singles out the group are "immutable." (*Ibid.*) This latter factor, however, has never been considered a prerequisite to a finding of a suspect class.

Lesbians and gay men are the embodiment of a suspect class. California courts, as well as the Legislature, have already recognized the existence of the key factors. The record in this case and the scholarly authority also support this conclusion.

A. Existing Law Amply Supports The Conclusion That Strict Scrutiny Of Classifications Based On Sexual Orientation Is Constitutionally Required.

California courts, especially this Court, have repeatedly intervened over the decades to stop harassment and discrimination against lesbians and gay men, both state-sponsored[21] and private.[22] These cases demonstrate the

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[21] See, e.g., *Stoumen,* 37 Cal.2d at 715-16 [revocation of liquor license because restaurant was frequented by gay men or lesbians]; *Vallerga v. Dept. of Alcoholic Beverage Control* (1959) 53 Cal.2d 313, 315,
(continued on next page)

Court's recognition of the reality of state-sponsored and private discrimination against gay people and that being gay does not correlate with inability to perform in society. Indeed, they lead inexorably to the conclusion that lesbians and gay men are a suspect class.

In *Gay Law Students Assn.*, the Court acknowledged that lesbians and gay men have been denied equality and that the stigma society has imposed on them has impeded them from protecting themselves through the political process:

> A principal barrier to homosexual equality is the common feeling that homosexuality is an affliction which the homosexual worker must conceal from his employer and his fellow workers. Consequently one important aspect of the struggle for equal rights is to induce homosexual individuals to "come out of the closet," acknowledge their sexual preferences, and to associate with others in working for equal rights. (24 Cal.3d at 488.)

The Court analogized the struggle of lesbian and gay men for equal rights to that of racial minorities and women: "The aims of the struggle for

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317 [same]; *Morrison*, 1 Cal.3d at 219, 235 [revocation of teacher's credential because he was homosexual]; *Nadler v. Superior Court* (1967) 255 Cal.App.2d 523, 525 [trial court abused discretion in holding that lesbian mom unfit for custody based solely on her sexual orientation]; *In re Marriage of Birdsall* (1988) 197 Cal.App.3d 1024, 1030 n.4 [trial court's restriction of father's visitation because he was homosexual].

[22] See, e.g., *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824 [country club refused to grant lesbian domestic partners membership on same terms as married heterosexuals]; *Hubert v. Williams* (1982) 133 Cal.App.3d Supp. 1, 5 [Unruh Act prevented landlords from refusing to rent to homosexuals or those "associated with" homosexuals]; *see also Curran v. Mount Diablo Council of the Boy Scouts of America* (1983) 147 Cal.App.3d 712, 733-734, disapproved on other grounds by (1998) 17 Cal.4th 670 [Unruh Act prohibits business establishments from excluding individuals based on sexual orientation].

homosexual rights, and the tactics employed, bear a close analogy to the continuing struggle for civil rights waged by blacks, women, and other minorities." (*Id.* at 488.)

In 1992 the Court of Appeal held unconstitutional a proposed local ballot initiative prohibiting enactment of any law that "provides preferential treatment or affirmative action on the basis of sexual orientation or AIDS" or "promotes, encourages, endorses, legitimizes or justifies homosexuality." (*Citizens for Responsible Behavior,* 1 Cal.App.4th at 1019.) The court acknowledged the measure's purpose was "to discriminate against an ill-defined social caste whose members are deemed pariahs . . . ." (*Id.* at 1029, citation omitted.)

In *People v. Garcia* (2000) 77 Cal.App.4th 1269, the Court of Appeal held exclusion from juries based on sexual orientation violates the constitutional right to a jury drawn from a representative cross-section of the community. The court recognized that lesbians and gay men constitute a cognizable group that shares a "common social or psychological outlook on human events," and it observed that they

> share a history of persecution comparable to that of blacks and women. While there is room to argue about degree, based upon their number and the relative indiscernability of their membership in the group, it is just that: an argument about degree. It is a matter of quantity, not quality. (*Id.* at 1276.)[23]

The court recognized that permitting the exclusion of lesbians and gay men from juries would have a pernicious effect:

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[23] See also *Smith v. Fair Employment and Housing Com.* (1996) 12 Cal.4th 1143, 1210 n. 7 (conc. & dis. opn. of Kennard, J.) ["homosexual couples have been subject to a . . . continuing . . . history of discrimination" and citing decision holding "there is a compelling government interest in eradicating discrimination against homosexuals"].

> The message it sends to all those in the courtroom, and all those who may later learn of the discriminatory act, is that certain individuals, for no reason other than [sexual orientation], are presumed unqualified by state actors to decide important questions upon which reasonable persons could disagree. We will not send that message. (*Id.* at 1281, citation omitted.)

In these cases, albeit without reaching the strict scrutiny question, the judiciary has clearly acknowledged that the two key ingredients for a suspect classification exist with respect to sexual orientation—a cognizable group that has historically been persecuted and stigmatized, and that the traits for which they have been singled out are unrelated to ability to perform.[24]

The Legislature has recognized both these factors as well. In adopting the current domestic partner law, for example, it acknowledged the "longstanding social and economic discrimination" lesbians and gay men have faced. (Stats. 2003, ch. 421, § 1(b).) In other legislation, it has referred to the "lifelong experiences of marginalization" of lesbian, gay and bisexual seniors (Welf. & Inst. Code, § 9103) and lesbians' and gay men's "common perspective of having spent their lives in a sexual minority, either exposed to, or fearful of, persecution and discrimination." (Stats. 2000, ch. 43.) By enacting laws prohibiting state and private discrimination

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[24] It is no wonder that one California appellate court has considered it obvious that classifications based on sexual orientation are suspect, while several others have suggested it. (See *Children's Hosp. and Medical Center v. Bonta* (2002) 97 Cal.App.4th 740, 769 [referring to "suspect classifications, such as race or sexual orientation"]; see also *Hinman v. Dept. of Personnel Administration* (1985) 167 Cal.App.3d 516, 520 ["We do not view the Dental Care Act or its interpretation by the DPA as establishing *any* classification on the basis of sexual orientation, and thus, we shall not afford a strict scrutiny analysis"]; *Kubik v. Scripps College* (1981) 118 Cal.App.3d 544, 549-50 [suggesting classifications based on sexual preference are subject to heightened scrutiny].)

in employment, housing, education, jury service, foster parenting and myriad other areas, as well as addressing sexual orientation-based hate crimes, the State obviously recognizes the existence and the pervasiveness of sexual orientation discrimination, and the ability of lesbians and gay men to contribute to society in all aspects of economic, public and private life.

Finally, both the record in this case (RA 223-38, 296-329, 256-57, 911-12) and a growing body of scholarship, some of which has been referenced above (see *ante*, at 6-19), amply demonstrate both that lesbians and gay men can and do perform in all areas of life, and that despite the irrelevance of sexual orientation to their ability to perform, they have been and continue to be targeted for discrimination, marginalized and stigmatized. These are fully sufficient grounds for this Court now to hold that lesbians and gay men are a suspect class for equal protection purposes.

B. The Issue Of Immutability Does Not Preclude A Finding That Lesbians And Gay Men Are A Suspect Class.

The majority below mechanistically assumed that a class is suspect only if it is persecuted based on an "immutable trait." (*Marriage Cases*, 143 Cal.App.4th at 922.) That is incorrect—immutability is not a prerequisite for a suspect class. But to the extent immutability may be considered relevant here, sexual orientation is indeed immutable.

1. Immutability is not a prerequisite for a suspect class.

In *Sail'er Inn.,* 5 Cal.3d at 18-19, the Court described two factors—"characteristic frequently bears no relation to ability to perform or contribute to society" and "stigma of inferiority and second class citizenship"—as the ones which "differentiate" between suspect and nonsuspect classes. Notably it did *not* describe immutability in this way. It also referred to two classifications it viewed as "suspect" that do *not*

involve immutable traits: alienage and poverty. (See *id.* at 18.) Although there has since been debate about whether poverty alone creates a suspect class in California, *Sail'er Inn*'s reference to alienage and poverty shows the Court did not view immutability as a prerequisite to holding a classification suspect.

Purdy confirms this. There the Court held alienage is a suspect classification because "particular alien groups and aliens in general have suffered from . . . prejudice" and aliens "lack the most basic means of defending themselves in the political processes." (*Purdy*, 71 Cal.2d at 579-80.) The Court did not mention immutability, and if it were a prerequisite the Court could not have held alienage is a suspect class since aliens may and often do become citizens.

In *Bowens v. Superior Court* (1991) 1 Cal.4th 36, the Court listed the relevant factors for determining a class to be suspect in the *dis*junctive. (*Id.* at 42 [referring to "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," citation and internal quotations omitted.) The Court did not mention "immutability" or suggest it was a prerequisite, even though imposition of such a prerequisite would have bolstered its decision that no suspect class was involved.

Besides alienage (and possibly poverty), another mutable trait the Court of Appeal has identified as suspect is religion. (See *Owens v. City of Signal Hill* (1984) 154 Cal.App.3d 123, 128; *Williams v. Kapilow & Son, Inc.* (1980) 105 Cal.App.3d 156, 161-62.) Obviously, people can and sometimes do change their religion. (Cf. *Tanner v. Oregon Health Sciences*

Univ. (1998) 157 Or.App. 502, 523-24 [holding sexual orientation is a suspect class under the Oregon equal protection provision and rejecting contention that immutability is a necessary prerequisite, noting that "both alienage and religious affiliation may be changed almost at will"].)

2. In any event, sexual orientation is an immutable trait.

Even if immutability were critical to the suspect classification analysis, the majority below erred in framing the issue. The question is not whether sexual orientation is a "biology-based trait" or a divinely created one. (143 Cal.App.4th at 922; *id.* at 942 [Parilli, J., concurring].) This approach is too rigid and narrow. Rather, the question is whether sexual orientation is "immutable" in the sense that it is a trait so fundamental to a person's identity that the government may not effectively condition the grant of rights, privileges and benefits, or the conferral of social status, on a persons' changing it.

All judicial opinions to seriously consider this question have rejected the narrow, biological construct of immutability and found sexual orientation to be immutable. For example, as Ninth Circuit Judges Norris and Canby put it: "It may be that some heterosexuals and homosexuals can change their sexual orientation through extensive therapy, neurosurgery or shock treatment . . . . But the possibility of such a difficult and traumatic change does not make sexual orientation 'mutable' for equal protection purposes." (*Watkins v. United States Army* (9th Cir. 1989) 875 F.2d 699, 725-26 (conc. opn. of Norris, J.).). As the District of Columbia Court of Appeals stated, "[t]here is no reason to think it would be any easier for homosexual men or women to reverse their sexual orientation than it would be for heterosexual[s] . . . to become predominantly or exclusively

homosexual." (*Gay Rights Coalition of Georgetown Univ. v. Georgetown Univ.* (D.C. 1987) 536 A.2d 1,35 (plur. opn.), citation omitted.) And the Canada Supreme Court has held that sexual orientation "is a deeply personal characteristic that is unchangeable or changeable only at unacceptable personal costs." (*Egan v. Canada* (No. 23636 May 25, 1995) 1995 Can.Sup.Ct. LEXIS 34, *30.) In contrast, the courts declining to hold sexual orientation immutable have not meaningfully analyzed the issue, "instead simply intoning that homosexual orientation was not immutable." (*Jantz v. Muci* (D.Kan. 1991) 759 F.Supp. 1543, 1547, *revd. on other grounds* (10th Cir. 1992) 976 F.2d 623, 629.)

The Ninth Circuit has also recognized, in the immigration context, that sexual orientation is immutable. To be granted asylum, a refugee must prove he was persecuted on account of his status in a "particular social group." (*Fatin v. INS* (3d Cir. 1993) 12 F.3d 1233, 1239.) Persecution on the basis of membership in a particular social group has been defined by the Board of Immigration Appeals as "persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, *immutable* characteristic." (*Hernandez-Montiel v. INS* (9th Cir. 2000) 225 F.3d 1084, 1091, internal quotations omitted.) The Ninth Circuit adopted the BIA definition of "immutability" to mean that "the common characteristic that defines the group . . . must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." (*Id.* at 1092, internal quotations omitted.) Other circuits have adopted this definition as well. (See, e.g., *Mwembie v. Gonzales* (5th Cir. 2006) 443 F.3d 405, 414-15, mod. in part *Almuhtaseb v. Gonzales* (6th Cir. 2006) 453 F.3d 743;

Castellano-Chacon v. INS (6th Cir. 2003) 341 F.3d 533, 546-47; *Fatin*, at 1239-40.)

The Ninth Circuit went on to hold that "[s]exual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them." (*Hernandez-Montiel*, 225 F.3d at 1093.) The Court noted the general agreement among scientists that sexual orientation is set in place (at the very least) at an early age and is so "deeply ingrained that one should not attempt or expect to change it." (*Ibid.*, internal quotations omitted]; accord *Karouni v. Gonzales* (9th Cir. 2005) 399 F.3d 1163, 1173 [homosexual may not be required to "relinquish such an integral part of [his] human freedom," internal quotations omitted.)

Lest there be any doubt that sexual orientation is "immutable" in this broader sense, that doubt is resolved by the United States Supreme Court's decision in *Lawrence*. As the court explained, "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,"

> involv[e] the most intimate and personal choices a person may make in a lifetime, *choices central to personal dignity and autonomy*, [and] are central to the liberty protected by the Fourteenth Amendment . . . . Beliefs about *these matters could not define the attributes of personhood were they formed under compulsion of the State*. (*Lawrence*, 539 U.S. at 574, italics added and internal quotations omitted].)

Lawrence stands for the proposition that one's sexual orientation and the related choices one makes regarding with whom to enter a personal or familial relationship are "attributes of personhood" that the state cannot expect people to change.

The evidence in the record fully supports the understanding that sexual orientation is immutable:

> sexual orientation is integrally linked to the personal relationships that human beings form with others to meet their deeply felt needs for love, attachment and intimacy. These bonds encompass not only sexual behavior, but also nonsexual expressions of affection between partners, shared goals and values, mutual support, and ongoing commitment. Consequently, sexual orientation is not simply a personal characteristic that can be defined in isolation. Rather one's sexual orientation defines the universe of persons with whom one is likely to find the satisfying and fulfilling relationships that, for a vast number of individuals, comprise an essential component of personal identity. (RA 911; see also RA 0254-58, 0905-0922.)[25]

Thus, to the extent immutability is relevant in this case, the test is satisfied: sexual orientation is so "fundamental to a person's identity, beliefs and self-definition" that a person should not be required to change it.[26]

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[25] The American Academy of Pediatrics, American Counseling Association, American Psychiatric Association, American Psychological Association, National Association of School Psychologists, and National Association of Social Workers "have all taken the position that homosexuality is not a mental disorder and thus there is no need for a 'cure.'" (See *Just the Facts About Sexual Orientation & Youth: A Primer for Principals, Educators and School Personnel* (developed and endorsed by all of the above-listed organizations) and sources therein <http://www.apa.org/pi/lgbc/publications/justthefacts.html#1h> [as of Mar. 30, 2007].) None of these organizations endorses and most have specifically advised against therapies aimed at trying to change sexual orientation because such therapies are ineffective and potentially harmful. (See *ibid.* and sources cited therein.)

[26] If this Court: (i) determines that immutability is a prerequisite to suspect class status; (ii) believes it cannot hold that sexual orientation is immutable as a matter of law; and (iii) rejects all the other constitutional claims put forward in this case, the unqualified reversal by the Court of Appeal means that further proceedings in the trial court will be necessary.

In the trial court, the City proffered evidence on immutability (and other issues), which the State did not dispute (see RA 256, RA 910-11), submitted proposed findings, and encouraged the court to make findings. (See RT 179, 181, 209-14, 330-31). When the Fund and Campaign proffered evidence regarding immutability, the City offered further (continued on next page)

C. Decisions From Other Jurisdictions That Have Rejected Strict Scrutiny For Sexual Orientation Primarily Rest On The Crumbled Foundation Of *Bowers*.

Respondents will undoubtedly point out that many federal and other states' courts have declined to hold sexual orientation is a suspect classification. These decisions are no more binding than were the many judicial opinions from other states that this Court declined to follow in *Perez*. The California Constitution—including its equal protection provision—has independent vitality. Moreover, decisions rejecting strict scrutiny for sexual orientation classifications are primarily vestiges of the United States Supreme Court's decision in *Bowers v. Hardwick* (1986) 478 U.S. 186, since overruled by *Lawrence*, 539 U.S. 558, which upheld the criminalization of "homosexual conduct." *Bowers* led many federal and state courts to reason that, since it was constitutionally permissible to

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evidence on the issue. (See Exhibits ISO Unopposed Mot. to Augment 2461-69.) However, the trial court declined to make findings or to allow development of a full record because it was determined, if possible, to resolve the case as a matter of law. (See *ante*, at 28-29.) But the court also made clear that no party would be prejudiced or precluded from seeking a further hearing and opportunity to present evidence if the case could not be resolved on issues of law. (RT 158.)

The majority declined to decide whether homosexuality is immutable, because it considered that issue "controversial" and to "present[] a factual question." (*Marriage Cases*, 143 Cal.App.4th at 922 [citing article referencing polling data].) This was an important conclusion, because from the majority's standpoint, immutability was critical to whether lesbians and gay men constitute a suspect class. (See *id.* at 923; *id.* at 942 (conc. opn. of Parilli, J.).) As matters now stand, therefore, this case is headed back down for trial on this issue as a result of the Court of Appeal's unqualified reversal. (*Id.* at 938; see *Weisenburg v. Cragholm* (1971) 5 Cal.3d 892, 896; *Gapusan v. Jay* (1998) 66 Cal.App.4th 734, 743.)

criminalize same-sex intimacy, homosexuals could not possibly be a suspect class.

The Ninth Circuit's opinion in *High Tech Gays v. Defense Industrial Sec. Clearance Office* (9th Cir. 1990) 895 F.2d 563 is representative. That court's primary reason for declining to apply strict scrutiny was *Bowers*: "if there is no fundamental right to engage in homosexual sodomy under the Due Process Clause . . . it would be incongruous to . . . find a fundamental right of homosexual conduct under . . . equal protection." (*High Tech Gays*, at 571.) This rationale, of course, has been obliterated by *Lawrence,* 539 U.S. at 578 ["*Bowers* was not correct when it was decided, and it is not correct today. . . . [It] should be and now is overruled."]. The majority of federal cases declining to apply strict scrutiny to sexual orientation relied on the now thoroughly repudiated premise that the government may criminalize homosexual conduct.[27] The only two Circuit court decisions addressing the issue since *Lawrence* rely—without discussion or analysis—on pre-*Lawrence* cases and thus indirectly on the discredited *Bowers* decision (*Lofton*, 358 F.3d at 818), or abdicate their responsibility simply because the U.S. Supreme Court has not yet decided the issue (*Citizens for Equal Protection v. Bruning* (8th Cir. 2006) 455 F.3d 859, 866).

Accordingly, judicial opinions from other jurisdictions that apply strict scrutiny to classifications based on sexual orientation are more persuasive. Although some of these opinions were reversed as inconsistent

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[27] See, e.g., *Ben-Shalom v. Marsh* (7th Cir. 1989) 881 F.2d 454, 464; *Woodward v. United States* (Fed. Cir. 1989) 871 F.2d 1068, 1076; *Padula v. Webster* (D.C. Cir. 1987) 822 F.2d 97, 103.

with *Bowers*, we now know that the basis for their reversal has been thoroughly discredited.[28]

The Court should hold that classifications based on sexual orientation are subject to strict equal protection scrutiny. And even if the justifications advanced for the marriage exclusion could somehow pass muster under the rational basis test, certainly they do not survive strict scrutiny.

IV. THE MARRIAGE EXCLUSION IS SUBJECT TO STRICT SCRUTINY BECAUSE IT DISCRIMINATES ON THE BASIS OF SEX.

The guarantee of equal protection in Article 1, section 7 of the California Constitution ensures that laws may not discriminate on the basis of sex unless necessary and narrowly tailored to serve a compelling state interest. (*Sail'er Inn,* 5 Cal.3d at 16.) This Court has reiterated that bedrock constitutional principle on many occasions. (E.g., *Catholic Charities v. Superior Court* (2004) 32 Cal.4th 527, 564; *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 37.) This State's constitutional protection from sex discrimination exceeds that granted by the U.S. Constitution.

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[28] Federal opinions concluding that sexual orientation is a suspect classification are: *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati* (S.D.Ohio 1994) 860 F.Supp. 417, *revd. as inconsistent with Bowers* (6th Cir. 1995) 54 F.3d 261, 266-267); *Jantz*, 759 F.Supp. at 1547-1548 *revd. as inconsistent with Bowers* (10th Cir. 1992) 976 F.2d 623); *Ben-Shalom v. Marsh* (E.D.Wis. 1989) 703 F.Supp. 1372, 1379-80, *revd. as inconsistent with Bowers* (7th Cir. 1989) 881 F.2d 454, 464-465; *High Tech Gays v. Defense Industrial Sec. Clearance Office* (N.D. Cal. 1987) 668 F.Supp. 1361, *revd. as inconsistent with Bowers* 895 F.2d at 563; *Rowland v. Mad River Local School Dist.* (1985) 470 U.S. 1009, 1014 (dis. from denial of cert. by Brennan, J.) State opinions concluding the same are: *Tanner*, 157 Or. App. at 523-25; *Gay Rights Coalition of Georgetown*, 536 A.2d at 33-38; *Snetsinger v. Montany Univ. System* (2004) 325 Mont. 148 (conc. opn. of Nelson, J.).

(Compare *Sail'er Inn,* at 17-18 [applying strict scrutiny to sex classifications] with *Craig v. Boren* (1976) 429 U.S. 190, 197 [applying intermediate scrutiny to sex classifications].)

The marriage laws discriminate not only on the basis of sexual orientation, but on the basis of sex. An individual's right to marry another person depends on the sex of the prospective spouse. If the prospective spouse is the "wrong" sex, the marriage cannot happen. This regime of sex discrimination promotes outmoded stereotypes about the proper roles of men and women.

A. The Marriage Exclusion Classifies On The Basis Of Sex.

The marriage laws use the gendered terms "man," "woman," "male," and "female" (§§ 300 301, 308.5) and require the State first to determine a person's sex before it can know in any particular case what marriage rights the person has—or doesn't have. It is therefore not sex-neutral.

A truly sex-neutral statute may "mention" sex but must treat all people the same regardless of sex. For example, a statute prohibiting consideration of a parent's sex in awarding child custody rights mentions sex but is sex-neutral because all people enjoy the exact same rights. In contrast, if a statute were to assign custody rights to the parent of the same sex as the child, that statute most assuredly would *not* be sex-neutral because a parent's actual custody rights would differ based on sex. The sex-neutral custody law need not be subjected to strict scrutiny simply for mentioning sex, but the law that classifies both men and women and assigns them custody rights on the basis of sex requires strict scrutiny.

This reasoning applies with equal force to the marriage exclusion. The exclusion deprives individuals of the right to marry based on the

gender of the prospective spouse. "That the classification is sex based is self-evident." (*Goodridge,* 440 Mass. at 346 (conc. opn. of Greaney, J.).)[29]

B. This Court Should Reject The "Equal Application" Argument Against Strict Scrutiny Review Of The Marriage Exclusion.

The majority below declined to apply strict scrutiny because it could discern no unequal treatment of, nor animus toward either sex. (*Marriage Cases*, 143 Cal.App.4th at 914-917.) In the majority's view, no sex discrimination occurred because the marriage exclusion did not single "out men or women as a class for unequal treatment." (*Id.* at 914.)

This defense against strict scrutiny, generally known as the "equal application theory," has been the sole refuge for courts that refuse to recognize that marriage exclusions discriminate on the basis of sex.[30] The theory is that when men and women are viewed as distinct classes, there is a certain parallelism to the treatment of each class, in that a person may not

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[29] See also *Hernandez v. Robles* (N.Y.Ct.App. 2006) 855 N.E.2d 1, 29-30 (dis. opn. of Kaye, C.J.) [marriage laws discriminate between individuals on the basis of sex]; *Deane v. Conaway* (Md.Cir.Ct. Jan 20, 2006) 2006 WL 148145, * 3 [same]; *Li v. State or Oregon* (Or.Cir.Ct. Apr. 20, 2004) 2004 WL 1258167, *5-6 [same]; *Brause v. Bureau of Vital Statistics* (Ala.Super. Feb. 27, 1998) 1998 WL 88743, *6 ["a sex-based classification can readily be demonstrated: if twins, one male and one female, both wished to marry a woman and otherwise met all of the Code's requirements, only gender prevents the twin sister from marrying under the present law"]; *Baehr,* 74 Haw. at 572, 580 [law restricting marriage to different-sex couples manifestly discriminates based on sex and is subject to strict scrutiny]; AA 0123 ["If a person, male or female, wishes to marry, then he or she may do so as long as the intended spouse is of a different gender. It is the gender of the intended spouse that is the sole determining factor"].

[30] See, e.g., *Anderson v. King County* (Wash. 2006) 138 P.3d 963, 990; *Hernandez,* 855 N.E.2d at 10.

marry within his or her class—regardless of the appeal or availability of a prospective spouse in that class.

This theory is unacceptable in California. Our constitution demands more than that classes have parallel rights. It demands that individuals have equal rights. Discrimination suffered by Jane Doe does not vanish into a constitutional black hole simply because a fellow human being, John Roe, suffers the same type of discrimination.

Indeed, a plurality of this Court rejected the equal application theory when, almost sixty years ago, the Court held that California's miscegenation law violated equal protection, despite the fact that the law was said to apply to the races "equally." (*Perez*, 32 Cal.2d at 716 (plur. opn. of Traynor, J.).) "The decisive question," Justice Traynor wrote, "is not whether different races, each considered as a group, are equally treated. The right to marry is the right of individuals, not of racial groups." (*Ibid.*) Thus, "the constitutionality of the state action must be tested according to whether the rights of an individual are restricted because of his race. . . . Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." (*Ibid.*, internal quotations omitted; see also *Loving,* 388 U.S. at 9 ["[W]e deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute"].)[31]

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[31] In *Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 44, the Court of Appeal rejected the argument that "strict scrutiny applies only where legislation grants a preference based upon race." The race-based classification itself triggered strict scrutiny. (*Ibid.*) In *J.E.B. v. Alabama ex rel. T.B.* (1994) 511 U.S. 127, 141, the Court held sex-based peremptory challenges violate the Equal Protection Clause even though they are used against men and women alike. (*Id.* at 141.) Equal application of a law or
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To distinguish *Perez* and *Loving*, the majority below implied that a racial classification is fundamentally different from classifications like sex. (*Marriage Cases*, 143 Cal.App.4th at 916.) Only because of the special sensitivity of race, the majority reasoned, did *Perez* and *Loving* "refuse[] to make an exception [to strict scrutiny] for laws that appear to affect all races equally." (*Marriage Cases*, at 916.) But this argument makes no sense under well established California law. While race is a criterion more suspect than sex under federal law, California law identifies both race and sex as equally suspect classifications. (*Sail'er Inn,* 5 Cal.3d at 17.)

The majority below also attempted to distinguish *Perez* and *Loving* on the ground that the race restrictions in the anti-miscegenation laws, unlike the sex restrictions in today's marriage laws, were motivated by an invidious discriminatory intent. (*Marriage Cases*, 143 Cal.App.4th at 916-917.) This argument is mistaken for three reasons. (*Ibid.*)

First, it mischaracterizes the analysis in *Loving* and *Perez.* In each of those cases, the application of strict scrutiny is independent of the law's motivations and rests entirely on the fact that the law classified and apportioned different rights to different individuals solely on the basis of race. This analytical structure is unmistakable in *Perez,* in which the plurality opinion in its first part holds that strict scrutiny is required because the law classifies individuals on the basis of race (*Perez*, 32 Cal.2d at 715-718), and then, in its second part, tests the law's rationale and finds it invidiously discriminatory (*id.* at 718-727). The structure of the *Loving*

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practice that treats people differently based on their gender is no more acceptable than a law or practice that singles one gender out.

decision is just as revealing. Its analysis first describes the reasoning of the Virginia court that upheld the antimiscegenation law (*Loving*, 388 U.S. at 7), then discusses and rejects the equal application theory in favor of applying strict scrutiny (*id.* at 7-11), and only then analyzes the law's invidious purpose.

Second, the majority's notion that invidious intent is a prerequisite to applying strict scrutiny to a race- or sex-based classification misstates equal protection jurisprudence. As the United States Supreme Court has explained, "when a classification expressly discriminates on the basis of gender, the analysis and level of scrutiny applied to determine the validity of the classification do not vary simply because the objective appears acceptable to individual Members of the Court. While the validity and importance of the objective may affect the outcome of the analysis, the analysis itself does not change." (*Mississippi Univ. for Women v. Hogan* (1982) 458 U.S. 718, 724 n.9.)

Finally, even if a showing of invidious discrimination were required to trigger strict scrutiny, that showing has been made here. Although race and sex discrimination are the same under the law, there are some relevant factual differences. Whereas in race discrimination cases, invidiousness usually rests on racial animus, sex discrimination cases locate invidiousness again and again in the legal enforcement of restrictive stereotypes. (See, e.g., *United States v. Virginia*, 518 U.S. at 533 [biological sex may not be used to denigrate the members of either sex or artificially to constrain any individual's opportunity]; *J.E.B.*, 511 U.S. at 139 fn. 11 [state actors may not rely on "overbroad" generalizations to make "judgments about people that are likely to . . . perpetuate historical patterns of discrimination"]; *Sail'er Inn,* 5 Cal.3d at 18 ["courts must look closely at classifications based

on [sex] lest outdated social stereotypes result in invidious laws or practices"].) These sex-role stereotypes are not usually based on hatred, but instead reflect unduly limited notions of the way the world works or even chivalrous attempts to shield women from realities thought too harsh for them to bear. (See *Sail'er Inn,* 5 Cal.3d at 20 ["Laws which disable women from full participation . . . are often characterized as 'protective' and beneficial. Those same laws applied to racial or ethnic minorities would readily be recognized as invidious and impermissible"].) As discussed below, by giving legal force to sex-role stereotypes of the past and the present, the marriage exclusion also discriminates invidiously.

C. The Marriage Exclusion Also Requires Strict Scrutiny Because It Gives Sex-Role Stereotypes The Force Of Law.

As indicated above, where the State controls access to a right or an institution, it has "no warrant to exclude qualified individuals based on fixed notions concerning the roles and abilities of males and females." (*United States v. Virginia*, 518 U.S. at 541, internal quotations omitted.) The marriage exclusion gives legal effect to sex stereotypes in two ways.

1. The notion that marriage requires a "husband" and a "wife" reflects outdated sex-specific role assignments that no longer serve any lawful purpose.

Traditional marriage laws and practice in this country ascribed very different roles to men and women. (See *ante*, at 19-25.) Fortunately, much has since changed. "No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas." (*Stanton v. Stanton* (1975) 421 U.S. 7, 14-15.)

Nonetheless, the legislative history of section 300 reveals that its restriction of marriage to opposite-sex couples rests on precisely such archaic stereotypes of a male breadwinner and a female

homemaker/childrearer, and a concomitant assumption that gay and lesbian families are fundamentally foreign to this traditional model. The author of section 300 justified it by stating that "[m]arriage as a legal institution carries with it a number of special benefits," and asserted that "[w]ithout exception, these special benefits were designed to meet situations where one spouse, typically the female, could not adequately provide for herself because she was engaged in raising children." (Bill Digest, Assembly Committee on Judiciary, Bill No. 607 (1977-1978 Reg. Sess).) The author further premised section 300 on the view that, in contrast to opposite-sex families, same-sex families, or "homosexuals" were almost always childless and so had no concerns about the possible financial dependency of a spouse. Thus, according to the bill's author, marriage would be an unjustified "windfall" for same-sex couples. (*Id.*)

These assertions sound in outmoded sex-role stereotypes. The "assumption that married men support their families and married women do not . . . is outmoded in a society where more often than not a family's standard of living depends upon the financial contributions of both marital partners." (*Arp v. Workers' Compensation Appeals Bd.* (1977) 19 Cal.3d 395, 405-406.) In truth, only a minority of opposite-sex families in California match the model of breadwinner husband and dependent wife—and many lesbian and gay couples also have a financially dependent partner. (RA 190, 201.) Moreover, nearly a third of the openly lesbian and gay couples in California are currently raising children, and lesbian and gay couples who parent are *more* likely than heterosexual couples who parent to have one partner stay at home to raise children. (*Id.* at 191-92.) Contrary to the stereotypes on which the marriage exclusion is based, either moms or dads can be financially dependent, stay-at-home parents, and this model can

apply whether a family is headed by two persons of the opposite sex or two persons of the same sex.

2. The marriage exclusion also enforces sex-role stereotypes about appropriate marriage partners for men and women.

Sex discrimination also takes place when any person, male or female, is penalized for failing (or refusing) to conform to gender-role stereotypes. (See *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 235, 250 [partnership's requirement that plaintiff "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" as condition of admission to partnership constituted sex discrimination].) Following *Price Waterhouse*, many federal circuits have held that both Equal Protection and Title VII's protections against sex discrimination extend to discrimination and harassment based on failure to conform to gender stereotypes, regardless of whether the victim is gay or straight.[32]

For example, in *Doe*, 119 F.3d at 567-68, a sixteen year old boy who wore an earring was subjected by his older coworkers to sustained harassment for his perceived effeminacy and, perhaps derivatively, his perceived homosexuality (H. Doe was in fact heterosexual). They called

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[32] See, e.g., *Medina v. Income Support Div.* (10th Cir. 2005) 413 F.3d 1131, 1135 [Title VII]; *Smith v. City of Salem* (6th Cir. 2004) 378 F.3d 566, 574-75 [Title VII and Equal Protection]; *Back v. Hastings on Hudson Union Free Sch. Dist.* (2d Cir. 2004) 365 F.3d 107; *Nichols v. Azteca Restaurant Enterprises* (9th Cir. 2001) 256 F.3d 864, 874-75; *Bibby v. Philadelphia Coca Cola Bottling Co.* (3d Cir. 2001) 260 F.3d 257, 262-63; *Higgins v. New Balance Athletic Shoe, Inc.* (1st Cir. 1999) 194 F.3d 252, 261, fn.4; *Doe v. City of Belleville* (7th Cir. 1997) 119 F.3d 563, 580, vacated on other grounds *Oncale v. Sundowner Offshore Services* (1998) 523 U.S. 75, 79.

him a "queer," a "fag," a "bitch," told him to "go back to San Francisco," threatened to rape him, and grabbed him by the testicles to see if he was "a girl or a guy." (*Id.* at 567.) As the court explained, whatever else it may also have been, this was discrimination for failure to conform to sex stereotypes, in violation of Title VII and the Equal Protection Clause:

> [A] man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave is harassed "because of" his sex. (*Doe*, at 581.)

The cultural, gender-based expectation that "real women" (not just the majority of women) will have their romantic involvements with men, and the strong cultural taboo that "real men" don't marry other men may be an accurate description for many people. But the marriage exclusion incorporates that cultural norm into law and by doing so penalizes only those who do not conform to those stereotypical gender norms.

It is no defense to strict scrutiny that the law *also* discriminates on the basis of sexual orientation. As long as gender is a motivating factor in the discrimination, "it need not necessarily be the *only* motivating factor." (*Schwenk v. Hartford* (9th Cir. 2000) 204 F.3d 1187, 1201.) Opprobrium toward lesbians and gay men tightly correlates with concerns about their masculinity and femininity, as evidenced, for example, by accusations that women who advocated for independence at the turn of the century were lesbians. (See *ante*, at 10-11.); see also *Doe,* 119 F.3d at 593 ["it is not at all uncommon for sexual harassment and other manifestations of sex discrimination to be accompanied by homophobic epithets"].)

The sex-based classifications and sex-role stereotypes at work in the marriage laws must be subjected to strict scrutiny. And again, even if the

justifications posited for the marriage exclusion were found to satisfy the rational basis test, they do not demonstrate that the marriage exclusion is narrowly tailored to achieve a compelling governmental interest.

V. THE MARRIAGE EXCLUSION UNCONSTITUTIONALLY INFRINGES THE RIGHT TO PRIVACY PROTECTED BY THE CALIFORNIA CONSTITUTION.

Article 1, section 1 of the California Constitution protects the privacy rights of California citizens:

> All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

With respect to the constitutional right to privacy, "there is a clear and substantial difference in the applicable language of the federal and state Constitutions." (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 326.) Thus, "in many contexts, the scope and application of the state constitutional right of privacy is broader and more protective of privacy" than the federal constitution. (*Id.* at 327.)

The right to privacy encompasses two kinds of interests: "informational" privacy, which is the interest "in precluding the dissemination or misuse of sensitive and confidential information," and "autonomy" privacy, which is the interest "in making intimate personal decisions or conducting personal activities without observation, intrusion or interference." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 35.) The latter is at stake here.

As set forth in *Hill* and elucidated in *American Academy*, as a preliminary matter the plaintiff must establish each of the following to support a privacy claim: "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by

defendant constituting a serious invasion of privacy." (*American Academy*, 26 Cal.4th at 330 , internal quotations omitted.) If the plaintiff surpasses this threshold, the question becomes whether the privacy invasion rises to the level of unconstitutionality. Depending on the nature of the privacy interest at stake, the Court either applies a "balancing test," or the "compelling interest" test. (*Id.* at 329-30.) If the interest at stake is "fundamental to personal autonomy," the compelling interest test must be applied. (*Id.* at 330.) An application of this doctrine demonstrates that the marriage exclusion violates the autonomy rights of lesbians and gay men.

A. Marriage Is A Legally Protected Autonomy Interest.

Autonomy privacy involves "a variety of rights involving private choices in personal affairs" and "has been held to protect a diverse range of personal freedoms." (*Robbins v. Superior Court* (1985) 38 Cal.3d 199, 212; accord *In re William G.* (1985) 40 Cal.3d 550, 563.) There is a fundamental autonomy interest in intimate association, bodily integrity, and other concerns that are "intrinsic to the human personality." (*Long Beach City Employees Assn. v. City of Long Beach* (1986) 41 Cal.3d 937, 944; see also *American Academy*, 16 Cal.4th at 333; *Warfield v. Peninsula Golf & Country Club* (1995) 10 Cal.4th 594, 624; *Robbins*, at 213.)

Even before California's constitutional guarantee of privacy was made explicit, this Court recognized "a 'right of privacy' or 'liberty' in matters related to marriage, family and sex." (*Belous*, 71 Cal.2d at 963.) It is therefore now understood that the privacy clause protects the right to marry. (*Ortiz v. Los Angeles Police Relief Assn., Inc.* (2002) 98 Cal.App.4th 1288, 1307.) After

all, marriage is "intrinsic to the human personality." (*Long Beach City Employees*, 41 Cal.3d at 944.) Thus, there can be no question that there is a legally protected autonomy interest—the interest in getting married—at stake in this case.

B. Lesbians And Gay Men Have A Reasonable Expectation In The Right To Marry.

The majority below appeared to conclude that lesbians and gay men do not have a reasonable expectation in the right to marriage because they "have never enjoyed such a right before." (*Marriage Cases*, 143 Cal.App.4th at 925.) In reaching this conclusion, the majority ignored a central aspect of this Court's holding in *American Academy*.

In *American Academy*, 16 Cal.4th at 338-39, the Court held that minors, and not just adults, have an autonomy interest in deciding whether to terminate a pregnancy, striking down a parental consent law that unconstitutionally infringed on that right. The State argued that "in light of the general statutory rule requiring a minor to obtain parental consent for medical care, and the existence of numerous abortion/parental consent statutes in other states, a minor has no reasonable expectation of privacy in this context . . . ." (*Ibid.*) The Court rejected that argument, holding that "it plainly would defeat the voters' fundamental purpose in establishing a constitutional right of privacy if a defendant could defeat a constitutional claim simply by maintaining that statutory provisions or past practices that are inconsistent with the constitutionally protected right eliminate any 'reasonable expectation of privacy' with regard to the constitutionally protected right." (*Id.* at 339.)

Thus, it is not relevant to the privacy analysis that California and other states presently exclude lesbians and gay men from the institution of

marriage. Rather, the question is whether "there is something in the particular circumstances in which an alleged intrusion of the privacy arises that demonstrates the plaintiff has no reasonable expectation of privacy in that context . . . ." (*Id.* at 388.) As discussed in previous sections, other than the fact that they have historically been excluded from marriage there is nothing about lesbians and gay men that prevents them from participating in the essential attributes of the institution. Accordingly, lesbians and gay men have a reasonable expectation in the right to marry guaranteed by the California Constitution's right to privacy.

C. There Is A Serious Invasion Of The Privacy Interest Involved.

Finally, there is the question whether the marriage ban constitutes "a serious invasion of privacy" (*Hill*, 7 Cal.4th at 40), and it is here that the majority had the most difficulty. This difficulty rested principally on the fact that marriage itself is a public matter. As the majority below rightly explained, "[m]arriage . . . is much more than a private relationship. To be valid in California, a civil marriage must be licensed and solemnized in some form of ceremony. More importantly, marriage is revered as a public institution." (*Marriage Cases*, 143 Cal.App.4th at 925, citations omitted.) The majority thus saw no serious invasion of any legally protected autonomy interest. (*Id.* at 926.)

The majority's reasoning focused on informational privacy interests and overlooked autonomy privacy. The fact that marriage is a publicly sanctioned institution and that participation in it is generally a matter of public record does not mean that an autonomy interest in marriage is unprotected. In *American Academy*, 16 Cal.4th at 339, the privacy right at issue was not about shielding oneself from public view or doing something

"in private"—i.e., informational privacy. Rather, the interest the Court held the parental consent law "significantly intrude[d] upon" was "*autonomy privacy*," i.e., denying "a pregnant minor, who believes it is in her best interest to terminate her pregnancy rather than having a child at such a young age, *control over her own destiny*." (Italics added.) Like in *American Academy*, it is individuals' *autonomy interest* in making the *personal decisions* involved that give the marriage right protection under the privacy clause. That is why the *Ortiz* court "refer[red] to the privacy right in this case as the right to marry." (98 Cal.App.4th at 1303.)

And because of the marriage exclusion, lesbians and gay men cannot marry *at all*. As the majority recognized, the marriage exclusion "renders marriage unavailable to gay and lesbian individuals . . . ." (*Marriage Cases*, 143 Cal.App.4th at 918.) Obviously, the total deprivation of a privacy right that a majority of citizens enjoys is a "serious invasion of a privacy interest" within the meaning of *Hill* and *American Academy*. It is as serious as they come.

D. Because Marriage Is Fundamental To Personal Autonomy, Lesbians And Gay Men Cannot Be Excluded Absent A Compelling Government Interest.

The final inquiry under the *Hill/American Academy* framework involves the level of scrutiny to be applied to the infringement of personal autonomy caused by the marriage exclusion. In some cases, courts apply a general balancing test. But "[w]here the case involves an obvious invasion of an interest fundamental to personal autonomy, *e.g.*, freedom from involuntary sterilization or the freedom to pursue consensual familial relationships, a 'compelling interest' must be present to overcome the vital privacy interest." (*American Academy*, 16 Cal.4th at 340, quoting *Hill,* 7 Cal.4th at 34.) Clearly marriage is "fundamental to personal autonomy,"

and any infringement must be justified by a compelling interest. And because there is not even a rational basis for the marriage exclusion, there can be no compelling justification. The exclusion therefore violates the right to privacy.

E. The Marriage Exclusion Also Violates The Right To Privacy By Conditioning Marriage Benefits On The Relinquishment Of The Right To Intimate Association.

Finally, even if the privacy clause did not confer upon lesbians and gay men the "right to marry," the marriage exclusion would still violate the clause. That is because there is a second, related privacy interest here at play: the right to make decisions about intimate personal relationships. The State, which controls access to the institution of marriage, is presently requiring lesbians and gay men to relinquish their choices of whom they will form intimate personal and familial relationships with as a condition of being allowed access to marriage. To marry, a lesbian (or gay man) must relinquish the right to intimately associate with the person she truly loves and wishes to form a family with, and instead marry someone she does not. Indeed, this is exactly what Cecelia Manning went through when she married her husband, only to have the marriage annulled six months later. (See *ante*, 50.)

It is well-settled in California that the government faces a "heavy burden" when it conditions the receipt of a public benefit on the relinquishment of constitutional rights (*Bagley v. Washington Township Hospital* (1966) 65 Cal.2d 499, 505), including privacy rights like the right to intimate association. (*Robbins*, 38 Cal.3d at 213.) To permissibly impose the condition, the governmental entity must establish that: "(1) the condition reasonably relates to the purposes of the legislation which confers the benefit; (2) the value accruing to the public from imposition of the

condition manifestly outweighs any resulting impairment of the constitutional right; and (3) there are no available alternative means that could maintain the integrity of the benefits program without severely restricting a constitutional right." (*Robbins*, at 213.)

The marriage exclusion cannot come close to satisfying this test. As to the first prong, the relinquishment of the right to intimate association with a person one truly loves hardly "relates to the purposes" of marriage; indeed, it is inimical to those purposes. As to the second prong, there is no legitimate "value accruing to the public" by conditioning the right to marry on the relinquishment of intimate association; while some of the respondents in this case may think it a good idea to encourage lesbians and gay men to marry people of the opposite sex, California public policy rejects such archaic notions. And as to the third prong, there is not an "alternative means that could maintain the integrity" of marriage without "severely restricting" the constitutional rights of lesbians and gay men. The alternative, second-rate institution of domestic partnership does not nearly provide the same tangible and intangible benefits of marriage. (See *ante*, at 48-59.)

This case is similar to *Robbins*, in which the challenged law conditioned the plaintiff's right to public assistance on his willingness to reside in a publicly subsidized homeless shelter. As the Court described the law, it 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." (*Robbins*, 38 Cal.3d at 207.) This Court held that the State's conditioning public welfare benefits on individuals' foregoing their rights to choose how, where and with whom to live infringed their constitutional

right to privacy and could not stand absent a showing of compelling need and no less onerous alternatives.[33]

The marriage exclusion operates in the same way. It tells lesbians and gay men that they may only enjoy all of the tangible and intangible benefits of marriage if they forego their right to live in a committed, intimate relationship with the person they truly love, and instead marry someone the State approves of—someone of the opposite sex. In short, in order to access the state-created and sanctioned institution that is marriage, lesbians and gay men must relinquish nothing less than their very personhood. This is an unconstitutional condition.

VI. THE MARRIAGE EXCLUSION DENIES LESBIANS AND GAY MEN THE FUNDAMENTAL RIGHT TO MARRY PROTECTED BY THE CALIFORNIA CONSTITUTION.

Article I, section 1 of the California Constitution also protects the right to liberty. This promise is furthered by article I, section 7(a) which states that: "[a] person may not be deprived of life, liberty, or property without due process of law . . . ." The right to marry has long been regarded as a fundamental liberty interest protected by the state and federal constitutions. (*Turner v. Safley* (1987) 482 U.S. 78, 95; *Zablocki v. Redhail* (1978) 434 U.S. 374, 383; *Loving,* 388 U.S. at 12; *Perez,* 32 Cal. 2d at 714-15.)

A. The Question Is Not Whether There Is A Fundamental Right To "Same-Sex Marriage," But Whether *All* Individuals Have A Fundamental Right To Marry.

The majority below concluded that lesbians and gay men may not enjoy the fundamental right to marry:

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[33] *Robbins* affirmed the grant of a preliminary injunction, holding that plaintiffs had shown a strong likelihood of prevailing on the merits of their privacy clause claim. (38 Cal.3d at 218.)

> Everyone has a fundamental right to "marriage," but, because of how this institution has been defined, this means only that everyone has a fundamental right to enter a public union with an opposite-sex partner. That such a right is irrelevant to a lesbian or gay person does not mean the definition of the fundamental right can be expanded by the judicial branch beyond its traditional moorings. (143 Cal.App.4th at 910.)

The majority thus held that the liberty interest must be defined by reference to the people who have and do not have access to it.

The majority believed this distinction was compelled by a trio of cases arising under federal law that require a "careful description" of an asserted liberty interest—*Dawn D. v. Superior Court* (1998) 17 Cal.4th 932, *Washington v. Glucksberg* (1997) 521 U.S. 702, and *Reno v. Flores* (1993) 507 U.S. 292—but none of these cases holds that a liberty interest must be defined by reference to those who seek to assert it. Moreover, the U.S. Supreme Court made clear that this cannot be so when it overruled *Bowers*.

The *Bowers* majority articulated the liberty interest put forward as an asserted "fundamental right to engage in homosexual sodomy." (478 U.S. at 191.) In *Lawrence*, the Court repudiated that formulation as too narrow and as "demean[ing] the claim the individual put forward." (539 U.S. at 567.) It was two narrow in two respects. First *Bowers* characterized the right as one merely "to engage in certain sexual conduct," which the *Lawrence* Court analogized to characterizing marriage as "simply about the right to have sexual intercourse." (*Lawrence*, at 567.) The *Lawrence* Court recognized that the law, while literally addressing specific sexual acts, had "more far-reaching consequences," touching not only on "the most private human conduct, sexual behavior, [and] touching upon and in the most private of places, the home," but also "seek[ing] to control a personal relationship." (*Ibid.*) Second, this right to engage in personal relationships,

including intimate sexual conduct, was not some special or unique right sought by homosexuals; it was a right the *Lawrence* Court recognized as "within the liberty of *persons* to choose." (*Ibid.*, italics added.) The Court concluded that the liberty interest in "intimate conduct with another" is "but one element in a personal bond that is more enduring," and is thus a right the Constitution protects for "homosexual persons" along with all others. (See *ibid.*) *Lawrence* thus stands as a powerful indictment of any attempt to define fundamental liberties along sexual orientation lines in the realm of personal choices that are "central to personal dignity and autonomy." (*Id.* at 574)

Further, at the time *Loving* was decided, it had long been settled that the Due Process Clause of the 14th Amendment protects only those liberties that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." (*Griswold v. Connecticut*, 381 U.S. 479, 487 (conc. opn. of Golberg, J.), internal quotations omitted.) Nothing in *Loving* or any subsequent decision by the Court suggests that, in holding that interracial couples had a right to marry, *Loving* intended to revisit that principle. The *general* tradition of marriage itself, and not any particular kind, was enough to support its recognition as a fundamental right, despite longstanding prohibitions on the specific kind of marriage there at issue. (See *Loving*, 388 U.S. at 12.) Nor did the Court inquire whether there was a longstanding tradition of allowing prisoners to marry in *Turner*, 482 U.S. 78, or of allowing deadbeat parents to marry in *Zablocki*, 434 U.S. 374.[34]

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[34] The majority below acknowledged that "[o]n the surface," *Loving* "appear[s] to provide compelling support for finding gays and lesbians have a fundamental right to marry their same-sex partners." (143 Cal.App.4th at 912.) But it distinguished *Loving* (as well as *Perez*) on the ground that it "cannot be divorced from the laws' racially discriminatory context." (*Ibid.*)
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Furthermore, even if federal law could somehow be construed as allowing courts to define the liberty interest with reference to the people who seek to exercise it, that would not be permitted under the California Constitution. As discussed above, this Court in *American Academy*, 16 Cal.4th at 334 rejected the argument that the statute did not intrude upon a protected privacy interest because it applied to minors. (See *ante*, at 84.) The Court observed that "it is well established that, as a general matter, minors as well as adults are 'persons' under the Constitution who are entitled to the protection provided by our constitutional rights." (*Id.* at 334 [citation omitted].) The Court explained that the distinction between minors and adults could be relevant in evaluating the state's asserted *interests* in the challenged law; but the distinction did not affect whether there was a fundamental privacy interest *to begin with*. (See *id.* at 337, 341-42.)

Just as California law regards minors as persons and affords substantial protection to minors in the realm of medical decision-making (see *id.* at 315-17), so does California law treat lesbians and gay men as persons, substantially equal to their heterosexual counterparts in every relevant measure. Moreover, the express language of article I, section 1, promising that "*all* people" possess inalienable rights of liberty, means that

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That conclusion cannot be reconciled with the United States Supreme Court's interpretation of its own decision: the description of *Loving*'s Due Process holding in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) 505 U.S. 833, 848 (plur. opn.) does not mention race. (See also *Zablocki*, 434 U.S. at 384 ["Although *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"].)

those inalienable rights cannot be defined by reference to classes of people, including only those classes of people who already exercise them. This language indicates that, under *California*'s Constitution at least, the fundamental liberty interest that everyone else has in marriage belongs equally to lesbians and gay men.

The Court of Appeal's reluctance to recognize that lesbians and gay men have a fundamental right to marry appears to rest in part on concern that such a holding might imperil other limitations on marriage the state has put in place. (See *Marriage Cases*, 143 Cal. App. 4th at 906, fn.15.) We appreciate that such concerns are no minor matter. But they are misplaced.

There is a fundamental distinction between the claim to marriage by gay people on the one hand, and the claim to polygamy or incest on the other. In fact, the majority unwittingly recognized this distinction when it noted that the marriage exclusion "renders marriage unavailable to gay and lesbian individuals . . . ." (*Marriage Cases*, 143 Cal.App.4th at 918.) The same is not true of those who wish to partake in polygamy or incest. In the case of polygamy, the person is not being *excluded* from the institution of marriage; he is merely being denied the right to marry a second or third person at the same time. In the case of incest, the person is being denied the right to marry a close relative, but is not denied the right to marry altogether. Lesbians and gay men, in contrast, are excluded from civil marriage entirely because, as a practical matter, there is nobody left for them to marry. Further, as Judge Kramer recognized, holding that there is a fundamental right to marry is not the end of the analysis. The court may still consider whether the State's limitation on the right is supported by an important social objective (AA 125-27), which in the case of both polygamy and incest the state can undoubtedly show.

B. Even If The Liberty Interest Asserted Here Were Narrowly Characterized As The Right To "Same-Sex Marriage," That Right Is Still Fundamental.

Even if the issue, narrowly stated, is whether the liberty interest protected by the California Constitution includes the right to choose a *same-sex* spouse, the only way to answer that question depends—as in any case in which a new factual scenario calls for the application of existing legal principles—on analyzing the reasons *why* the courts have afforded constitutional protection to other couples or individuals who wished to get married. One cannot conclude, as the majority below did, that there is no constitutionally protected liberty interest in "same-sex marriage" simply because it is an issue of first impression or, relatedly, because the state has legislatively defined marriage to consist solely of a union between a man and a woman.[35]

In assessing whether an asserted right is fundamental, courts look not to arbitrary labels, lines or distinctions, but to the reasons why the right has been regarded as fundamental in the past. "[A]djudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule." (*Casey*, 505 U.S. at 849 (plur. opn.); see also *Moore v. City of East Cleveland* (1977) 431 U.S. 494, 500-01 [rejecting argument that fundamental right recognized in earlier cases did not apply to

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[35] See *Marriage Cases*, 143 Cal.App.4th at 905 ["no fundamental right to marriage between same-sex partners has been recognized"]; 906 ["none of these cases addressed the type of union respondents are now urging . . ."]; 908-08 ["no authority binding upon us . . . has ever held or suggested that individuals have a fundamental constitutional right to enter the public institution of marriage with someone of the same sex"].

persons involved in instant case (grandparents), because "unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case"].)

In *Turner*, the United States Supreme Court faced a constitutional challenge to prison regulations that prohibited inmates from marrying without the approval of prison authorities. Prison authorities conceded that the decision to marry is a fundamental right under *Loving* and *Zablocki*, but argued that those prior decisions do not apply to prisoners. (*Turner*, 482 U.S. at 95.) The Court rejected that argument, because "[m]any important attributes of marriage remain . . . after taking into account the limitations imposed by prison life." (*Ibid*). It found the following remaining "attributes of marriage" to be constitutionally significant:

> First, inmate marriages, like others, are *expressions of emotional support and public commitment*. These elements are an important and significant aspect of the marital relationship. In addition, many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, *the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication*. Third, most inmates eventually will be released by parole or commutation, and therefore *most inmate marriages are formed in the expectation that they ultimately will be fully consummated*. Finally, marital status *often is a precondition to the receipt of government benefits* (e.g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimation of children born out of wedlock). These incidents of marriage, like the religious and personal aspects of the marriage commitment, are unaffected by the fact of confinement or the pursuit of legitimate corrections goals. (*Id.* at 95-96, italics added.)

The Court thus concluded that "[t]aken together, . . . these remaining elements are sufficient to form a *constitutionally* protected marital relationship in the prison context." (*Id.* at 96, italics added.)

As *Turner* itself indicates, prisoners' rights—including constitutional rights—are often restricted and those restrictions are upheld when they are "reasonably related to legitimate penological objectives." (*Turner*, 482 U.S. at 87, internal quotations omitted.) Indeed, in that very case, the Court upheld a restriction on correspondence between inmates. (*Id.* at 91, 93.) Yet, so important is the right to marry that, notwithstanding prisoners' disfavored status, the Court in *Turner* held they could not be deprived of that right because at least some of the constitutionally significant attributes of that right could still be enjoyed in the prison context.

Here, lesbians and gay men, who are not supposed to be disfavored in status under California law, can benefit from the attributes of marriage that *Turner* and other cases have recognized to be constitutionally significant. Lesbian and gay couples are equally capable and desirous of expressing emotional support and public commitment to one another (*Turner*, 482 U.S. at 95); for some, marriage may have "spiritual significance" as an act of religious faith (*id.* at 96); lesbian and gay couples are as capable as their heterosexual counterparts of starting families and raising children (see *Zablocki*, 434 U.S. at 384); and, above all, of forming a cherished "bilateral loyalty" to one another through which they "com[e] together for better or for worse" in a manner that is "hopefully enduring, and intimate to the degree of being sacred" (*Griswold*, 381 U.S. at 486). Who could doubt that these features are "sufficient to form a constitutionally protected marital relationship" (*Turner*, 482 U.S. at 96)?

Finally, it must be remembered that the absence of a tradition of "same-sex marriage" is primarily attributable to the fact that lesbians and gay men have suffered through a history of invisibility and persecution. California public policy now recognizes that this was an injustice, striving to promote equality for lesbians and gay men in virtually all areas. Yet, sadly, under the majority's view of fundamental liberties, lesbians and gay men are penalized for their past suffering—deprived of the right to marry because they were so detested that the thought was inconceivable until recently. That analysis is profoundly misguided. The injustices of the past do not warrant their perpetuation in the present and future.

CONCLUSION

For the reasons set forth above, the language of section 300 stating that marriage must be "between a man and a woman," the gender-specific language of section 301, and the entirety of section 308.5 are unconstitutional. The Court should declare these provisions invalid, and order the State to grant marriage licenses to same-sex couples as it does to opposite-sex couples.

Dated: April 2, 2007

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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 29,625 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 April 2, 2007.

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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 April 2, 2007, I served:

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

on the interested parties in said action, by placing a true copy thereof in sealed envelopes addressed as follows:

ATTACHED SERVICE LIST

and served the named document on the parties as set forth on the attached list in the manners indicated below:

☒ **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 offices of the addressees.

☒ **BY ELECTRONIC MAIL:** I caused a copy of such document to be transmitted via electronic mail in Portable Document Format ("PDF") Adobe Acrobat from the electronic address: *monica.quattrin@sfgov.org*

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

Executed April 2, 2007, at San Francisco, California.

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