SUPREME COURT OF THE STATE OF CALIFORNIA

Coordination Proceeding Special Title (Rule 1550(b))
IN RE MARRIAGE CASES

Case No. S147999

Judicial Council Coordination Proceeding No. 4365

First Appellate District
No. A110449
(Consolidated on appeal with case nos. A110540, A110451, A110463, A110651, A110652)

San Francisco Superior Court Case No. 429539
(Consolidated for trial with San Francisco Superior Court Case No. 429548)

CITY AND COUNTY OF SAN FRANCISCO'S CONSOLIDATED REPLY BRIEF

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

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INTRODUCTION

> Today we enjoy a society that is remarkable in its openness and opportunity. Yet our tradition is to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain.
>
> -- Justice Anthony Kennedy[1]

> [T]he Court should review individual rights questions, unabated by its judgment about whether a particular result will be subject to criticism, hostility, or disobedience.
>
> -- Professor Jesse Choper[2]

An unmistakable theme emerges from the Answer Briefs. Respondents[3] – and especially the Attorney General – ask the Court to alter this State's constitutional landscape in dramatic ways. They do so because only through a sharp deviation from settled principles of constitutional law could the Court allow the State to continue denying marriage licenses to same-sex couples.

First and foremost, the Attorney General asks the Court to conclude that marriage is nothing but a constitutionally insignificant label. He asserts that because domestic partnership gives same-sex couples similar

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[1] *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1* (2007) ____ U.S. ____, 127 S.Ct. 2738, 2791 (conc. opn. of Kennedy, J.).

[2] Choper, Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court (1980) 167 (Choper).

[3] The City and County of San Francisco (City) refers to the various parties asking the Court to uphold the marriage exclusion as "Respondents."

benefits as marriage, those couples suffer no constitutional injury from being denied marriage licenses. But if the Attorney General were correct that marriage licenses have no constitutional meaning in comparison to domestic partnership certificates, the State would be free to prevent any number of groups from getting married – i.e., people who have been divorced, deadbeat parents, or elderly couples. As long as the State provides domestic partnership to those people, according to the Attorney General's theory, denying them marriage licenses would cause no constitutional injury. But this "marriage as a constitutionally insignificant label" theory conflicts with decades of case law which recognizes the cherished role that civil marriage plays in our society. And notably, the Attorney General fails to explain why, if the title "marriage" has so little meaning, the State and its allies are working so hard to ensure that lesbians and gay men remain excluded from it.

The Attorney General also contends that because lesbians and gay men advocated for domestic partnership, they cannot now complain that domestic partnership fails to confer equality upon them. He further asserts that because domestic partnership was supported by the lesbian and gay community, the current regime is distinguishable from past "separate but equal" regimes that mark such a shameful part of our nation's history. However, to adopt the Attorney General's proposed distinction, the Court would have to ignore the fact that black communities in the Jim Crow South themselves advocated for separate schools and other facilities. After all, some schools were better than none, and the back of the bus was better than walking. Black advocacy for separate institutions ultimately did not stop the United States Supreme Court from rejecting the argument that the existence of those institutions eliminated any claim that racial segregation

was unconstitutional. To do so would have punished African Americans for seeking partial improvements. The same is true of the Attorney General's argument here.

The Attorney General next asks the Court to rewrite suspect classification doctrine in California. He recognizes that lesbians and gay men have suffered a long history of discrimination and persecution. He agrees they suffer this discrimination because of a characteristic – sexual orientation – that bears no relation to a person's ability to perform in society. In other words, he concedes that the same factors that led this Court in 1971 to confer heightened constitutional protection upon women are present with respect to lesbians and gay men. But the Attorney General contends that because lesbians and gay men have recently enjoyed some legislative success in California, those other factors are now irrelevant. If he were correct, the Court would have to reverse its ruling that conferred heightened constitutional protection on women. After all, by 1971 they had won major state and national legislative victories. The same can obviously be said of racial minorities. To accept the Attorney General's contention that lesbians and gay men do not constitute a suspect class is to hold that there is no longer such thing as a suspect classification within the meaning of equal protection doctrine.

All of the Respondents ask this Court to hold that "deference to the Legislature" and "preserving tradition" should be considered a legitimate governmental interest under the rational basis test. Although the principle of deference to the Legislature plays an important role in judicial review, Respondents are asking the Court to badly misuse it here. Deference is relevant to the decision about what level of equal protection scrutiny to apply, and often leads courts to apply rational basis review as opposed to

strict scrutiny. But deference cannot be used again when the rational basis test is actually applied. Otherwise, courts would have to uphold every legislative act under rational basis review, because by definition, every legislative act represents the will of the Legislature. California's equal protection doctrine would be eviscerated.

Similarly, preserving tradition is not a legitimate governmental interest under equal protection. Like the principle of deference, tradition is at most relevant to the decision about what level of scrutiny to apply. It cannot justify a classification under rational basis review.

Finally, the Attorney General asks this Court to rule against marriage equality on the theory that a ruling *in favor* of marriage equality would cause backlash and social disruption. In other words, he asks this Court to take political considerations into account when interpreting the California Constitution. This controversial approach to constitutional decisionmaking has been rejected even by the leading advocates of judicial restraint, such as Professors Jesse Choper and Alexander Bickel. And rightly so. While it is one thing for courts to consider these factors when deciding whether to decide a question in the first place, it is quite another for judges to adjudicate substantive questions of constitutional law less than honestly based on their personal speculation about the popular reaction to a ruling. Such an approach is particularly dangerous because judges and lawyers are ill-equipped to predict how society will react to a court ruling. Indeed, the positive reaction to marriage equality in Massachusetts suggests that the Attorney General's dire predictions are wrong, and that his scare tactics are misplaced. But most fundamentally, this judicial branch has a constitutional obligation to ensure that it does not infect its decisions about the constitutional rights of California citizens with political considerations.

The Court's obligation is to adjudicate civil rights claims fairly and evenhandedly and to apply constitutional principles faithfully, without regard to whether its decision will be popular or unpopular.

A straightforward application of constitutional doctrine – one that is not infected by political concerns – requires this Court to strike down the marriage exclusion. Such a ruling will no doubt generate strong feelings and controversy, even if not nearly as dramatic as the Attorney General predicts. But controversy is far preferable to a high court ruling that is based on political considerations and imposes wholesale revisions to constitutional law – all for the sake of allowing the State of California to continue denying marriage licenses to same-sex couples. Far worse than any short term controversy a principled but unpopular decision might engender, an unprincipled, politically-based decision of the sort the Attorney General seeks will invite and sanction the continued stigmatization and marginalization of lesbians, gay men, and their families. Even worse, it will degrade the constitutional jurisprudence of this State and diminish the stature of its courts.

DISCUSSION

I. THE GOVERNMENT'S DEFINITION OF MARRIAGE IS NOT IMMUNE FROM JUDICIAL REVIEW.

Campaign for California Families (CCF) and Proposition 22 Legal Defense and Education Fund (Fund) begin with what can only be described as a justiciability argument. They contend the Court does not have the power to question the government's policy of preventing lesbians and gay men from getting married. That is because, according to them, the government's definition of marriage is not just a law. It is a universal norm, a way of life, and one that existed well before the formation of our state. In short, California's existing statutory definition of marriage as between a

man and a woman is nothing less than an expression of "natural law." (Answer Brief of Campaign for California Families on the Merits (CCF Ans.) 8, quoting *Sharon v. Sharon* (1888) 75 Cal. 1, 8.) Under these circumstances, CCF and the Fund argue this Court does not have the power to hold that the government's denial of marriage licenses to same-sex couples violates their constitutional rights. (CCF Ans. 6-15; Proposition 22 Legal Defense and Education Fund Answer to Petitioners' Briefs on the Substantive Issues (Fund Ans.) 2-22.)[4]

This approach blurs the critical constitutional distinction between the private and public spheres. If California had never gotten into the business of defining and regulating marriage, perhaps CCF and the Fund would be correct. And if the state had chosen to leave marriage to the private sphere, courts would not be permitted to reject whatever private understanding of marriage developed. For example, if, as a private matter, Californians came to universally understand marriage as a relationship that imposed different duties on women than on men, the judiciary could not strike down that shared definition as invalid. But if the *Legislature* were to enact a statute that stated "marriage is a relationship in which women stay home and care for children," a challenge to the validity of that statute would be justiciable.

Indeed, even today, in a state where the government *has* chosen to regulate and adopt a definition of marriage, the judiciary would not have the authority to invalidate a definition created in the private sphere. If, for example, a religious sect understood marriage only as a union between two people in that sect, the courts would have no authority to "strike down" that

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[4] The Attorney General and Governor do not appear to argue that the case is nonjusticiable.

definition. If certain private individuals or groups persisted in conceiving of marriage as only between two persons of the same race, judges could not force them to change their private definition.

However, when a couple approaches *the government* and applies for a marriage license, and *the government* denies them that license, that is *government conduct*. And fortunately for all, government conduct that affects the lives of California citizens is subject to constitutional constraints. "It is abundantly clear that the draftsmen of the 1849 and 1879 constitutions regarded the California Constitution as the principal bulwark protecting the liberties of Californians from governmental encroachment." (*Golden Gateway Center v. Golden Gateway Tenants Assn.* (2001) 26 Cal.4th 1013, 1027 (plur. opn. of Brown, J.), italics omitted, quoting Grodin et al., The California State Constitution (1993) 21.) And it is, of course, this Court's role to interpret and apply the Constitution. (See, e.g., *In re Horton* (1991) 54 Cal.3d 82, 97; *Bixby v. Pierno* (1971) 4 Cal.3d 130, 141.) Indeed, the Court is "independently responsible for safeguarding the rights of our citizens" and owes its "primary obligation to that fundamental document." (*Sands v. Morongo Unified School Dist.* (1991) 53 Cal.3d 863, 906 (conc. opn. of Mosk, J.).)

The framework asserted by CCF and the Fund for understanding the government's definition of marriage also fails to account for the significance that an act of the sovereign has for the lives of its citizens. When the sovereign regulates and defines a previously private institution, that is not just "more of the same." By making marriage an official, governmentally sanctioned institution, the state turns it into something far greater and far more significant than it was before. The sovereign that has the power to put us in jail, to force us to pay taxes, to take our children

away from us, and to shape the meaning of our lives in so many other ways, is now placing its official seal of approval on the institution of marriage. It is thereby placing a stamp of legitimacy on the marriage relation – no matter how good or bad the actual relationship is. And it is celebrating, with great fanfare, those who enter it. (See, e.g., *Marvin v. Marvin* (1976) 18 Cal.3d 660, 684 [stating that marriage is "the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime"].) Conversely, by insisting on preserving the definition of marriage taken from the private sphere, the sovereign signals to those who are denied licenses under that definition that their relationships do not have the same legitimacy as marital relationships. This is not just some abstract government action. It has a profound effect on the lives of individual California citizens and their families.

Nor does the fact that this case involves a government definition, as opposed to government action of some other sort, change the equation. As discussed in the City's Opening Brief on the Merits (City OB) at pages 41-42, the judiciary considers the constitutionality of statutory definitions all the time. If CCF and the Fund were correct that the judiciary has no authority consider the validity of the marriage exclusion because it is worded as a *definition* instead of an *exclusion*, California could have maintained its ban on interracial marriage in 1948 if the statute at issue happened to be worded differently. If California's ban on interracial marriage had said, "marriage is defined as a union between persons of the same race," the State could have successfully relied on the argument that this "definition" had been grounded in statute since 1850 and, more importantly, embedded in the private sphere well before that. (*Perez v. Sharp* (1948) 32 Cal.2d 711, 746-47 (dis. opn. of Shenk, J.).)

Finally, as discussed at the beginning of this section, the argument advanced by CCF and the Fund, and seemingly accepted by the majority below (*In re Marriage Cases* (2006) 143 Cal.App.4th 873, 889-90), is at its core a contention about justiciability. If the Court of Appeal majority believed it did not have authority to decide the constitutional questions presented, it *should not have gone on to decide them* by ruling, as a matter of substantive constitutional law, that denying marriage licenses to same-sex couples is consistent with principles of equal protection, due process and personal autonomy. Nor, once it is determined that the validity of the marriage exclusion *is* justiciable, should the Court create a special category of ultra-deferential constitutional non-review simply because the case involves a statutory definition about a social arrangement that has existed for a long time. We are aware of no case in which a court determined that a controversy was justiciable but held that it lacked the authority to engage in meaningful constitutional inquiry as it would in other cases. In short, there is no "marriage exception" to settled rules of constitutional interpretation, nor is there a basis for creating one. If this Court determines that the case is justiciable, the argument that the government's definition of marriage is older than the government itself cannot be used to interfere with a straightforward application of the constitutional provisions at issue.

II. THE EXISTENCE OF DOMESTIC PARTNERSHIP DOES NOT JUSTIFY PREVENTING LESBIANS AND GAY MEN FROM GETTING MARRIED.

A second threshold argument made by all Respondents is that there is no constitutional injury because lesbians and gay men in California now have domestic partnership. For example, according to the Attorney General, domestic partnership gives lesbians and gay men all the "personal and dignitary interests" to which they are constitutionally entitled. (Answer

Brief of State of California and the Attorney General to Opening Briefs on the Merits (AG Ans.) 55.) He continues, "the state provides domestic partners with all the same rights that it affords to married couples while withholding the word 'marriage' to describe their relationship." (*Id.* 46.) Marriage, in other words, is just a constitutionally insignificant "label." (*Id.* 62-63.)

We suspect most married Californians would be startled by the Attorney General's suggestion that their marriages, backed by government-issued marriage licenses, are nothing but constitutionally insignificant labels. Equally surprised would be the domestic partners who lined up outside San Francisco's City Hall to obtain marriage licenses after having "waited years, sometimes several decades, for a chance to wed, yearning to obtain the public validation that only marriage can give." (*Lockyer v. City & County of San Francisco* (2004) 33 Cal.4th 1055, 1132 (conc. & dis. opn. of Kennard, J.).) If marriage is just a label that is no better than domestic partnership, why do Respondents care so much about preventing lesbians and gay men from attaining it? Why has this question "created great division and disagreement in our state and throughout the nation"? (Answer Brief of Governor Arnold Schwarzenegger and State Registrar of Vital Statistics Teresita Trinidad on the Merits (Gov. Ans.) 2.) The reason is that marriage has a far greater status, and everyone knows it.

To be sure, domestic partnership represents a significant step towards equality. For a group of people that has been the victim of state-sponsored persecution for centuries, and continues to be subjected to discrimination and violence, it is no small matter that the state has now conferred *some* recognition upon their relationships. It is an entirely different matter, however, to argue that this progress erases the

constitutional injury inflicted by the denial of a marriage license. No matter how meaningful the state's recognition of a domestic partner relationship is for the people involved, it can never be as meaningful for them as marriage.

That is because their domestic partner relationship is not accorded nearly the same honor by their own sovereign. Contrary to the Attorney General's "label" theory, marriage has a far greater significance than the sum of the tangible benefits it confers, precisely because of the prestige and reverence that our society, and specifically our government, has conferred upon it. As the United States Supreme Court has said, civil marriage is a "way of life" that is "sacred." (*Griswold v. Connecticut* (1965) 381 U.S. 479, 486.) And in the words of this Court, "[t]hat the marriage relation is the foundation of all society has been so frequently expressed by this court that it is entirely unnecessary to refer to the cases wherein it is so held." (*Estate of De Laveaga* (1904) 142 Cal. 158, 170-71; see also *Marvin,* 18 Cal.3d at 684 [stating that marriage is "the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime"]; *In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 287-88 ["The laws relating to marriage and divorce have been enacted because of the profound concern of our organized society for the dignity and stability of the marriage relationship. This concern relates primarily to the status of the parties as husband and wife," citations and internal quotation marks omitted].)

Furthermore, by publicly recognizing all marriages regardless of whether any religious or social group sanctions it, and by creating legal rights, benefits, conditions and obligations for all who marry, the State has given the "label" of marriage a meaning whose significance transcends

religion and culture. In entering the business of marriage, the government has elevated its meaning and established it as the most cherished relationship recognized by the sovereign. This is not, as the Attorney General asserts, constitutionally insignificant. In short, "marriage has an important signaling function, and quite apart from material benefits, the official institution of marriage entails a certain public legitimation and endorsement." (Sunstein, *The Right To Marry* (2005) 26 Cardozo L.Rev. 2081, 2093; see also *Elden v. Sheldon* (1988) 46 Cal.3d 267, 274-275.) While California, thankfully, now gives same-sex couples most of the tangible benefits given to married couples, it denies them the honor of being included in this institution so revered by society and government alike. And by denying them this honor, the sovereign stigmatizes same-sex couples and their children. (See generally City OB 48-56.) This is true whether or not those couples are entitled to receive the lesser classification of domestic partnership.

The Attorney General argues that the "separate but equal" rationale in this case is different from the rationale used to justify separate schools, train cars and other facilities for African Americans. According to the Attorney General: "Domestic partnerships and civil unions, unlike Jim Crow laws, were not conceived by a majority group for the purpose of oppressing a minority group. Rather, they were sponsored by gay and lesbian rights groups." (AG Ans. 46.) This distinction has no basis in law, and more importantly, it has no basis in historical reality.

Immediately following the Civil War, southern black children generally received no education at all. (Nieman, ed., African American Life in the Post-Emancipation South, 1861-1900 (1994) viii (Nieman).) Accordingly, during the late Nineteenth and early Twentieth Centuries,

black communities focused their energies on obtaining "separate but equal" education for their children. "Black southerners searched for creative ways to ensure that black needs for . . . education . . . were met . . . . The erection of parallel institutions . . . offered effective bulwarks against hopelessness and despair." (Hine, *The Briggs v. Elliot Legacy: Black Culture, Consciousness, and Community Before Brown, 1930-1954* (2004) U. Ill. L.Rev. 1059, 1065-66.) These separate schools were often created at tremendous expense by already impoverished black communities. (Anderson, The Education of Blacks in the South, 1860-1935 (1988) 16.) Overall, African Americans created and financed thousands of black schools during the Jim Crow era. (*Id.* at 5, 155.)

Indeed, black communities in the Jim Crow South frequently sued to *force* the creation of single race schools. (Bullock, A History of Negro Education in the South: From 1619 to the Present (1967) 213-14.) These efforts were successful in states such as Arkansas, Georgia, North Carolina and Mississippi. (*Id.* at 214-15.) Black groups sued to increase funding for those separate institutions as well. For example, in the 1930's the NAACP launched a campaign to equalize teacher salaries in black schools, filing 38 lawsuits over a 12-year period. (*Id.* at 216-17.)

These "separate but equal" schools represented significant victories for African Americans. A separate education was far better than no education at all. But the fact that blacks had successfully advocated for their own schools did not prevent the United States Supreme Court from rejecting the argument that those institutions eliminated the constitutional injury inflicted upon black children by excluding them from white schools. "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in

the community that may affect their hearts and minds in a way unlikely ever to be undone." (*Brown v. Bd. of Education* (1954) 347 U.S. 483, 494.)[5]

Nor was black advocacy for separate facilities limited to the education context. For example, in the 1930's and 1940's, throughout the Jim Crow South blacks were excluded from parks altogether. (See, e.g., Johnson, Patterns of Negro Segregation (1943) 29.) Local governments only opened parks for blacks after members of the black community persuaded them to do so. Indeed, the creation of black-only parks were celebrated by parades. (See, e.g., Barr, Black Texans: A History of African Americans in Texas, 1528-1995 (1996) 168; The Daily Aesthetic: Leisure and Recreation in a Southern City's Segregated Park System, at <http://www.uky.edu/Projects/TDA/narrativ.htm> [as of Aug. 16, 2007].) Similar advocacy resulted in the creation of black-only cemeteries,

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[5] Similarly, in the decade before *Sweatt v. Painter* (1950) 339 U.S. 629, many blacks in Texas advocated for the creation of separate institutions of higher education. One black plaintiff sued to force Texas to create a separate black university at Austin. (*University at Austin Sought by Negroes*, Houston Informer (July 2, 1946).) Another advocate stated, "the majority of Negroes want adequate and sufficient opportunities for education and are not presently geared for an anti-segregation fight." (Carter Wesley, *What We Want in Education*, Houston Informer (October 27, 1945).) And student groups who supported Sweatt's effort to be admitted to the University of Texas also supported (presumably as a second-best option) the creation of a separate law school. (*Sixteen Student Organizations Represented*, Houston Informer (Nov. 23, 1946).) In sum, although they knew that separate institutions could never confer true equality, blacks and others who supported the civil rights movement *campaigned* for separate institutions. They may not have been as good as integration, but they were better than nothing at all. (The newspaper articles discussed in this footnote may be found at http://www.law.du.edu/russell/lh/sweatt/inf/HI-index.htm [as of Aug. 16, 2007].)

hospitals, and recreational venues. (Rabinowitz, *From Exclusion to Segregation: Health and Welfare Services for Southern Blacks, 1865-1890*, in Neiman at 326, 341.)

As the *Brown* decision recognized in 1954, the approach taken by Respondents ignores the reality that when a historically marginalized group is relegated to a separate institution, this itself stigmatizes this group in a way that is unconstitutional, even if the separate institution is better than nothing at all. Lesbians and gay men now have domestic partnership. But the reason they have *only* domestic partnership, as opposed to marriage, is *because* of their historic marginalization. When same-sex couples are required to register as domestic partners rather than apply for marriage licenses, they do so against the backdrop of the government's history of persecution of homosexuals, which no lesbian or gay man can forget.

As the City has shown, although homosexuality was largely invisible in early America, that did not stop governments from prosecuting and executing those who committed the "crime not fit to be named." As lesbians and gay men became more visible, so too did the repression. This was true in California, where state and local governments harassed and arrested lesbians and gay men, refused to hire them, and prevented them from gathering in public accommodations, all in an effort to stamp out homosexuality. The federal government conducted witch hunts to remove thousands of "perverts" from their jobs. Today nationally chartered organizations like the Boy Scouts of America have no trouble denouncing homosexuality and kicking out gay members. Gay people, particularly children, continue to be victimized by hate crimes and violence in California and throughout the nation. Children are systematically harassed in the schools and elsewhere, and as a result are far more likely to become

homeless or commit suicide. (City OB 6-19.) Under these circumstances, it cannot seriously be contended that the government's continued insistence that lesbians and gay men be steered to domestic partnership and away from marriage will not be devastatingly stigmatizing to them and their families, in the same way that separate schools stigmatized black children in the Jim Crow South.

Thus, the Attorney General's attempt to distinguish the current "separate but equal" argument from those previously rejected by the courts fails. To uphold segregation in the South based on the fact that blacks had advocated for separate institutions would have penalized them for making some progress in obtaining equality. So too here: the Attorney General proposes that a historically marginalized minority group be penalized because it successfully obtained a lesser form of governmental recognition. It is regrettable that the Attorney General of the State of California must resort to such arguments to prevent a ruling that the marriage exclusion is unconstitutional. But it is also telling. A proper application of the separate but equal doctrine and an honest look at history reveal that there is no meaningful distinction between the argument advanced by Respondents in this case and the one infamously adopted by the United States Supreme Court back in 1896:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. (*Plessy v. Ferguson* (1896) 163 U.S. 537, 551.)

III. THE MARRIAGE EXCLUSION DOES NOT SATISFY RATIONAL BASIS REVIEW.

Although we contend the marriage exclusion is subject to strict scrutiny because it discriminates on the basis of sexual orientation and gender, and because it infringes on the fundamental rights to marriage and personal autonomy, this case can be resolved on the ground that there is no rational basis for denying marriage licenses to lesbians and gay men. No party has identified a constitutionally permissible "legitimate governmental purpose" for the exclusion that would satisfy rational basis review. The State's and its allies' failure to do so proves the point made in our opening brief: the marriage exclusion is invalid because it singles out an unpopular group, and relegates its members to a separate, lesser institution based on their sexual orientation – a characteristic that has no effect on the welfare of others.

A. The Parties Fail To Identify Legitimate Governmental Purposes For The Marriage Exclusion.

Under rational basis review, a legitimate governmental purpose must be identified, and the statutory classification must be rationally related to the achievement of that governmental purpose. (*Warden v. State Bar* (1999) 21 Cal.4th 628, 647.) The parties have identified the following so-called "legitimate governmental purposes" for the marriage exclusion: (1) deference to the legislative process; (2) preservation of the traditional definition of marriage; (3) the need to avoid political or social backlash and to continue the democratic conversation about same-sex marriage; and (4) procreation. But none of these are legitimate.

1. Deference to the legislative process is not a legitimate governmental purpose.

The Attorney General and Governor contend that under rational basis review, "deference to the legislative process" is, in itself, a legitimate

governmental purpose. Although it is true that the principle of deference to the Legislature plays an extraordinarily important role in constitutional jurisprudence, the Attorney General and Governor are badly misusing it here. They have conflated two critically distinct phases of the analysis: the decision about what test to apply, and the actual application of that test.

California's two-tiered system of equal protection review already ensures that courts will, in most cases, remain quite deferential to the political branches. In the cases where a statute creates a suspect classification or infringes on a fundamental right, courts apply strict scrutiny. But for all other cases, courts must accord substantial deference to the political branches. To ensure that courts truly do so, rather than merely substitute their policy judgment for that of the Legislature, the rational basis test is applied. As this Court recently put it, the rational basis test "manifests restraint by the judiciary in relation to the discretionary act of a co-equal branch of government . . . ." (*Hernandez v. City of Hanford* (2007) 41 Cal.4th 279, 298.) In other words, deference is the *reason* courts apply rational basis review instead of strict scrutiny. (See also *Landau v. Superior Court* (1998) 81 Cal.App.4th 191, 208 ["Recognizing it is the Legislature's responsibility to draw distinctions between groups, and the lines can rarely be precisely drawn, courts generally apply the rational basis test to most legislation"].)

But once a court decides, out of deference, that it must apply the rational basis test, it must still actually apply the test. That test is not a rubber stamp. Instead, it asks whether there is a legitimate governmental purpose, and whether the classification is rationally related to that purpose. The legitimate governmental purpose must be a substantive one. Courts may not "double count" by applying rational basis out of deference, and

then using deference again as the government purpose that *satisfies* rational basis scrutiny. (See, e.g., *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1201 ["even in the ordinary equal protection case calling for the most deferential of standards, [courts must ascertain] the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause," quoting *Romer v. Evans* (1996) 517 U.S. 620, 632].)

Indeed, we are aware of no decision in the history of this Court, the United States Supreme Court, or the California Courts of Appeal (other than the decision below) that has upheld a statute under rational basis review by citing deference as the legitimate governmental purpose served by the statute in question. In fact, we are aware of no other case in which the government has even attempted the argument. Rather, governments regularly assert, and courts regularly consider, *substantive* governmental purposes asserted for the statutes, even if they are being reviewed under the deferential rational basis test.[6]

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[6] (See, e.g., *Hernandez*, 41 Cal.4th at 302 [attracting and retaining large department stores within the city]; *People v. Tilbury* (1991) 54 Cal.3d 56, 68 [protecting public from crime]; *Roa v. Lodi Med. Group* (1985) 37 Cal.3d 920, 931-32 [discouraging attorneys from instituting frivolous lawsuits]; *Am. Bank & Trust Co. v. Cmty. Hosp.* (1984) 36 Cal.3d 359, 369 [preventing defendants from being required to pay damages to individuals not actually injured by defendants' conduct]; *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 676, *affd.* 475 U.S. 260 (1986) [mitigating adverse effects of housing shortage]; *Samples v. Brown* (2007) 146 Cal.App.4th 787, 8009 [mitigating financial impact of impoundment provisions on rental car companies]; *People v. Rhodes* (2005) 126 Cal.App.4th 1374, 1387 [protecting the public]; *Yoshioka v. Superior Court* (1997) 58 Cal.App.4th 972, 990-91 [reducing cost of insurance premiums].)

It is not surprising that no court has identified deference as the "legitimate government purpose" of a statute, for doing so would render rational basis review a nullity. Every statute, by definition, reflects the judgment of the legislative process, and if governments needed only to invoke the concept of deference to justify a statutory classification, there would be no rational basis review. The judiciary would only be permitted to strike down statutes on equal protection grounds if heightened scrutiny were applied. That, of course, is not the law. (See *Parr v. Municipal Court* (1971) 3 Cal.3d 861, 870.)

While the City would be the last party in this case to denigrate the importance of deference to the legislative process, it would be unprecedented and constitutionally disastrous to use deference as the "legitimate government purpose" in the rational basis inquiry. Courts must express their deference *by* applying rational basis test, they cannot be instructed to use deference as a legitimate governmental interest *within* that test. While the invocation of phrases like "deference to the legislators" and "will of the people" by the Governor and the Attorney General may be more politically palatable than the substantive reasons generally asserted for preventing lesbians and gay men from getting married, this Court cannot use them to support a finding that the marriage exclusion satisfies rational basis scrutiny. As with Respondents' "separate but equal" argument, it is a commentary that the Governor and Attorney General seek such a dramatic departure from settled constitutional doctrine, just to prevent lesbians and gay men from getting married.

2. Preserving the traditional definition of marriage is not a legitimate governmental purpose.

The Governor and Attorney General's invocation of the phrase "preserving the traditional definition of marriage" involves an even greater contortion of the rational basis test, for several reasons.

First, as the Attorney General's own sources demonstrate, reliance on tradition in the equal protection context is highly questionable. As Professor Sunstein explains, the principle of substantive due process is solicitous of tradition, while the primary purpose of equal protection is to prevent minority groups from *being victimized* by tradition. (See Sunstein, 26 Cardozo L.Rev. at 2106, 2119 [noting that while due process principles embody Edmund Burke's solicitude for tradition, the principle of equal protection is a "self-conscious attack on traditional practices"]; see also *id.* at 2085 [Equal Protection Clause "calls traditions into sharp doubt."], Sunstein, *Learning Things Undecided* (1996) 110 Harv. L.Rev. 4, 100 [while due process is grounded in tradition, equal protection is grounded "in a tradition-correcting norm of civic equality"]; *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 v. Texas* (2003) 539 U.S. 558.) This Court has recognized the tradition-questioning nature of the equal protection clause as well. (See, e.g., *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"]; *In re Antazo* (1970) 3 Cal.3d 100, 109 [longevity of a practice "does not foreclose its reassessment in the light of the continued evolution of fundamental precepts of our constitutional system"]; see generally City OB at 44-45.)

In any event, if tradition were relevant in the equal protection analysis, it would be considered if at all – like deference to the legislative process – at the first phase of the inquiry. If this Court concludes that the marriage laws do not create a suspect classification or interfere with a fundamental right, it would be required to apply the rational basis test out of deference to the legislative process and perhaps to tradition as well. But the City is arguing that in this case, preserving the traditional definition of marriage violates the equal protection rights of same-sex couples. The government cannot, in response, simply intone that preserving the traditional definition of marriage is a legitimate governmental purpose.[7]

Tradition is "worthy of respect," the Attorney General asserts, because it "draws on the wisdom of many generations . . ." (AG. Ans. 44.) But that just begs the question. What is the "wisdom" upon which the traditional definition of marriage is based? Wisdom about who should raise children? Wisdom about the kinds of relationships the government should express preference for? The failure of the Attorney General and the Governor to answer these questions speaks volumes. Absent a *substantive* reason for preserving this traditional definition, the marriage exclusion does not satisfy rational basis review.

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[7] The Governor, perhaps unwittingly, makes our point. While on the one hand he asserts that "maintaining the understanding of marriage that has always existed in California" is itself a legitimate governmental purpose (Gov. Ans. 30), he later describes the test properly when he writes, "this Court should ask *whether* there is any conceivable basis to maintain a definition of marriage that has existed throughout history . . . ." (*Id.* 31, emphasis added.)

3. Preventing backlash and continuing the democratic conversation about the marriage exclusion cannot justify the exclusion under rational basis review.

With the above understanding, it becomes clear that "deference to the Legislature" and "preserving tradition" are political slogans, not substantive governmental purposes that may be asserted to satisfy rational basis review. The Governor stops there. The Attorney General, however, goes on to assert additional political considerations: preventing backlash and continuing the democratic debate about same-sex marriage. (See AG Ans. 45-51.) This argument is new. Neither the Attorney General nor the other parties asserted the argument below – which itself casts doubt on it. But more important, these political considerations have never, as far as the City is aware, been relied upon in an equal protection case by a California court (or, for that matter, by the United States Supreme Court). Nor does the Attorney General cite any such case. The primary authorities he cites for the proposition that matters such as "potential backlash" should affect the Court's ruling on the merits are the works of Professor Cass Sunstein.

Sunstein states that a ban on same-sex marriage probably violates equal protection, but nonetheless urges federal judges to "hesitate" before striking them down. (See Sunstein, 26 Cardozo L.Rev. at 2085, 2112-14; see also Sunstein, 110 Harv. L.Rev. at 98-99.) It is difficult to decipher whether Sunstein is simply arguing that federal courts should hold the marriage cases to be nonjusticiable, or whether he is going further, and implying that once a federal judge decides to adjudicate the validity of a marriage ban on the merits, he or she should rule contrary to constitutional doctrine in order to avoid backlash.

In any event, the Attorney General uses Sunstein's work to argue that this Court should rule for the government on the merits, because a ruling in

favor of marriage equality could "galvanize opposition" to marriage of same-sex couples, "weaken the nondiscrimination movement itself," and "provoke increased hostility and even violence against homosexuals." (Sunstein, 110 Harv. L. Rev. at 97; see also AG Ans. 50-51.) The Attorney General further asserts that a ruling against same-sex couples would keep the democratic "conversation" about same-sex marriage going, while a ruling for marriage equality would, he implies, put an end to that conversation. (AG Ans. 50-51.) The majority below hinted that this may have been its approach to constitutional decisionmaking, which may explain why the Attorney General has asserted it here: "Californians' evolving notions of equality may eventually lead to the recognition of a right to same-sex marriage and its ultimate status as a constitutionally guaranteed right. However, these developments are still in their infancy, and the courts may not compel the change respondents seek." (*In re Marriage Cases,* 143 Cal.App.4th at 913; see also *id.* at 908, fn. 16, 910-11, 936-38 [referring repeatedly to decision of Massachusetts Supreme Judicial Court, and the issue of marriage equality in general, as "controversial"].) There are at least five major flaws in this line of reasoning.

1. First, there is a fundamental difference between considering these factors to avoid *unduly broad* judicial rulings, and considering them when *deciding which party should win the case.* The Attorney General (and perhaps Sunstein) advocate the latter approach, which is remarkable in its prescription for judicial review. It is premised on the notion that judges should apply the constitutional principles they swore to uphold less than honestly if they feel, based on their own personal exercise in political science conducted in the rarified air of their chambers, that this would serve

the best interests of society and would in their view be politically preferable.

In contrast, the first approach is uncontroversial, and only that principle is discussed by most of the commentators cited by the Attorney General. For example, Justice Breyer spoke approvingly of *Bartnicki v. Vopper* (2001) 532 U.S. 514, 525, 529, which was resolved on the narrow facts presented and avoided prematurely deciding whether radio stations have a blanket First Amendment right to broadcast peoples' private communications. (Breyer, Active Liberty (2005) 71-72.) But Justice Breyer never suggested courts should allow political considerations to infect their substantive constitutional reasoning. Similarly, the Attorney General is correct that Justice Ginsburg criticized *Roe v. Wade* (1973) 410 U.S. 113. But she criticized the Court for issuing a ruling broader than necessary to resolve the case at hand. (Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade* (1985) 63 N.C. L.Rev. 375, 385-86.) Justice Ginsburg most certainly did not suggest that the Court should have, for political reasons, actually ruled that the state had not violated Jane Roe's constitutional rights.

The marriage case decided by the New Jersey Supreme Court is another example of judicial avoidance of a broad ruling; it is not, as the Attorney General suggests, an example of deciding a case in a less-than-principled fashion for political reasons. The court in that case did not hold that it is constitutional to relegate lesbians and gay men to a separate, marriage-like institution. It *reserved* that question, while holding that the state's failure to provide same-sex couples with the tangible benefits of marriage violates equal protection. (*Lewis v. Harris* (N.J. 2006) 908 A.2d 196, 220-22.) The court criticized the three dissenters who wished to rule

on the "separate but equal" question immediately, stating: "the dissenters presume in advance that our legislators cannot give any reason to justify retaining the definition of marriage solely for opposite-sex couples. A proper respect for the coordinate branch of government counsels that we defer *until* it has spoken." (*Id.* at 222, emphasis added.) Here, of course, the question has been squarely presented – same-sex couples have been relegated to domestic partnership status, and this is either constitutional or unconstitutional. There can be no "narrow" or "broad" version of a ruling on that substantive constitutional question.

2. The second flaw in the approach advocated by the Attorney General is that it fails to distinguish between factors that are relevant to a high court's decision whether to *grant review* in the first place, and factors that are relevant once the high court has decided to *adjudicate the merits*. Considerations about backlash or continuing the democratic conversation may be relevant to a high court's decision about whether to grant review, or even to its decision about whether to dismiss a case as improvidently granted. (See generally Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962) (Bickel).) But not even Alexander Bickel, the father of "passive virtues" who dedicated his career to mitigating the "counter-majoritarian difficulty," supported the Attorney General's approach to constitutional decisionmaking. As Bickel recognized, there is a monumental difference between avoiding making a decision for political reasons and *actually deciding constitutional questions in favor of the government* for political reasons:

> It is true enough that the Court does not approve or otherwise anoint a legislative policy when it finds it, as the formula goes, "not unconstitutional." No doubt, in one of the late Charles P. Curtis' phrases, "to call a statute constitutional is no more of a compliment than it is to say that it is not intolerable." But, if not a

> compliment, neither is it an inconsequential appreciation. To declare that a statute is not intolerable in the sense that it is not inconsistent with *the principles whose integrity the Court is charged with maintaining* – that is something, and it amounts to a significant intervention in the political process . . . . [I]t is no small matter, in Professor Black's term, to "legitimate" a legislative measure. The Court's prestige, the spell it casts as a symbol, enable it to entrench and solidify measures that may have been tentative in the conception or are on the verge of abandonment in the execution. (Bickel, at 129, emphasis added.)[8]

Similarly, Professor Jesse Choper notes that while courts should avoid entering political disputes in many types of cases, they should exercise this restraint so that, in *cases like this*, courts have the legitimacy and fortitude to faithfully discharge their constitutional duty. As he explains in the context of the federal system, the United States Supreme Court should refrain from getting involved in politically charged disputes that *do not* involve individual rights (i.e., disputes between states and the federal government), so they will preserve their "capital" to properly protect individual rights:

> in continuing vigorously to exercise its power of judicial review over this class of issues, the Court is performing its vital role in American democratic society – the role for which it is peculiarly suited and for which all other government institutions are not . . . . [T]he Court should review individual rights questions, *unabated by its judgment about whether a particular result will be subject to criticism, hostility, or disobedience*. (Choper, at 167, emphasis added.)

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[8] There are no better examples of this than *Plessy,* 163 U.S. 537 and other Reconstruction era cases -- which led to a half century of legally sanctioned and socially reinforced segregation and discrimination. *Ayers v. Allain*, 893 F.2d 732, 745-46 (5th Cir. 1990). (See A. Tsesis, Furthering American Freedom: Civil Rights and the Thirteenth Amendment, 45 B.C.L. Rev. 307, 328-38 (2004) – and *Bowers v. Hardwick* (1986) 478 U.S. 186 – which led to almost two decades of legally sanctioned and socially reinforced discrimination against lesbians and gay men. See City OB 71 & n.27.)

3. A third flaw in the Attorney General's approach is that it relies exclusively on commentators discussing the *federal* judicial system, and fails to acknowledge that their arguments apply with much less force to state court decisions. It is true that if the United States Supreme Court were to rule that the marriage exclusion violates the federal Constitution, the ruling would likely put an end to the "democratic conversation" in the states because the federal Constitution is so difficult to amend. For this reason, Sunstein advises *federal* courts to exercise caution in marriage equality cases because the issue "is under intense discussion at the local, state, and national levels – and there are many possibilities, ranging from diverse forms of civil unions to ordinary marriage." (Sunstein, 26 Cardozo L.Rev. at 2113.) If this Court were to rule that the marriage exclusion is unconstitutional in California, it would not end the nationwide conversation with which Sunstein and others are concerned. Rather, the Court would be offering up one of Sunstein's "possibilities," thereby contributing to the national debate while remaining faithful to the constitutional principles it was sworn to uphold. Just as it did when it became the first high court in the nation to rule that laws banning interracial marriage were unconstitutional in *Perez,* 32 Cal.2d 711.

Indeed, the Attorney General neglects to quote the following statement from Professor Sunstein:

> In fact aggressive decisions by state courts have the advantage of ensuring a degree of experimentation (subject to democratic override). If one or more states recognize less traditional marriages, it will be possible to see how they work out in practice, and hence to evaluate the objections of those who fear adverse social consequences. (Sunstein, 26 Cardozo L.Rev. at 2109 & fn. 102.)

The fact that no harm resulted from this Court's decision to strike down the ban on interracial marriage in 1948 undoubtedly contributed greatly to the nationwide democratic conversation that followed.[9]

Nor would the democratic conversation end *even within* California. The commentators relied upon by the Attorney General do not consider a system like California's, in which the people may amend the Constitution by simple majority vote. They discuss the federal system, in which the United States Supreme Court's word is almost always final and binding on every state in the Union.[10] Regardless of whether this Court rules for or against the City, the debate over same-sex marriage in California will continue, and the losing side has the option of placing an initiative on the ballot. Further, if the Court upholds the City's constitutional claims and the voters respond by enacting a constitutional amendment banning same-sex marriage (a proposition that, as discussed below, is far from assured), it is safe to presume the people will revisit the issue in the future.

4. Fourth, the Attorney General appears to have misjudged the political and social impact of rulings in favor of marriage equality, underscoring the dangers involved in manipulating constitutional doctrine

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[9] Indeed, in the 19 years between this Court's decision in *Perez* and the United States Supreme Court's decision in *Loving v. Virginia* (1967) 388 U.S. 1, half of the states besides California that had miscegnation laws when *Perez* was decided (see *Perez*, 32 Cal.2d at 747 (dis. opn. of Shenk, J.) repealed them (*Loving*, at 6, fn. 5).

[10] (Cf. Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function* (2001) 114 Harv. L.Rev. 1833, 1887 ["Nor are state constitutional decisions 'final' in the federal sense. Rather, the ease of state constitutional amendment through popular mechanisms . . . give[s] state judicial decisionmaking a conditional quality that further attenuates countermajoritarian concerns," footnotes omitted].)

based on political assessments by judges or law professors. The sky has not fallen in Massachusetts since its Supreme Judicial Court issued its ruling in 2004. To the contrary, in the election immediately following the Massachusetts Legislature's initial 2004 vote about whether to put a constitutional amendment on the ballot to reverse the decision, *every single* legislator up for reelection who opposed the amendment was reelected to another term. (Laura Kiritsy, *State Results Buoy Hope of Defeating Amendment* (Nov. 4, 2004), at <http://www.massequality.org/news/news_story.php?id=39> [as of Aug. 16, 2007].) And one legislator who supported the amendment was defeated by an openly gay challenger. (Raphael Lewis, *A Rift On Gay Unions Fuels Coup At Polls*, Boston Globe (Sept. 26, 2004) B1.) In 2007, opponents of marriage for same-sex couples in Massachusetts again failed to qualify a constitutional amendment for the ballot despite needing the vote of only 25% of the legislature to do so. (Price, *Gay Marriage Digs Roots, Gains Momentum,* The Detroit News (June 25, 2007) 7A.) The current Massachusetts governor, Deval Patrick, won by a landslide in 2006 as a vocal advocate of marriage for same-sex couples (as did New York's current governor, Elliot Spitzer). (*Ibid.*) Meanwhile, nearly 10,000 same-sex couples have been married in Massachusetts since the 2004 ruling, without any apparent social upheaval. (*Ibid.*)

Perhaps it is partly for this reason that attitudes about marriage equality are changing. For example, the 2006 election saw the first-ever defeat (in the "red state" of Arizona no less) of a statewide ballot initiative that sought to ban marriage for same-sex couples. (*State Ban On Gay Marriage No 'Slam-Dunk': Changing Attitudes May Sink Amendment* Tampa Tribune (July 8, 2007) 1.) In light of the foregoing, it is doubtful

and indeed unlikely that a ruling in favor of Petitioners will create a change that "rends the fabric of society in ways that cannot be readily assimilated and that may prompt backlash reactions." (AG Ans. 2.)

Furthermore, it cannot be forgotten that this Court's rulings serve a significant educative function by clarifying and articulating the principles of equality upon which our constitutional society is based. A ruling that the marriage exclusion is constitutional could "entrench and solidify measures that may have been . . . on the verge of abandonment" (Bickel, at 129; see also Choper, at 162), while a ruling striking down the marriage ban could carry significant weight as the democratic discussion continues in California. As Professor Bickel stated: "Today's declaration of constitutionality [or unconstitutionality] will not only tip today's political balance but may add impetus to the next generation's choice of one policy or another." (Bickel, at 131.) Thus, the Court's ruling in this case will not "rend the fabric of society." But it *will* have an educative impact on the ongoing debate, however the ruling comes out. Given the Court's significant educative function in our democratic society, its ruling should be based on principle, not political speculation.

5. Finally, and most fundamentally, the Attorney General's approach is inconsistent with the role of California's independent judiciary to protect individual constitutional rights. As this Court has made clear, the California judiciary bears the solemn responsibility to apply constitutional norms to strike down legislation that conflicts with such norms at the expense of a political minority:

> The separation of powers doctrine articulates a basic philosophy of our constitutional system of government; it establishes a system of checks and balances to protect any one branch against the overreaching of any other branch. (See Cal. Const., arts. IV, V and VI; The Federalist, Nos. 47, 48 (1788).)

> Of such protections, *probably the most fundamental lies in the power of the courts to test legislative and executive acts by the light of constitutional mandate and in particular to preserve constitutional rights, whether of individual or minority, from obliteration by the majority*. . . . Because of its independence and long tenure, the judiciary probably can exert a more enduring and equitable influence in safeguarding fundamental constitutional rights than the other two branches of government, which remain subject to the will of a contemporaneous and fluid majority. (See Cardozo, The Nature of the Judicial Process (1921) 92-94; Hand, *The Contribution of an Independent Judiciary to Civilization* in The Spirit of Liberty (1959) 118-126.)

(*Bixby,* 4 Cal. 3d at 141; see also *Com. to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 262 [judges have a "personal obligation to exercise independent legal judgment in ascertaining the meaning and application of the state constitutional provisions", citation and internal quotation marks omitted]; *In re Horton,* 54 Cal.3d at 97.) In light of this solemn obligation, California courts should not be instructed to conduct finger-in-the-wind analyses of political currents before deciding whether a person has suffered constitutional violation, especially when that person is a member of a long-persecuted minority group. As the United States Supreme Court explained over 40 years ago,

> We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us. (*Reynolds v. Sims* (1964) 377 U.S. 533, 566.)

For all these reasons, this Court should reject the Attorney General's invitation, based on Sunstein's works, to infect constitutional analysis with political considerations and trade its historic independence for a new role as a third political branch of our State government. It is not worth such a fundamental reconceptualization of the role of the judiciary just to preserve the State's ability to deny marriage licenses to same-sex couples.

4. Procreative concerns cannot justify the marriage exclusion under rational basis review.

Although the government disavows it and the majority below rejected it, CCF and the Fund continue to assert that the marriage exclusion furthers the governmental interest in procreation. There are two versions of this argument: first, the government has a legitimate interest in trying to ensure that children are raised by opposite-sex couples, and second, the government has a legitimate interest in encouraging heterosexual couples to procreate responsibly. Neither satisfy rational basis review.

a. Ensuring that children are raised by opposite-sex couples cannot justify the marriage exclusion.

CCF asserts that California "has an interest in insuring for the survival of society." (CCF Ans. 58.) And it notes that historically there has been a link between marriage and procreation. (*Id.* 55.) Accordingly, it contends "heterosexual marriage is important to the survival of [our] culture." (*Id.* 57, quoting Dent, *Traditional Marriage: Still Worth Defending* (2004) 18 BYU J. Pub. L. 419, 428.)

Perhaps realizing that marriage by same-sex couples does not actually prevent heterosexuals from procreating, however, CCF continues that the state's interest in procreation includes "an interest in promoting the optimal environment for the rearing of children." (CCF Ans. 65.) Families with opposite-sex parents, CCF asserts, will better help children "become desirable future citizens," thereby reducing the "need for public assistance" for those children. (*Id.* 70.) Further, "children raised by same-sex couples are more likely to be promiscuous and become homosexual themselves." (*Id.* 71.) In short, by CCF's account, marriage promotes a kind of modern-day eugenics program by ensuring that only those it has deemed most

worthy of raising children (i.e., heterosexuals) obtain the benefits of marriage.

This argument fails because efforts to prevent same-sex couples from raising children reap no societal benefits. "Empirical studies comparing children raised by sexual minority parents with those raised by otherwise comparable heterosexual parents have not found reliable disparities in mental health or social adjustment." (Herek, *Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective* (2006) 61 Am. Psychol. 607, 611.) Indeed, it is the continued discrimination against same-sex couples advocated by CCF that will harm children. (See City OB 48-56.)

Furthermore, CCF's "best interest of the children" argument is inconsistent with California law, which makes clear that the purpose of civil marriage is not to screen for ideal parents. California does not condition marriage on anyone's potential fitness as a parent. Convicted child abusers may marry; so may drug addicts, the indigent, tax-cheats and traitors. Conversely, California does not precondition its determination of parental status on marriage. "The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." (Fam. Code § 7602.)

But most importantly, CCF's argument fails because steering children to opposite-sex couples and away from same-sex couples is not a legitimate government purpose – at least not in this State. As the Governor himself notes, the assertion that marriage by same-sex couples would harm children is "inconsistent with California's determination to extend registered domestic partners the 'same rights, protections, and benefits' as spouses." (Gov. Ans. 30, fn. 22.) And as set forth in the City's Opening

Brief at pages 37-40, California public policy treats lesbians and gay men as equals in virtually all respects. This includes the rights and obligations of parenthood, including the right to produce and raise children, the right to adopt children, the right to become foster parents, and the obligation to provide for children even after separation. (*Id.* 38; see also *Elisa B. v. Superior Court* (2005) 37 Cal.4th 108, 119 ["We perceive no reason why both parents of a child cannot be women."].)

b. Encouraging responsible procreation by heterosexuals cannot justify the marriage exclusion.

A second version of the procreation rationale is as follows: Most opposite-sex couples have the ability to procreate by accident. Thus, the government has a legitimate interest in steering opposite-sex couples into marriage, because doing so will help increase the likelihood that accidentally-created children will be born into stable family environments. (See Fund Ans. 42.) In contrast, "[p]rocreation and parenting are not natural consequences of any same-sex relationship. Parenthood occurs *only* by intentional involvement of third parties." (*Id.* 46.) Accordingly, the Fund contends government may rationally extend the "carrot" of marriage, and all the tangible benefits that come with it, to opposite-sex couples while denying that carrot to same-sex couples, because same-sex couples do not need it. (See also *Hernandez v. Robles* (N.Y. 2006) 855 N.E.2d 1, 7 (plur. opn.) [finding that the New York Legislature "could choose to offer an inducement – in the form of marriage and its attendant benefits – to opposite-sex couples who make a solemn, long-term commitment to each other"].)

As a preliminary matter, this responsible procreation rationale does not identify a realistic governmental purpose under California equal

protection law; rather it invokes a "fictitious purpose[] that could not have been within the contemplation of the Legislature." (*Warden*, 21 Cal.4th at 648; *Hofsheier*, 37 Cal.4th at 1201.)[11] As discussed in the City's Opening Brief at pages 6-20, until recently lesbians and gay men were invisible, having suffered under centuries of state-sponsored persecution. Under these conditions nobody contemplated the possibility of marriage by same-sex couples, let alone the "responsible procreation" rationale for excluding them. In 1977 and 2000, when the Legislature and then the voters considered the issue, there is no doubt some considered the historical link between marriage and procreation. And many likely felt that children raised by same-sex couples would be damaged. But it is inconceivable to think that they wished to deny lesbians and gay men access to marriage for the purpose of decreasing the number of children born to heterosexuals out of wedlock. The responsible procreation rationale may sound "nicer to gays" than the argument that children should not be raised by same-sex couples (Yoshino, *Too Good for Marriage*, New York Times (July 14, 2006)), but it is an exercise in logical gymnastics that was not conceivably contemplated by the Legislature or the voters, thereby precluding it from being used as a legitimate government purpose under California equal protection jurisprudence.

Even if one could conclude that a purpose of excluding lesbians and gay men from marriage was to encourage responsible procreation, the

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[11] See also *Brown v. Merlo* (1973) 8 Cal.3d 855, 865, fn. 7 ["Although by straining our imagination we could possibly derive a theoretically 'conceivable,' but totally unrealistic, state purpose that might support this classification scheme, we do not believe our constitutional adjudicatory function should be governed by such a highly fictional approach to statutory purpose"].

exclusion is not rationally related to that goal. As an initial matter, no Respondent explains how such an exclusion would encourage heterosexuals to procreate more responsibly. Indeed, denying the "carrot" of marriage to same-sex couples does not alter the incentive for opposite-sex couples to marry in any way. Thus, the exclusion does not increase the likelihood that accidentally-created children will be born into stable family environments.

In any event, lesbians and gay men procreate through technology or adoption. And under California law, they are allowed to – indeed even celebrated for – bearing, adopting and raising children within the context of their relationships. (See, e.g., Stats. 2003, ch. 421, §1(a) [emphasizing that same-sex couples have formed "lasting, committed, and caring relationships" in which they "raise children and care for other dependent family members together"].) By the same token, heterosexual couples do not hold a monopoly on irresponsible procreation. For example, in *Elisa B.*, 37 Cal.4th 115, a lesbian couple split two years after they had children. One of the mothers sought to avoid her child support obligations on the ground that, because she did not give birth to the children, she was not their "parent." Thus, if the governmental purpose is to ensure that children are brought into the world by stable, two-parent families, excluding same-sex couples from marriage conflicts with that goal rather than furthers it. Through the marriage exclusion, the State is ignoring some of the very procreators it allegedly wishes to steer into stable, lasting relationships for the benefit of children.

Furthermore, the "responsible procreation" rationale does not explain why the State may rationally exclude same-sex couples who, as discussed above, *do* procreate, while at the same time include opposite-sex couples who *do not* procreate. After all, California does not exclude the

elderly or the sterile from marriage. California does not and could not (see *Turner v. Safley* (1987) 482 U.S. 78) prevent a prisoner from getting married, even if that prisoner had no chance of being released at an age where he or she is still capable of procreating. This belies the contention that that the marriage exclusion is supported by a policy of encouraging responsible procreation.

Finally, even if the responsible procreation argument could somehow apply to uphold a marriage exclusion in a state like New York where the government has declined to extend same-sex couples the tangible benefits that come with marriage (*Hernandez*, 855 N.E.2d at 7 (plur. opn.)), it cannot apply in California. That is because the California Legislature has (to use the parlance of the responsible procreation argument) extended most of the same "carrots" to same-sex couples to "induce" them to make "solemn, long-term commitments" to each other. Those carrots having been extended to same-sex couples, the responsible procreation rationale no longer provides a basis for denying them marriage licenses and the affirmation they provide.

B. The Parties' Inability To Identify A Legitimate Governmental Purpose Proves The Marriage Exclusion Is Invalid Because It Singles Out An Unpopular Social Group Based On Characteristics That Have No Effect On The Welfare Of Others.

The fact that no party to this case has been able to identify a legitimate governmental purpose for preventing same-sex couples from getting married underscores the point discussed in the City's Opening Brief: the marriage exclusion singles out an unpopular social group based on a characteristic (sexual orientation) that has no effect on the welfare of others. (See City OB 33-37; see also *Parr,* 3 Cal.3d at 870; *Mansur v. City of Sacramento* (1940) 39 Cal.App.2d 426, 430 [legislative classification

"must not rest upon personal, physical or even mental characteristics pertaining solely to the individual affected, but rather upon the *relation* which such individual may bear to society"]).

Neither the Governor nor the Attorney General disputes the principle of law described above. Nor do they explain how a person's sexual orientation has any effect on the welfare of others. Instead, they suggest that if this Court were to strike down the marriage exclusion, some Californians would get upset. (See, e.g., Gov. Ans. 1; AG Ans 2.) The majority below also expressed great concern about people getting upset, highlighting that marriage is "a social institution of profound significance to the citizens of this state, many of whom have expressed strong resistance to the idea of changing its historically opposite-sex nature." (*In re Marriage Cases,* 143 Cal.App.4th at 934; see also *id.* at 889.)

It is no doubt correct that some would become upset if this Court ruled that the denial of marriage licenses violates the constitutional rights of same-sex couples. However, there is a difference between not liking something and being injured by something. Certainly if allowing lesbians and gay men to get married would cause some actual injury to other Californians, the avoidance of injury to those people would be relevant to the constitutional analysis. The Court would have to balance that injury to others against the harm caused by denying marriage licenses to lesbians and gay men. But neither the majority below nor the government has attempted to explain how anyone in California would be *remotely injured* by allowing same-sex couples the right to marry. Nor is there any such explanation. Marriage equality would not harm opposite-sex couples, because it could have no conceivable effect on their relationships. And it would not harm children, because as California law already makes clear, same-sex couples

are equally capable of raising them. Absent the articulation of any actual harm that others would suffer by allowing same-sex couples to marry, the bare fact that some Californians dislike the idea is of no help to the government.

Indeed, the fact that some Californians would become upset, while at the same time the government is unable to explain how granting marriage licenses to same-sex couples would actually injure those who would be upset or anyone else, proves our point that the exclusion is based on discomfort or hostility toward a class of persons based on characteristics that have no effect on anyone else, rendering it invalid even under the rational basis test.

IV. THE MARRIAGE EXCLUSION CLASSIFIES BASED ON SEXUAL ORIENTATION AND IS THEREFORE SUBJECT TO STRICT EQUAL PROTECTION SCRUTINY.

A. The Majority Below Correctly Concluded That The Marriage Laws Classify Based On Sexual Orientation.

Respondents argue that the laws limiting marriage to opposite-sex couples do not classify based on sexual orientation at all, thereby obviating the need to inquire in this case whether classifications based on sexual orientation are subject to strict scrutiny. They assert there is no sexual orientation classification because the government's definition of marriage was not adopted in 1977 out of animus towards lesbians and gay men; it was adopted for the benign purpose of codifying preexisting understandings of marriage.[12] (See, e.g., AG Ans. 23, Gov. Ans. 25, Fund Ans. 60.) But the presence or absence of animus, while sometimes relevant in other parts

[12] As explained in the City's Opening Brief at page 12, this assertion is dubious.

of the equal protection inquiry, is totally irrelevant to the question whether a classification exists in the first place.

Animus is most relevant in the application of the rational basis test once a classification has been found to exist. That is to say, a classification that does not infringe on a fundamental right or single out a suspect class is subject to rational basis review, and a court must strike down the classification under rational basis review if it reflects a "bare . . . desire to harm a politically unpopular group." (*U.S. Dept. of Agric. v. Moreno* (1973) 413 U.S. 528, 534; see also *Parr*, 3 Cal.3d at 864.) But we do not need to know whether animus existed to determine if a classification was created in the first place. That preliminary determination is a very simple and objective one: does the statute treat members of one class differently from members of another class?

Accordingly, even assuming the unlikely truth of Respondents' assertion that neither the 1977 definition nor Proposition 22 was adopted out of any animus or discomfort towards same-sex couples, that would not change the fact that it creates a classification based on sexual orientation. The parties admit that the definition was adopted to ensure that same-sex couples would be kept out of marriage (Gov. Ans. 8; AG Ans. 5-6), and there is no disputing that the law accomplished its goal. The law allows opposite-sex couples to marry while preventing same-sex couples from doing so. This is a classification, and the only distinguishing characteristic between the two classes is their sexual orientation.[13]

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[13] The majority's analysis of this issue was erroneous in one respect. It suggested that the marriage exclusion involves a "disparate impact" on lesbians and gay men rather than "disparate treatment" of them. Disparate impact cases involve actions that adversely affect one group of people without any evident intent to have such an impact. (See, e.g., *Harris v.*

(continued on next page)

B. A Proper Application Of California Law Mandates The Conclusion That Sexual Orientation Classifications Are Subject To Strict Scrutiny.

In our opening brief, we asserted that sexual orientation classifications should be subject to strict scrutiny for precisely the same reasons this Court applies strict scrutiny to classifications based on gender: (1) like women, homosexuals have suffered from a "stigma of inferiority and second class citizenship"; and (2) like women, homosexuals have endured these disadvantages based on a trait (in this case sexual orientation) that "frequently bears no relation to ability perform or contribute in society." (City OB 60, 64, quoting *Sail'er Inn v. Kirby* (1971) 5 Cal.3d 1, 18-19.) And we demonstrated that the California judiciary has, over the years, already recognized the existence of these factors as applied to lesbians and gay men. (City OB 60-64.)

None of the four Respondents disputes that lesbians and gay men satisfy these criteria. Nor could they. (See *ante,* at 9-16; City OB 6-19, 37-40, 60-64.) Indeed, the Governor and CCF do not discuss the strict scrutiny factors at all, instead simply asserting that this Court should not recognize sexual orientation as a suspect classification because it has not yet done so. (Gov. Ans. 25-27; CCF Ans. 38-42.)

The Attorney General concedes that the above-discussed factors are satisfied as to sexual orientation, and also concedes the immutability factor

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(footnote continued from previous page)
Capital Growth Investors XIV (1991) 52 Cal.3d 1142, 1171-72.) In this case, as Respondents admit, the laws being challenged were adopted with the goal of keeping lesbians and gay men out of marriage – i.e., with the goal of *treating* same-sex couples in a particular way. This is a disparate *treatment* case. Whether the disparate treatment is out of animus or not is irrelevant to the question whether a classification exists.

sometimes considered by the courts. (AG Ans. 24-25; see also *id.* 42.) However, despite recognizing that the very same factors that led this Court in *Sail'er Inn* to apply strict scrutiny to gender-based classifications are met here, the Attorney General contends the lesbian and gay community in California should be denied heightened constitutional protection because it is "able to wield political power in defense of its interests." (AG Ans. 25.) If "a minority group can adequately defend itself in the political process," the Attorney General asserts, "the justification for strict scrutiny disappears" regardless of whether the factors considered by this Court in *Sail'er Inn* are present. (AG Ans. 25)[14]

This suggested approach to equal protection scrutiny suffers from numerous flaws: (i) it is incorrect as a doctrinal matter; (ii) would require the Court to overrule *Sail'er Inn* and strip women and other disadvantaged groups of their constitutionally protected status; (iii) exaggerates the amount of power lesbians and gay men exert in the political process; and (iv) punishes lesbians and gay men for the legislative victories they have finally obtained after centuries of state-sponsored persecution.

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[14] The Fund similarly asserts the Attorney General's "political power" argument, and briefly adds that there is a factual dispute about whether homosexuality is immutable. (Fund Ans. 69.) As thoroughly explained in our opening brief, immutability has never been a prerequisite to a finding of a suspect class, and in any event homosexuality is immutable within the meaning of suspect classification doctrine. (City OB 60-70.) Moreover, if this issue were deemed important and the record was inadequate to resolve it, consistent with the Court of Appeal's unqualified reversal, this Court should remand the case with instructions to resolve the issue. (See City OB 28; see also Augmented Clerk's Transcript (Case No. A110651) 2461, 2462-2464, 2466-2468 [explaining immutability of sexual orientation].) The trial court declined to resolve any factual issues because it believed that the constitutional issues could be decided without doing so.

As a doctrinal matter, the Attorney General is correct to a point – political power is one factor this Court and the United States Supreme Court have sometimes considered in determining whether a classification should be subject to strict scrutiny. For example, in *City of Cleburne, Texas v. Cleburne Living Center* (1985) 473 U.S. 432, the Court held that classifications based on mental retardation are not subject to strict scrutiny for two reasons: mental retardation *is* relevant to a person's ability to perform in society; and lawmakers had acted in a way that "that belies a continuing apathy or prejudice" towards the mentally retarded. (*Id.* at 442-43.) Similarly, this Court has explained that aliens require special constitutional protection because they suffer from a history of prejudice and are denied the right to vote. (See *Raffaelli v. Com. of Bar Exam'rs.* (1972) 7 Cal.3d 288, 292; *Purdy & Fitzpatrick v. State* (1969) 71 Cal.2d 566, 578-79.)

However, neither this Court nor the United States Supreme Court has ever held that some past success in the legislative arena will, *on its own*, preclude the finding of a suspect class, and certainly not if the other factors are met. Political power is but one of several factors considered in the disjunctive.[15] None of the cases cited by the Attorney General remotely stands for the proposition that if members of a discrete and insular minority

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[15] (See, e.g., *Bowens v. Superior Court* (1991) 1 Cal.4th 36, 42 ["The determination whether a suspect class exists focuses on whether the system of alleged discrimination and the class it defines have any of the traditional indicia of suspectness: such as a class saddled with disabilities, *or* subjected to such 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, emphasis added, brackets and internal quotations omitted].)

has suffered a long history of discrimination based on a trait that has no bearing on their ability to perform in society, they should be denied heightened constitutional protection because they recently achieved certain legislative victories.

In fact, if the Attorney General were correct, *Sail'er Inn* would have to be overruled, and gender-based classifications would become subject to rational basis review. In *Sail'er Inn,* the Court's discussion of the history of discrimination to which women have been subjected made clear that they had already achieved significant gains by 1971. The Court noted that women *used to* be denied the right to vote, *used to* be treated as the inferior spouse in the marital relationship, and "until recently," *used to* be denied the right to sit on juries. (*Sail'er Inn*, 5 Cal.3d at 19 & fns.17-19.) Indeed, the Court recognized that Congress had acted to protect women from employment discrimination through the passage of Title VII of the Civil Rights Act of 1964 (*Sail'er Inn,* at 10, citing 42 U.S.C. § 2000e.) And it recognized that, less than one year prior to its decision, the California Legislature amended the Fair Employment Practices Act, which barred discrimination in the workplace, to include sex discrimination. (*Sail'er Inn* at 6, fn. 3, citing Stats. 1970, ch. 1508, p. 40.)[16] But the Court went on to note that women continued to suffer from some forms of discrimination,

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[16] Similarly, in *Frontiero v. Richardson* (1973) 411 U.S. 677, 687-88, the plurality cited antidiscrimination legislation, including Title VII of the Civil Rights Act of 1964, to support the conclusion that classifications based on sex merit heightened constitutional scrutiny. (Cf. *Nabozny v. Podlesny* (7th Cir. 1996) 92 F.3d 446, 457 ["There can be little doubt that homosexuals are an identifiable minority subjected to discrimination in our society. Given the legislation across the country both positing and prohibiting homosexual rights, that proposition was as self-evident in 1988 as it is today," footnote omitted].)

particularly in employment and educational opportunities, and continued to be "underrepresented in federal and state legislative bodies and in political party leadership." (*Sail'er Inn,* at 19 & fn. 17.) In sum, because women had "historically labored under severe legal and social disabilities," because discrimination continued despite significant gains, and because the discrimination is based on traits that bore no relation to ability to perform in society, gender-based classifications are suspect. (*Id.* at 19.)

Because this analysis applies squarely and indisputably to lesbians and gay men, to rule that sexual orientation classifications are not suspect is to repudiate *Sail'er Inn* and the cases that have followed it,[17] thereby depriving women of the heightened constitutional protection they presently enjoy. Indeed, there is no reason to believe the constitutional avalanche the Attorney General seeks to trigger would stop with women. After all, African Americans and other racial minorities have made substantial legislative gains in California and throughout the nation. The Attorney General provides no principled basis for concluding that his analysis would not require courts to apply rational basis scrutiny to racial classifications as well as gender classifications.

The Attorney General's proposed reconceptualization of the suspect classification doctrine raises other troubling questions. Is a court required to conduct the suspect classification analysis anew each time a member of a minority group challenges government action as violative of equal protection? If so, this would seem to include, under the Attorney General's approach, a tally and an analysis of any legislative victories obtained by the

[17] (See, e.g., *Catholic Charities v. Superior Court* (2004) 32 Cal.4th 527, 564 [stating that gender discrimination "triggers the highest level of scrutiny"].)

minority group since the previous equal protection ruling. How does one define a "legislative victory"? If it is a partial victory, should it be considered evidence that strict scrutiny is no longer necessary? Or should it be considered evidence of continued political frailty?

An equally troubling question arises from the Attorney General's assertion that the suspect classification analysis should be balkanized so that relative political power of a minority group is assessed only in the jurisdiction with which the case is involved. Does this mean that if a Latino challenges a discriminatory policy adopted by the City of Los Angeles that the court must assess the political power of Latinos within that City? If so, does that mean the same discriminatory policy could be subject to rational basis review in Los Angeles while it is required to satisfy strict scrutiny in Mono County?[18]

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[18] The Attorney General cites one case in support of his suggestion that equal protection scrutiny be balkanized by jurisdiction: *Hernandez v. Texas* (1954) 347 U.S. 475. That case does not even come close to supporting his argument. *Hernandez*, which involved discrimination in jury selection, asked the question whether people of Mexican descent constituted a separate class from whites in the community at issue. (*Id.* at 479.) The Court concluded that the two groups did indeed constitute distinct communities. (*Id.* at 479-80.) And because they constituted distinct communities, exclusion of persons of Mexican descent from juries violated the constitution. The Court stated: "When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated." (*Id.* at 478.) This statement, of course, supports our contention that the marriage exclusion violates the equal protection clause, because it singles out lesbians and gay men – who are indisputably thought to constitute a community distinct from heterosexuals – for different treatment without any reasonable basis.

Even putting aside the fact that the Attorney General is asking the Court to disrupt decades of case law on equal protection scrutiny just to win this one controversial case, his characterization of the recent legislative victories by lesbians and gay men is facile. Just as it would be wrong to suggest that the Civil Rights Act of 1964 magically leveled the political playing field for minorities and women, it is wrong to suggest that the legislative gains in California, however significant, can magically wipe away the barriers to full political participation created by centuries of discrimination against lesbians and gay men. The sad fact remains that lesbians and gay men continue to be the regular victims of hate crimes, and that lesbian and gay children suffer discrimination that is more likely to make them homeless or suicidal. (City OB 18-19.) It is safe to assume that such circumstances discourage some lesbians and gay men from participating fully and openly in the political process. Certainly lesbian and gay members of the military, which continues to discharge its homosexual soldiers with great frequency, are unable to participate as openly and actively in the political process as their heterosexual counterparts. (*Id.* 18.) Nor can it be said that the effects of the longtime censorship of the media and Hollywood, or of the ongoing witch hunts in cities like Los Angeles and San Francisco, are somehow wiped away by a few years of legislative success. (*Id.* 12-14.)

It bears repeating that the California judiciary set the stage for many of the legislative victories recently obtained by lesbians and gay men. It was *the courts* who first protected gay bars from being shut down, who first protected lesbians and gay men from employment discrimination, and who first ensured that people would not be excluded from juries on the basis of sexual orientation. (See City OB 60-64.) This underscores the historical

importance of the role of the judiciary in protecting discrete and insular minorities in the State of California – a role Respondents are asking this Court to renounce.

At this point it is worth briefly revisiting the changes the Attorney General has suggested to constitutional law in California. He asks the Court to create a false distinction from past separate but equal cases by arguing that lesbians and gay men have advocated for domestic partnerships and ignoring that blacks in the Jim Crow South similarly advocated for separate institutions and facilities. He asks the Court to eviscerate the rational basis test by holding that deference to the legislative will is a "legitimate government interest" under that test. He puts forward an approach that encourages California judges to apply constitutional doctrine less than honestly if, based on their personal finger-in-the-wind political assessments, they believe doing so would be in society's best interests. And he asks the Court to adopt a rule for identifying suspect classifications that would strip women and other minority groups of the heightened constitutional protection they presently enjoy in California. Again, all to prevent lesbians and gay men from getting married.

Indeed, the Attorney General's reasons for upholding the marriage exclusion appear to be more about politics than actual constitutional analysis. The Court, however, should apply the suspect classification doctrine without regard to the political considerations that are driving the Attorney General. A straightforward application of this doctrine can lead to

only one conclusion: classifications based on sexual orientation are constitutionally suspect.[19]

V. THE MARRIAGE EXCLUSION IS ALSO SUBJECT TO STRICT EQUAL PROTECTION SCRUTINY BECAUSE IT CLASSIFIES ON THE BASIS OF GENDER.

A. The Marriage Exclusion Treats Men and Women Equally Badly, But It Treats Them Differently.

In one manner, the marriage exclusion treats men and women the same because it prohibits them both from marrying members of the same sex as themselves. But in another manner – the manner that is constitutionally significant – it treats men and women quite differently. And it does so on its face.

Our opening brief posed a hypothetical statute to demonstrate this point – a statute providing that, in the event of parental separation, primary custody rights shall be granted to the parent who is the same sex as the child. (City OB 73.) This statute treats men and women the same (and equally badly) in the sense that they are both denied custody of children who are not the same sex as themselves. But it treats them differently in that a mother may not have custody of her son, and a father cannot have custody of his daughter. Surely no father who is denied primary custody of his daughter on the ground that he is not a woman would believe the government is treating him equally to women. Similarly, a lesbian who is

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[19] The Attorney General also suggests the Court may be interested in applying intermediate scrutiny to sexual orientation classifications. He provides no principled basis for applying intermediate scrutiny to laws that discriminate based on sexual orientation while applying strict scrutiny to laws that discriminate based on gender. But if intermediate scrutiny were applied, the law would still fail: the marriage exclusion is not related to important governmental interests at all, much less substantially so. As discussed at pages 17-40, it does not even pass the rational basis test.

denied the right to marry the one person she loves and wishes to spend the rest of her life with, on the ground that she too is a woman, cannot be expected to believe the government is treating her equally to men.

Three of the Respondents did not discuss this hypothetical at all in their briefs. The Fund briefly addresses it in a footnote, stating, "while the hypothetical statute would not likely be sex discrimination without giving preference to men or women, it would infringe the liberty interest in parenting one's children." (Fund Ans. 50, fn. 25.) There are several problems with this response.

Even if the hypothetical somehow implicates "the liberty interest in parenting one's children," other comparable hypothetical statutes clearly would not implicate that or any other constitutional right. Imagine, for example, a statute requiring that women and men may only sit next to persons of the same sex on the bus. Men and women are treated equally badly as groups, but the individual woman who wishes to sit next to her male friend on the bus is treated differently because she is a woman.

But more fundamentally, the Fund's assertion that our hypothetical statute is not a gender classification because does not give "preference to men or women" rests on a flawed understanding of the equal protection clause. While it is true that the hypothetical statute does not single out either *group* for preferential treatment, that is not the sole test for gender discrimination. What ultimately matters for constitutional purposes is how the *individual* is treated. As stated above, the man who is denied custody of his daughter or who may only sit next to other men on the bus is being treated differently *because he is a man.* Indeed, he would obtain custody or be able to sit next to a woman *if he were a woman*. Similarly, the woman who wishes to marry her female loved one is being treated differently

because she is a woman; if she were a man, the government would permit her to marry her loved one. These are facial classifications based on gender.

The "equal application" theory advanced by Respondents – that is, the theory that if men and women are treated differently based on their sex, but neither is given preferential treatment, there is no equal protection violation – has not been used to uphold a statute against equal protection challenge outside the context of marriage equality. Perhaps the Attorney General's political approach to contitutional decisionmaking is influencing courts in those cases. In any event, while Respondents cite a long line of cases in which courts have struck down laws that treat men or women unfavorably as groups, none of these cases suggests that a law *cannot* be considered a gender classification if, while treating individuals differently because of their sex, it happens to treat both groups equally badly.

To the contrary, as discussed in our opening brief, this Court and the United States Supreme Court have rejected the equal application theory. As stated in *Perez*, "[t]he decisive question . . . 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." (*Perez*, 32 Cal.2d at 716 (plur. opn. of Traynor, J.).) And in *J.E.B. v. Alabama ex rel. T.B.* (1994) 511 U.S. 127, the government argued it should be permitted to challenge prospective jurors on the basis of gender, thereby allowing it to treat men and women equally badly in jury selection. But the Court recognized that if an *individual* is treated differently "'for no reason other than the fact that the person happens to be a woman or happens to be a man,'" that is gender discrimination. (*Id.* at 146, citation omitted. See also City OB 74-78.)

In fact, the United States Supreme Court rejected the equal application theory of equal protection once again in June 2007. In *Parents Involved in Community Schools,* 127 S.Ct. 2738, the Court reviewed a student assignment system in Seattle which used race as a "tiebreaker" to determine a student's admission to a particular school. If the school already had too many nonwhite students, the white applicant would win the tiebreaker, while if the school had too many white students, the nonwhite applicant would gain admission. (*Id.* at 2747 (plur. opn.))[20] Of course, this system did not single out either group for favorable treatment; it treated both groups "the same" in the sense discussed by Respondents because members of neither group were allowed to attend a school with too many of their own. But it was still a racial classification subject to strict scrutiny, because "'at the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.'" (*Id.* at 2757 (plur. opn.), quoting *Miller v. Johnson* (1995) 515 U.S. 900, 911; see also *Parents,* at 2792 (conc. opn. of Kennedy, J.) [strict scrutiny required because programs involved "different treatment based on a classification that tells each student he or she is to be defined by race"].)

These cases demonstrate that Respondents' equal application theory must be rejected. Yes, statutes that single out men or women for preferential treatment are gender classifications. However, statutes that prefer neither men nor women but nonetheless treat them differently as individuals based on gender are also gender classifications. This is how the

[20] The Court also considered (and struck down) a student assignment system in Louisville, Kentucky that operated in a slightly more complicated but ultimately similar fashion. (*Parents,* 127 S.Ct. at 2749-50.)

marriage exclusion works – it treats individuals differently depending on whether the person happens to be a woman or a man, and as such it is subject to strict scrutiny.

B. The Answer Briefs Prove The Marriage Exclusion Is Based On Unconstitutional Gender Stereotypes

When the government sponsors 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* (1996) 518 U.S. 515, 541, internal quotations omitted.) Thus, a classification is also gender-based when it relies on outmoded gender stereotypes. The insistence that marriage cannot be between two women or two men is based on the assumption that each marital partner must occupy a sex-specific role. It is further based on the notion that a "real man" is someone who should want to marry a woman, and vice-versa. (See City OB 78-82).

Respondents deny this, but their arguments about marriage confirm our point. For example, CCF asserts that retaining the traditional definition of marriage would foster the "complementary roles in society" of men and women. (CCF Ans. 73.) It quotes Professor Lynn Wardle who states:

> The union of two persons of different genders creates a union of unique potential strengths and inimitable potential value to society. It is the integration of the universe of gender differences – profound and subtle, biological and cultural, psychological and genetic – associated with sexual identity that constitutes the core and essence of marriage.

(*Id.* 33, quoting Wardle, *The "End" of Marriage* (2006) 44 Fam. Ct. Rev. 45, 53.) This presumes that men and women must fulfill certain gender-based roles in a marital relationship. Similarly, the Fund quotes David Blankenhorn for the proposition that "marriage's *single most fundamental idea* is that every child needs a mother and father." (Fund Ans. 11,

emphasis in original, quoting Blankenhorn, The Future of Marriage (2007) 178 (Blankenhorn).) This presumes that mothers and fathers necessarily play different, i.e., gender-based, roles in raising children.

Thus, the substantive policy arguments offered for retaining the traditional definition of marriage are indeed grounded in gender-based stereotypes, namely that women and men must each play prescribed roles in the family unit that depend on their gender, and that children need one person of each gender to play these "complementary" roles. It assume two women cannot play "complementary roles" because both will play the role ascribed to women and that the same is true for men. These stereotypes are outmoded, at least in California. (Compare, e.g., Blankenhorn, at 178 ["every child needs a mother and father"] with *Elisa B.*, 37 Cal.4th at 119 ["We perceive no reason why both parents of a child cannot be women"]; see also City OB 19-23, 37-39 [discussing California's rejection of assumptions about the specific role of women in marriage and the state's recognition that same-sex couples are equal to opposite-sex couples in family matters].)[21] When a law is based on such stereotyping it must be

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[21] The Fund cites *Jespersen v. Harrah's Operating Co., Inc.* (9th Cir. 2006) 444 F.3d 1104 – in which the Ninth Circuit held that a grooming policy requiring women but not men to wear makeup did not violate Title VII of the Civil Rights Act of 1964 – for the proposition that if the sexes are treated equally, there is no improper gender stereotyping. (See Fund Ans. 53.) First, *Jespersen* is not an equal protection case, and as such it does not involve the circumstances in which a gender-based classification is to be considered constitutionally suspect. But more fundamentally, the *Jespersen* court stated the following with respect to gender stereotyping: "There is no evidence in this record to indicate that the policy was adopted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear." (*Jespersen*, 444 F.3d at 1112.) Here, as discussed above, Respondents themselves have admitted that the marriage exclusion is based on gender role stereotyping.

subject to strict equal protection scrutiny. And because the marriage exclusion serves no compelling governmental purpose, it violates equal protection.

VI. UNDER THE PRINCIPLES OF BOTH EQUAL PROTECTION AND DUE PROCESS, THE MARRIAGE EXCLUSION VIOLATES THE FUNDAMENTAL RIGHTS OF LESBIANS AND GAY MEN.

The Attorney General argues that same-sex couples are not denied "the fundamental right to marry" because nobody – gay or straight – is entitled to a marriage license. The right at issue, according to the Attorney General, is the "fundamental right to enter into a legally-recognized family relationship with the person of [one's] choice or to enjoy other benefits associated with traditional marriage." (AG Ans. 55.) Lesbians and gay men are not denied this right, he continues, "because all of the personal and dignity interests that have traditionally informed the right to marry have been given to same-sex couples through the Domestic Partnership Act." (*Id.* 55-56.)

Under the Attorney General's "marriage is a constitutionally insignificant label" theory, California could declare that deadbeat fathers, prisoners, or even people who have been divorced shall no longer be entitled to a marriage license. After all, as long as they are still allowed to participate in domestic partnership, there is no constitutional violation, because domestic partnership protects all of the constitutionally significant "personal and dignity interests" at issue. In *Zablocki v. Redhail* (1978) 434 U.S. 374, the state could have denied a marriage license to the plaintiff as long as there was a separate institution of domestic partnership for deadbeat fathers to which he could be relegated. The same is true for the prisoner in *Turner,* 482 U.S. 78. Under the "label" theory, the government could

choose to relegate divorced persons, elderly couples, or any number of other groups to domestic partner status based on its judgment about whether they are deserving of a marriage license.

This illustrates just how gravely the Attorney General has misunderstood the nature of the fundamental right to marry. As discussed at pages 9-16, the right to marry is greater than the sum of its parts. (See also City and County of San Francisco's Supplemental Brief (City Supp.) 1-5, 18-38.)The unique reverence conferred upon marriage by society and by government is a significant reason why it is constitutionally significant. It has "an important signaling function, and quite apart from marital benefits, the official institution of marriage entails a certain public legitimation and endorsement." (Sunstein, 26 Cardozo L. Rev. at 2093.)

If the Attorney General were correct that marriage is no greater than the sum of its parts, the deadbeat fathers, the prisoners, and the divorced people discussed above would have no cause to complain about a law that relegated them to the institution of domestic partnership. There would be no harm in denying them the constitutionally meaningless label of "married." But these people *would* be harmed, because their most intimate and important relationships would be denied the "sacred" status that only government-sanctioned *marriage* provides. (*Griswold*, 381 U.S. at 486.) It is this status, in combination with the other "personal and dignitary interests" conferred by marriage, that embodies the fundamental right to marry. (See City Supp. 18-38.)

The above discussion also underscores the fallacy of the distinction, asserted by the other Respondents, between the "right to opposite-sex marriage" and the "right to same-sex marriage." The fundamental right at issue is *neither* "opposite-sex marriage" nor "same-sex marriage." It is

marriage, which encompasses both the right to receive the tangible benefits associated with marriage and the intangible honor and respect that the government and society uniquely confers on married couples and their families. That right cannot be denied without a compelling government interest for doing so. In seeking to define the right by distinguishing between heterosexuals and homosexuals, and claiming the former are entitled to receive this honor while the latter are not, Respondents " demean[ ] the claim [Petitioners] put forward." (*Lawrence,* 539 U.S. at 567; see also City OB 89-93.)

Finally, the Attorney General tepidly suggests that California might even be able to abolish the institution of government-sponsored civil marriage altogether, leaving marriage to private institutions. (AG Ans. 61.) For this proposition he again cites Sunstein. (*Ibid.*) Although the City disagrees with this suggestion, let us assume for sake of argument that California could stop giving marriage licenses to everyone, and that, despite the tremendous public outcry that would result, it would be constitutional for California to do so.[22] It still would not follow that, if the government *chooses to stay* in the marriage business, it could deny the honor of marriage to lesbians and gay men while conferring it upon heterosexuals.

Sunstein recognizes this point, even though the Attorney General neglects to mention it. He states as follows:

> [T]he "right to marry" entails both some right of intimate association in the private sphere and (more relevantly for present purposes) an individual right of access to the official institution of marriage *so long as the state provides that institution.* With respect to the

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[22] Would the government merely stop giving marriage licenses to people in the future? Or would it have to invalidate the marriage licenses already granted, so as to avoid an equality problem?

> access right, the best analogy is the right to vote. As the Constitution is now understood, states are not required to provide elections for state offices. But *when* elections are held, the right to vote *qualifies as fundamental*, and state laws that deprive people of this right will be strictly scrutinized and generally struck down. The analogy between the right to marry and the right to vote is quite close. In both cases, the state may not be required to create the practice in the first instance. But so long as the practice exists, the state must make it available to everyone." (Sunstein, 26 Carodoza L.Rev. at 2096, emphases added.)[23]

Accordingly, even if the right to marry is not protected under due process principles (i.e, even in the unlikely event California could simply deny all married couples the official recognition they have heretofore enjoyed) the marriage exclusion would still violate the fundamental rights of lesbians and gay men under the Equal Protection Clause. (See also CCSF Supp. 18-38.)

VII. THE MARRIAGE EXCLUSION VIOLATES THE RIGHT TO PERSONAL AUTONOMY PROTECTED BY THE CALIFORNIA CONSTITUTION.

The privacy provision of the California Constitution protects the right to personal autonomy. Lesbians and gay men have an autonomy interest in marriage for the reasons discussed above – they have a constitutionally significant interest in deciding whether and with whom to enter a relationship that enjoys the government's highest form of recognition and approval. As explained in the City's Opening Brief, the marriage exclusion seriously invades that autonomy interest by denying them the right altogether, without any countervailing justification. (See City OB 82-87.) But as also explained in the Opening Brief, the privacy

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[23] We believe Sunstein's article is quite helpful to understanding the constitutional doctrines involved in this case, even though he later urges federal courts to misapply those doctrines for political reasons.

provision of the California Constitution is implicated in another way – a way Respondents have not even attempted to address.

Under the privacy clause, the marriage exclusion implicates a closely related right that is itself constitutionally protected: the right to intimate association, i.e., the right to form an intimate relationship with the person of one's choice. Through the marriage laws, the State is telling lesbians and gay men, "if you only want the tangible benefits of marriage, you can enter a domestic partnership with your loved one. But if you want *all* the benefits of marriage, you must get a marriage license, and you must do so with a person of the opposite sex." But by marrying someone of the opposite sex, a lesbian or gay man is relinquishing the right to form a lifetime bilateral union with the person he or she truly loves. Thus, the State is conditioning the unique benefits that come with a marriage license on *the relinquishment of the right to intimate association.*

The government faces a "heavy burden" when it conditions the receipt of a public benefit, here a marriage license, on the relinquishment of constitutional rights (*Bagley v. Washington Twp. Hosp.* (1996) 65 Cal.2d 499, 505), particularly privacy rights like the right to intimate association. (*Robbins v. Superior Court* (1985) 38 Cal.3d 199, 213; see also City OB 87-89). Deference to the Legislature, preserving tradition, avoiding political backlash, and procreation are not governmental interests that justify an infringement of such a cherished and universally recognized right.

CONCLUSION

For the reasons set forth above, the Court should rule that the State must grant marriage licenses to same-sex couples on the same terms as it does to opposite-sex couples.

Dated: August 17, 2007

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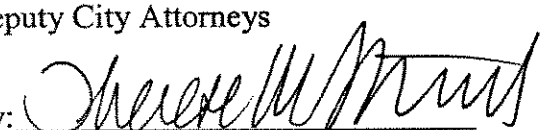
By: 
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CERTIFICATE OF COMPLIANCE

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 17,822 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 August 17, 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 August 17, 2007, I served:

CITY AND COUNTY OF SAN FRANCISCO'S CONSOLIDATED REPLY BRIEF

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

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

☒ **BY PERSONAL SERVICE:** I sealed true and correct copies of the above documents in addressed envelopes and caused such envelopes to be delivered by hand at the above locations by a professional messenger service.

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

Executed August 17, 2007, at San Francisco, California.

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San Francisco Superior Court Case No. CGC-04-429539
consolidated with
Woo v. Lockyer
San Francisco Superior Court Case No. CPF-04-504038

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