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 ANSWER TO *AMICUS CURIAE* BRIEFS

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

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INTRODUCTION

Although the State's amici offer some new and rather creative arguments for the marriage exclusion, their filings primarily serve to flesh out several critical themes developed in the parties' briefs.

First, there continues to be extensive discussion of the role of the judiciary, suggesting that the Court's ruling could reverberate far beyond the issue of marriage for same-sex couples. That is especially true if the Court accepts the invitation by the State and its *amici* to decide the case based on speculation about how the public might react to a ruling for marriage equality. As Professor Jesse H. Choper and others explain, to give credence to the Attorney General's threat of "backlash" and to rule against marriage equality for that reason would violate the Court's special role in our democracy to protect the rights of minority groups from infringement by the majority. And it would diminish the legitimacy of future rulings by the Court, because society could not be confident those decisions were the result of principled constitutional inquiry.

Second, if there is anything the briefs in favor of the State prove, it is that the Attorney General stands alone in his view that marriage is a constitutionally insignificant label. The State's *amici* recognize the profound inferiority of domestic partnership as compared to marriage. The problem, of course, is that they go on to contend that marriage is *too good* for lesbians and gay men. They argue that "alternative household arrangements" harm society in myriad ways, and that allowing same-sex couples into the revered institution of marriage would inflict even further societal damage. This argument, of course, is wholly at odds with California law, which makes clear that lesbians and gay men are equals in matters of employment, child-rearing, and their overall ability to contribute

to society. *Amici*'s arguments about the inferior status of same-sex couples also underscores the harm and stigma the State inflicts upon them and their families by relegating them to the separate and unequal institution of domestic partnership.

Third, the various legal arguments pressed by the State's *amici* amount to a request that the Court twist the meaning of the California Constitution beyond recognition. For example, they advocate a rule that Courts may not protect individual constitutional rights if doing so would be contrary to the "policy" preferences of the Legislature. They contend that lesbians and gay men should not be considered a suspect class because they have recently made political gains in California, despite the fact that such a ruling would necessarily strip racial minorities and women of their long-held and hard-earned constitutional protections. And as discussed above, they ask the Court to abdicate its critical function of protecting individual constitutional rights, based on a wholly unsubstantiated threat of backlash. The Court should not make these changes just to allow the State to continue denying marriage licenses to same-sex couples.

DISCUSSION

I. THE ROLE OF THE COURT

A. The Marriage Exclusion Is Not Shielded From Judicial Review By The Fact That It Involves Questions Of Public Policy.

Several of the State's *amici* argue that the Court would exceed its constitutional role if it were to strike down the marriage exclusion. In so doing, they attempt to create a dichotomy between matters of "public policy" and matters of "individual rights." For example, one brief asserts: "The Marriage Cases involve a question best understood not as a narrow

individual rights claim but rather as an enormously important public policy question about a social institution at the very heart of our society."[1]

This is a false dichotomy. The marriage exclusion does, of course, have important policy consequences. But the same is true of many civil rights issues. Indeed, school segregation was one of the most significant social policy debates of the Twentieth Century. It was, to borrow the words of *amici*, "an enormously important public policy question" about access to an "institution at the very heart of our society." Yet the Supreme Court refused to uphold legislative decisions to segregate the schools on this basis. Rather, it struck down school segregation because it represented a public policy choice that violated the equal protection rights of African-American children. The Court was not merely competent to address this question; it was constitutionally obligated to do so.

None of the State's *amici* has been able to show why the denial of marriage licenses to same-sex couples does not similarly give rise to a cognizable individual rights claim that the judiciary must resolve. As the City explained in its reply brief, when a couple approaches the government and applies for a marriage license, and the government denies them that license on the ground that they do not fall within the class of persons entitled to marry, that is government conduct affecting individual rights, and it is reviewable by the judiciary.[2] The constitutional rights of the couples who are denied marriage licenses are no less sacred – and no less

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[1] (Brief of the Church of Jesus Christ of Latter-Day Saints, California Catholic Conference, National Association of Evangelicals, and Union of Orthodox Jewish Congregations of America in Support of Respondent State of California (Latter-Day Saints Br.) 6.)

[2] (City and County of San Francisco's Reply Brief (City Reply) 6-7.)

justiciable – simply because they arise in the context of a debate that has significant policy implications.

B. The Marriage Exclusion Is Not Shielded From Judicial Review By The Fact That Marriage Was Widely Understood To Be An Arrangement Between Opposite-Sex Couples At The Time California's Constitution Was Adopted.

Several of the State's *amici* also note that marriage has long been understood as a relationship between a man and a woman, and that when California's constitution was adopted, it was inconceivable that same-sex couples could be married. They contend that these historical facts (which nobody denies) are somehow embedded in the California Constitution, thereby stripping the Court of the authority to hold that the State's current policy of denying marriage licenses to same-sex couples violates their constitutional rights.[3]

That is not how constitutional interpretation works, either nationally or in California. Particularly instructive on this point is the brief of Professor Pamela S. Karlan, et al. As Professor Karlan explains, the framers of the Fourteenth Amendment did not intend it to outlaw school segregation, and the Supreme Court recognized as much in *Brown v. Board of Education* (1954) 347 U.S. 483. In fact, the framers of the Fourteenth Amendment segregated the schools in the District of Columbia.[4] But as the

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[3] (See, e.g., Brief of California Ethnic Religious Organizations for Marriage in Support of Appellees (Ethnic Religious Br.) 6-8.)

[4] (See Brief of Professors of Constitutional Law Pamela S. Karlan, Paul Brest, Alan E. Brownstein, William Cohen, David B. Cruz, Mary L. Dudziak, Susan R. Estrich, David Faigman, Philip B. Frickey, Ronald R. Garet, Kenneth L. Karst, Goodwin Liu, Lawrence C. Marshall, Radkiha Rao, Kathleen M. Sullivan, Johathan D. Varat, and Adam Winkler in Support of Respondents Challenging the Marriage Exclusion (Karlan Br.) 6-7.)

Supreme Court stated in 1954, "we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation . . . ." (*Brown*, 347 U.S. at 492-93.)

This Court must similarly consider the marriage exclusion in light of the "present place in American life" of lesbians and gay men – and not in light of their place in American life during the Nineteenth Century. It is of course true that nobody would have dreamed of marriage by same-sex couples when California's constitution was adopted. After all, our society had not even discovered the concept of homosexuality; same-sex conduct was believed to be nothing more than aberrant criminal behavior to be severely punished.[5] But the fact that society did not recognize homosexuality when the California Constitution was adopted never prevented this Court from interpreting it to protect lesbians and gay men from employment discrimination or discrimination in business licensing. (Karlan Br. 11; City OB 60-63; see also *Brown v. Merlo* (1973) 8 Cal.3d 855, 865, fn. 6 ["the present constitutionality of the . . . statute's classification scheme must be evaluated in light of the contemporary treatment accorded similarly situated individuals"]; *id.* at 868-69; *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1206 [rejecting classification as "historical atavism"].) Similarly, there is no basis for concluding that the disfavored place of lesbians and gay men throughout our history prevents

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[5] Petitioner City and County of San Francisco's Opening Brief on the Merits (City OB) 8-13.)

this Court from engaging in meaningful judicial review in this case, based on present-day reality.

C. The Court Should Decline The Invitation Of *Amici* To Render A Decision Based On Fear Of Controversy.

Some *amici* join in the Attorney General's call for this Court to concern itself with the potential public reaction to its ruling. For example, one brief urges the Court to take the "political winds into account" when conducting its constitutional analysis, and argues that a ruling for marriage equality would stir "great passions" and result in backlash.[6] In its reply brief, the City discussed the numerous reasons the Court should not base its decision on politics. (City Reply 23-32.) Several of the briefs filed in support of the City underscore the point.

First and foremost, as Professor Jesse H. Choper explains, while potential controversy might be a reason to deny review, it cannot be a reason to deny rights. "For a court to decline protection until popular attitudes have reached that point of consensus at which its decisions will be readily accepted is to shirk its essential duty and contradict its critical function as the government agency of last resort for the guardianship of constitutional liberties."[7] This would not only deny justice in the case at hand – it would harm the Court's legitimacy in future cases. (Choper Br. 7-8.)

Second, "[j]udges are, generally speaking, not trained to make social-scientific predictions, and even those who are so trained will often

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[6] (Brief of Leland Traiman and Stewart Blandon in Support of the State of California and the Attorney General 9.)

[7] (Brief of Professor Jesse H. Choper in Support of Petitioners (Choper Br.) 5.)

get it wrong." (Choper Br. 7.) Accordingly, even if it were theoretically appropriate for courts to infect their substantive constitutional decisionmaking with political speculation, it would be treacherous to do so. (*Ibid.*) A brief look at the political landscape on marriage equality underscores Professor Choper's point. In this litigation, the vast majority of California's major cities have filed (or have subsequently sought to join) a brief in support of marriage equality.[8] This includes the City of San Diego, whose Republican mayor proclaimed his support for the Cities' Brief on the ground that the principles of equality should not be compromised for the sake of political expediency.[9] The California Legislature has twice voted to lift the marriage ban. And as the Equality Federation explains in its brief, while national opposition to marriage for same-sex couples briefly spiked amidst anti-gay rhetoric following the Massachusetts ruling, it has now reached an all-time low as society has begun to realize that it causes no harm.[10] One can only assume the poll numbers are far more favorable in California. Meanwhile, more than 10,000 same-sex couples have been married in Massachusetts, without any apparent social upheaval or retribution against supporters of marriage equality in that state. Indeed, the

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[8] (See Brief of City of Los Angeles, City of San Diego, City of San Jose, City of Long Beach, City of Oakland, City of Santa Rosa, City of Berkeley, City of Santa Monica, City of Santa Cruz, City of Palm Springs, City of West Hollywood, City of Signal Hill, City of Sebastopol, Town of Fairfax, City of Cloverdale, County of Santa Clara, County of San Mateo, County of Santa Cruz, and County of Marin in Support of the City and County of San Francisco (Cities' Brief).)

[9] Available at http://youtube.com/watch?v=VAOkwjQdm6Q [as of November 12, 2007].

[10] (Brief of Equality Federation and Gay and Lesbian Advocates & Defenders in Support of Respondents (Equality Federation Br.) 17.)

current governor of Massachusetts campaigned as a strong and vocal supporter of the Supreme Judicial Court's ruling. (See generally City Reply 29-31.) All of this suggests that the Attorney General's threat of "backlash" is an empty one,[11] and underscores that courts should not allow their constitutional rulings to be swayed by these scare tactics.

Third, the "political expediency" argument fails to account for the important educative function served by high court rulings. After all, this Court has a long history of intervening to protect the rights of lesbians and gay men from infringement by the majority. (City OB 14-15, 60-63.) Far from diminishing the Court's stature or legitimacy, these rulings have served as bellwethers in the long struggle for lesbian and gay equality in California. Similarly, the Court's ruling on interracial marriage in 1948 (despite much stronger popular opposition to interracial marriage at that time compared to marriage for same-sex couples now) served as a tremendous contribution to the national conversation on the issue. The Court's record of principled constitutional adjudication in these areas gives truth to Professor Choper's statement that "a high court's message can have a proselytizing and sobering effect, converting an impetuous popular mind into one more receptive to reason." (Choper Br. 6.)

But just as a ruling in favor of marriage equality would have an important impact on the national conversation, it is equally true that a ruling against marriage equality would have a major effect, because "a ruling that defers to discriminatory popular sentiment can serve to entrench that sentiment." (Choper Br. 6, fn. 4.) This Court should not entrench the

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[11] (Answer Brief of the State of California and the Attorney General to Opening Briefs on the Merits (A.G. Ans.) 2.)

marriage exclusion by declaring it constitutional based out of fear that a principled constitutional ruling would generate short-term controversy.

II. THE CONSTITUTIONAL SIGNIFICANCE OF THE DIFFERENCE BETWEEN MARRIAGE AND DOMESTIC PARTNERSHIP

In his supplemental reply brief, the Attorney General continues to assert that "so long as the Legislature ensures that all rights and benefits enjoyed by married couples under the law are also available to domestic partners . . . then the Constitution is not violated."[12] In other words, according to the Attorney General, "marriage" itself is a constitutionally insignificant label, and therefore the State is free to relegate lesbians and gay men to the separate institution of domestic partnership.

If the Attorney General is correct, it follows that the State has broad leeway to transfer distinct classes of people from marriage to domestic partnership in order to serve various policy goals. The State may, for example, adopt a policy that divorced people are eligible for domestic partnership, but not marriage. That people who have been convicted of crimes can become domestic partners, but not spouses. That people who are incapable of having children can register as domestic partners, but cannot obtain a marriage license or get married.[13]

If there is one thing the *amicus curiae* briefs for the State show, it is that the Attorney General stands alone in his claim that the label of "marriage" is constitutionally insignificant. The Latter-Day Saints, for example, assert that "[m]ale-female marriage is the life-blood of

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[12] (Reply of the State of California and Attorney General to Supplemental Briefs 2-3.)

[13] (City and County of San Francisco's Supplemental Brief (City Supp. Br.) 31-38; City Reply 9-12.)

community, society, and the state." (Latter-Day Saints Br. 2.) As the Ethnic Religious Organizations put it, marriage is a "universal social institution that provides the matchless benefit of a husband and wife committed to one another and to the children they may create." (Ethnic Religious Br. 11-12.) It is safe to assume, based on the characterizations of marriage that pervade these briefs, that not one of the State's *amici* would agree that the State could permissibly relegate divorced persons, convicts, or infertile couples to domestic partnership. And they would be correct.

But the State's *amici* go too far in the opposite direction. They argue that marriage is *too important* for lesbians and gay men – that same-sex couples are not worthy of participation in this revered institution. They argue that the State should deny marriage licenses to same-sex couples because of the "substantial adverse consequences for children that often flow from alternative household arrangements." (Latter-Day Saints Br. 3.) They contend that "many of society's ills are rooted in adult alternative lifestyle choices . . ."[14] In sum, they take the position that the State can and should exclude same-sex couples from marriage because to treat them as equals would harm society.

To be sure, the position taken by the State's *amici* is more honest than the position taken by the State itself. After all, given the inherent invidiousness of "separate but equal" treatment, the State may not inflict such treatment upon its citizens unless it can identify a "social evil" that the segregation is designed to protect against.[15] At least the State's *amici* have

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[14] (Brief of The American Center for Law & Justice in Support of Respondent Proposition 22 Legal Defense and Education Fund 13-14.)

[15] (See, e.g., Brief of the American Psychoanalytic Association, the American Anthropological Association, and the Lawyers' Committee for

(continued on next page)

attempted to identify a "social evil" that the marriage exclusion protects against. But their relative honesty only serves to highlight the invalidity of the marriage exclusion, because their central contention – that treating lesbians and gay men as equals would harm society – is not just contrary to scientific fact,[16] but totally contrary to California law and California public policy, which proclaims that same-sex couples are equal to opposite-sex couples in matters of family and child-rearing. (City OB 37-40.) In short, *amici*'s arguments prove too much. They prove that relegating lesbians and gay men to domestic partnership *does indeed* stigmatize them, and that there is no constitutionally acceptable justification for doing so.

III. DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION

A. That The Original Understanding Of Marriage Did Not Include Same-Sex Couples Does Not Make The Current Marriage Exclusion Immune From A Discrimination Claim.

Several of the State's *amici* protest that the historical understanding of marriage as a male-female partnership is not rooted in bigotry towards lesbians and gay men. That may be true, but it is irrelevant. It was not until the latter half of the Twentieth Century that lesbians and gay men truly developed a visible identity in American society, and only after that happened did marriage equality become an idea capable of formulation.

(footnote continued from previous page)
Civil Rights of the San Francisco Bay Area Urging Reversal of the Decision of the Court of Appeal 14-32; see also City OB pp. 48-56.)

[16] (See Respondent's Appendix (RA) 0254-0258, 0905-0922; Brief of the American Psychological Association, California Psychological Association, American Psychiatric Association, National Association of Social Workers, and National Association of Social Workers, California Chapter in Support of the Parties Challenging the Marriage Exclusion (APA Br.) 14-18, 26-35.)

(City OB 13-19.) Once the idea was formulated, the State quickly took action to prevent it from being achieved. As all parties to this case agree, the 1977 amendment to the marriage statutes was enacted for the sole purpose of preventing same-sex couples from getting married.[17] (See AG Ans. 23, Gov. Ans. 25, Fund Ans. 60.) The same is true of Proposition 22 in 2000, albeit for out-of-state couples. Accordingly, the City does not, contrary to some protestations of *amici*, attack the institution of marriage as discriminatory. Rather, the City attacks as unconstitutional the efforts to keep same-sex couples out of marriage – efforts that arose only after lesbians and gay men finally overcame centuries of state-sponsored persecution to develop an identity of their own.

Furthermore, even if California's marriage statutes had always specified that marriage connotes a relationship between a man and a woman, thereby obviating the State's need to take legislative action to exclude same-sex couples in 1977, that would still not preclude this constitutional challenge. A statute that was not intended to discriminate when enacted can nonetheless become discriminatory based on changed societal circumstances. For example, imagine a society that, at its inception, was composed solely of Protestants, Catholics and Jews. Imagine further that the Legislature enacted a statute providing that marriages could be performed by the clergy of the Protestant, Catholic and Jewish faiths. Such a law would obviously not be rooted in bigotry. However, if a century later that society subsequently became infused with

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[17] (See A.G. Ans. 23; Answer Brief of Governor Schwarzenegger and State Registrar of Vital Statistics Teresita Trinidad on the Merits 25; Proposition 22 Legal Defense and Education Fund Answer to Petitioners' Opening Briefs on Substantive Issues 60.)

Muslims (something that may have been utterly inconceivable at the time of enactment), and if the State invoked the statute to deny Muslims the right to have their clergy preside over their civil marriages, the statute would discriminate against Muslims by drawing a classification that precludes their equal treatment.

B. The Marriage Exclusion Does Not Merely Have A "Disparate Impact" On Lesbians And Gay Men; It Constitutes Differential Treatment Of Them.

Some of the State's *amici* argue that while the marriage exclusion might have a "disparate impact" on lesbians and gay men, it does not constitute "disparate treatment" of them. It follows, they contend, that there is no cognizable equal protection claim because there can be no equal protection violation based on a disparate impact theory.[18]

However, as discussed in the preceding section, as well as in the City's Reply Brief at 41-42, this clearly is a disparate treatment case, not a disparate impact case. As all parties agree, the 1977 amendment to the marriage statutes and the 2000 initiative were enacted for the explicit purpose of preventing same-sex couples from obtaining marriage licenses recognized by the State – i.e., for the purpose of ensuring they received *differential treatment* from the State. As such, they stand in stark contrast to cases such as *Washington v. Davis* (1976) 426 U.S. 229, 246 and *Personnel Administrator of Massachusetts v. Feeney* (1979) 442 U.S. 256, 271, in which the government policies at issue were adopted for a purpose *other than* to exclude a discrete group, but which *happened to* have a disparate impact on that group.

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[18] (See, e.g., Brief of the Knights of Columbus in Support of the State Defendants (Knights Br.) 16-17.)

Amici further argue that because the marriage laws do not explicitly mention "same-sex couples" or "gay men and lesbians," the Court cannot deem the marriage exclusion to be a classification based on sexual orientation. That argument proves too much. To use a derivation on the hypothetical from the preceding section, imagine a law that stated, "government benefits shall go to Protestants." And imagine the legislative history showed that the Legislature enacted this law to prevent Catholics from receiving benefits. Nobody would have the audacity to argue that this law merely had a coincidental "disparate impact" on Catholics. Everyone would recognize it involved disparate treatment of Catholics, even though it did not mention them by name. Incidentally, this would be true whether people wished to deny benefits to Catholics out of "animus" or merely out of a desire to "keep things the way they always have been." Either way, it would be disparate treatment of Catholics. And in this case, either way, it is disparate treatment of same-sex couples. (See also City Reply 40-41.)

C. The Court Cannot Deprive Lesbians And Gay Men Heightened Constitutional Protection On The Ground That They Have Made Political Gains In California.

The State's *amici* also latch on to the Attorney General's argument that even though lesbians and gay men bear all the traditional *indicia* of a suspect class, courts should not apply strict scrutiny to classifications based on sexual orientation because the gay community has recently made political gains in California. The City's Reply Brief already demonstrates that this argument: (1) is wrong as a doctrinal matter because women and other groups achieved significant legislative success before this Court ruled they constitute a suspect class; (2) would require the Court to conclude that women and racial minorities are no longer entitled to heightened constitutional protection; (3) exaggerates the amount of power lesbians and

gay men exert in the political process; and (4) punishes lesbians and gay men for the legislative victories they have finally obtained after centuries of state-sponsored persecution. (City Reply 42-50.)

The City also strongly commends to the Court the brief filed by the Equal Justice Society. Among other things, this brief discusses at length the disturbing implications of the "political power" argument:

> We assume that the State does not question the continuing need for judicial vigilance against discrimination on the basis of race, gender and religion. The State presumably does not believe, in other words, that these forms of invidious discrimination have become constitutionally unimportant because legislatures have acted to fight against them. Why, then, is antigay discrimination different?
>
> The only explanation is that the State believes that people of color, women and religious minorities "snuck under the wire": they succeeded in securing judicial rulings establishing that discrimination against them is presumptively unconstitutional *before* they secured the benefit of protective legislation . . . .
>
> The State urges this Court to hold that it is only when judges step out *ahead* of legislatures that they should feel comfortable in protecting the equal citizenship status of disfavored minorities. When judges *follow the lead* of legislatures in recognizing the invidious quality of discrimination against a disfavored minority, the State would have this Court rule that the judiciary has "missed its chance" and should turn a blind eye toward any subsequent laws or policies that deny equal citizenship to that minority group.[19]

In sum, the State and its allies advocate a seismic shift in California's equal protection jurisprudence – a shift that would strip the judiciary of its constitutional role as the institution primarily responsible for the protection of minority rights against infringement by the popular majority. It is not

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[19] (Brief of Equal Justice Society in Support of Parties Challenging the Marriage Exclusion (EJS Br.) 16-17.)

worth imposing this dramatic change just for the purpose of allowing the State of California to continue denying marriage licenses to same-sex couples.

D. Sexual Orientation Is An Immutable Trait, But If The Court Believes There Is A Factual Dispute On This Question That Affects The Outcome Of The Case, It Should Remand For A Trial.

Although the Attorney General concedes that sexual orientation is an immutable trait for purposes of the suspect classification doctrine (A.G. Ans. 24-25), a group of *amici* led by Jews Offering New Alternatives to Homosexuality argues that sexual orientation is not, in fact, immutable.[20] It argues, among other things, that "at least a few strongly motivated individuals can voluntarily change their orientation." (JONAH Br. 13.)

The City has addressed this argument fully in its Opening Brief at 64-69. To summarize, immutability is not a prerequisite for a suspect class, as demonstrated by the fact that courts have applied heightened scrutiny to classifications based on the mutable traits of alienage, poverty and religion. But even if immutability were relevant here, sexual orientation is clearly an immutable trait – it is a trait so fundamental to a person's identity that the government may not demand that a person change it in order to be granted rights or privileges under the law. Even the JONAH Brief appears to acknowledge that sexual orientation is fundamental when it asserts that only "a few strongly motivated individuals" can change their sexual orientation.

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[20] (Brief of Jews Offering New Alternatives to Homosexuality ("JONAH"), Parents and Friends of Ex-Gays & Gays ("PFOX"), and Evergreen International, in Support of Proposition 22 Legal Defense and Education Fund (JONAH Br.).)

Finally, if the Court were to deem the question of immutability decisive in this case, and if it were to determine, like the Court of Appeal below, that the factual record is inadequate to resolve it, the Court should remand for a trial on the issue. This would be the appropriate result in light of the Court of Appeal's unqualified reversal. (See City OB 28, 69-70, fn. 26; City Reply 43-44, fn. 14.)

IV. DISCRIMINATION ON THE BASIS OF GENDER

A. The State's *Amici* Have Failed To Refute The City's Central Argument For Why The Marriage Laws Classify Based On Gender.

Although numerous *amici* argue that the marriage exclusion does not classify on the basis of gender, none has responded to the City's central argument on this point. The City posed a hypothetical 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. Under such a statute, a father is denied primary custody of his daughter on the sole ground that he is a man. A mother is denied primary custody of her son, on the sole ground that she is a woman. Although this statute does not single out one sex or the other for adverse treatment, nobody could argue (indeed nobody has argued) that this custody statute does not classify on the basis of gender. Similarly, a statute requiring that women and men may only sit next to persons of the same sex on the bus does not single out one sex for adverse treatment, but a woman who wishes to sit next to her male friend is denied the right to do so because she is a woman, and vice-versa. (City OB 73; City Reply 50-51.)

One of the State's *amici* argues that the "equal application" theory still applies in the gender context, even if it has been rejected in the race

context.[21] If that were correct, then the above statutes would be valid. But they clearly are not – they are gender classifications subject to strict scrutiny, and they would never satisfy strict scrutiny. The "equal application" theory is as meritless here as it was in the race cases. (See also *J.E.B. v. Alabama ex rel. T.B.* (1994) 511 U.S. 127, 146 [rejecting equal application theory and striking down gender-based conduct that does not single out one sex for negative treatment]; City OB 74-78; City Reply 52-54.)

The State's *amici* also make much of the fact that there are real physical differences between men and women, and that these differences sometimes justify gender-based classifications in contexts where race-based classifications would not be permitted. That argument conflates two distinct inquires: (1) whether a statute classifies on the basis of gender; and (2) whether the gender classification satisfies strict scrutiny. The physical differences between men and women are relevant to the second inquiry. But the fact that there are physical differences between the sexes cannot possibly affect whether a gender-based classification exists in the first place.

In sum, *amici*'s arguments about differences between the sexes do not change the fact that when a law classifies on the basis of gender, strict scrutiny must be applied. The State and its allies have failed to demonstrate that the marriage laws – by treating men and women differently based on their sex – is not a gender-based classification. Nor have they explained how this gender-based classification could possibly satisfy strict scrutiny.

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[21] (Brief of Doublas W. Kmiec, Helen M. Alvare, George W. Dent, Jr., Stephen G. Calabresi, Steven B. Presser, and Lynn D. Wardle, Professors of Law, in Support of the State of California (Kmiec Br.) 9-12.)

B. The State's *Amici* Fail To Demonstrate That The Marriage Exclusion Is Not Based On Improper Gender Stereotypes.

The State's *amici* also argue that the marriage laws cannot possibly be based on improper gender stereotypes because marriage has always been between a man and a woman. (See, e.g., Kmiec Br. 23.) This completely misses the point. The City does not argue that society's historical understanding of marriage as a relationship between a man and a woman is based on gender stereotypes.[22] It argues that when the Legislature amended the laws in 1977 to prevent same-sex couples from participating in marriage, and when the voters opted against recognizing out-of-state marriages of same-sex couples in 2000, *those* legislative decisions were based on improper gender stereotypes. They were based in large part on the assumptions that a "real man" should not want to be with another man, and that a "real woman" should not want to be with another woman. They were also based on the assumption that the "family" was composed of a male breadwinner and an economically-dependent female childrearer – a model into which same-sex couples did not fit. (City OB 78-82; City Reply 54-56.) Those assumptions are gender stereotypes. Equal protection does not permit laws to be based on them.

V. THE FUNDAMENTAL RIGHT TO MARRY

Several of the State's *amici*, while acknowledging the constitutional significance of marriage and the fundamental differences between marriage

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[22] Historically the marriage laws in this state and around the country contained many gender-based distinctions that were predicated on stereotypical gender roles and beliefs about women that were later recognized to have been demeaning. (See, e.g., City OB 21-24.) Whether the limitation of the relation to opposite-sex couples was itself the product of such stereotypes is not a question this Court needs to consider.

and domestic partnership, argue that the State may nonetheless deny marriage licenses to same-sex couples because this is not a right they have heretofore enjoyed. This misstates the issue for several reasons.

First, it fails to recognize the distinction between the equal protection and due process prongs of the fundamental rights doctrine. As Professor Karlan's brief explains, when the state decides to extend an important right or privilege to its citizens, equal protection dictates that the right or privilege be extended on *equal terms*, absent a compelling reason not to. Examples include voting, access to appellate review, and access to limited public forums. (Karlan Br. 12-17.) So, for example, the federal Constitution does not require states to provide appellate review, but if they choose to do so, they may not exclude a subset of society without a compelling justification. And if a particular group were historically denied access to appellate review, nobody would have the audacity to argue that the group has no constitutional claim because it has "never enjoyed the right before." Rather, to justify the extension of this important privilege on unequal terms, the state would be required to show that the exclusion serves a compelling governmental interest.

The law treats marriage exactly as it does voting, access to appellate review, and access to limited public forums: equal protection dictates that states must extend it on equal terms. Marriage "has been held too important a privilege to be distributed along lines that would otherwise constitute a permissible discrimination." (Karlan Br. 17.) The state may deprive prisoners and convicts of many rights and privileges, but it may not deny them the right to marry, because once the state decides to extend that right, it is required to extend it to all on equal terms, absent a compelling reason not to. Accordingly, to deny this right to same-sex couples, the State must

provide a compelling justification. It cannot avoid the obligation to do so simply by asserting that lesbians and gay men have never enjoyed the right to marry before. Such facile arguments would never prevail in a case involving voting, access to the courts or access to limited public forums. The Court should not allow it to prevail in a case involving the fundamental right to marry.

Second, even under the substantive due process prong of the fundamental rights doctrine, the argument that same-sex couples have no claim because they have "never enjoyed the right before" is belied by the case law. As set forth extensively in the City's prior briefs, the Supreme Court in *Lawrence* resoundingly rejected the notion that states could criminalize same-sex conduct simply because society had not previously recognized the "fundamental right to engage in homosexual sodomy." (City OB 90-93; City Reply 56-58.) Rather, the sodomy statutes implicated the general right to intimate association, and the fact that society had not previously recognized that right for lesbians and gay men did not preclude them from successfully asserting it. Similarly, in the miscegenation cases, the fact that society had not previously recognized a fundamental right to interracial marriage did not preclude interracial couples from successfully asserting that they too enjoyed the fundamental right to marry under principles of due process. (City OB 91-92.) So too here – the fact that society was, until recently, unable to conceive of marriage by same-sex partners is no basis for concluding that the State may continue, today, to treat lesbians and gay men as second-class citizens.

VI. THE RIGHT TO PRIVACY

Throughout all the briefing in this case, not a single party or *amicus* has responded to the City's argument that the marriage exclusion imposes

an unconstitutional condition on lesbians and gay men, in violation of the privacy provision of the California Constitution. (City OB 87-89; City Reply 59-60.) To summarize, if one agrees that marriage is indeed a superior institution to domestic partnership (as everyone does except apparently the Attorney General), it necessarily follows that the State cannot condition the benefits of marriage on the relinquishment of constitutional rights. In other words, the State may not tell its citizens that they will be denied marriage and relegated to domestic partnership unless they are willing to relinquish their constitutional rights.

But as the City has argued and as the Anti-Defamation League's brief shows in greater detail, by not allowing same-sex couples to marry, the State is conditioning the benefit of marriage for lesbians and gay men on the relinquishment of the right to intimate association, i.e, the right to be with the person they love.[23] Nobody disputes that all in society, including lesbians and gay men, enjoy this right to intimate association. Yet, neither the State nor its *amici* have explained why the State may condition the benefits of marriage for lesbians and gay men on the relinquishment of this cherished privacy right.

VII. THE PROCREATION RATIONALE

Few if any of the State's *amici* take seriously the assertion that deference to "the will of the people" or "tradition" can be considered a

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[23] (See generally Brief of the Anti-Defamation League, Los Angeles Gay and Lesbian Center, Sacramento Gay and Lesbian Center, San Diego Lesbian, Gay, Bisexual and Trangender Community Center, San Francisco LGBT Community Center, Billy DeFrank Center, The Gay and Lesbian Center of Greater Long Beach, Desert Pride Center, Lighthouse Community Pride Center, the Pacific Center, and Stanislaus Pride Center in Support of Respondents Challenging the Marriage Exclusion.)

substantive justification for a legislative classification, even under the rational basis standard. Nor should they. As the City explained in its Reply Brief, these concepts have assisted courts in establishing different levels of scrutiny and using a deferential level in most cases, but courts do not and cannot use them as reasons for holding that a particular law actually satisfies equal protection scrutiny. (City Reply 17-22.) The brief of the Equal Justice Society in support of the City makes this point in greater detail, showing that the authorities cited by the Attorney General for the proposition that deference requires the Court to uphold the marriage exclusion stand for nothing of the sort. (EJS Br. 6-12.)

Instead, the State's *amici* assert "procreation" as a justification for the marriage exclusion. As discussed in the City's Reply Brief, there appear to be two versions of this argument. The first is that opposite-sex couples make better parents than same-sex couples, thereby justifying the extension of the "carrot" of marriage to the preferred group of child-rearers. This rationale, of course, is wholly invalid in California, whose laws insist that same-sex couples are to be treated as equals with respect to parenting. (City Reply 33-35.)

The second version of the procreation argument is that marriage promotes "responsible procreation," and because only heterosexual couples procreate irresponsibly, they are the only people in need of incentives to stay together after having children. Again, as the City has explained, this argument suffers from numerous defects: (1) it fails to recognize that same-sex couples make babies as well, and thereby presumably should also be incented to stay together after doing so; (2) it fails to explain why it is rational to exclude same-sex couples, who do make babies, while including prisoners and the infertile, who do not; and (3) it fails to explain how

granting marriage licenses to *same-sex* couples could possibly harm the state's interest in "responsible procreation" by *heterosexual* couples. (City Reply 33-38; City OB 46-47.)

On this last point, the State's *amici* strain to provide a reason why allowing same-sex couples to marry would threaten the State's procreative interests. Their exceedingly abstract language is revealing. One *amicus* states that "procreation is a key public purpose of marriage," and argues that allowing same-sex couples to marry "harms this interest." (Knights Br. 11.) Another argues that if marriage equality were achieved, "the close cultural linkage between the institution of marriage and the begetting and raising of children will be weakened." (Latter-Day Saints Br. 4.)

What are they suggesting? That if same-sex couples are allowed to marry, heterosexual married couples will stop making babies? That heterosexual couples will stop getting married, thereby having more babies out of wedlock? If that is what *amici* contend, it is extraordinarily far-fetched – akin to the type of "theoretically 'conceivable,' but totally unrealistic state purpose" that cannot be used to uphold a statute that treats people unequally, even under rational basis. (Brown, 8 Cal.3d at 865, fn. 7; see also City Reply 35-36.)[24] Moreover, the assumption that marriage by same-sex couples should drive heterosexual couples into irresponsible

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[24] One *amicus* makes the far-fetched argument that same-sex unions in Europe have caused an increase in out-of-wedlock births and a decline in marriage by heterosexuals. (Brief of The American Center for Law & Justice In Support of Respondent Proposition 22 Legal Defense and Education Fund 5.) The briefs of the American Psychological Association and Professor Eskridge refute the point. (APA Br. 24 & fn. 43; Brief of Professor William N. Eskridge, Jr. in Support of Parties Challenging the Marriage Exclusion 35.)

behavior is premised on the notion that same-sex couples are inferior or immoral – a notion that is contrary to California law and cannot be a basis for upholding the marriage exclusion under any level of scrutiny.

Perhaps *amici* simply mean to argue that certain individuals who care a great deal about the historical linkage between marriage and procreation – perhaps for religious reasons – will suffer some psychic injury if a class of persons historically *not* linked to biological procreation is given permission to marry. They do not say that, of course, because they know that psychic injury to some is not a legitimate reason to deny rights to others. And they know that civil rights for all cannot be defined by the religious beliefs of some.[25] Indeed, individuals who strongly opposed the

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[25] As the *amicus curiae* briefs for the State show, some of the most vocal opponents of marriage equality claim that allowing lesbians and gay men to marry would do violence to their religious beliefs and practices. History shows that proponents of slavery, segregation, miscegenation laws, and laws denying suffrage and other rights to women held similarly strong religious beliefs that were offended by the extension of full civil rights to blacks and women. (See *The Biblical and "Scientific Defense of Slavery* in Anti-Black Thought 1863-1925, vol. VI (Smith edit., 1993); Fehrenbacher, The Dred Scott Case: Its Significance in American Law and Politics (1978) 12, 15; Kennedy, Interracial Intimacies, Sex, Marriage, Identity and Adoption (2003) 18-20, 26-27, fn. 1; Cott, Public Vows, A History of Marriage and the Nation (2000) 6, 11, 59-61, 106-107; Kandt, *In the Name of God; An American Story of Feminism, Racism, and Religious Intolerance: The Story of Alma Bridwell White* (2000) 8 American U. J. Gender Soc. Policy & Law 753, 783-84, 777, fn. 213, citing 2 Ruether & Keller, Women and Religion in America, The Nineteenth Century (1982) 231; Hammond, *Trial and Tribulation: The Story of United States v. Anthony* (2000) 48 Buff. L.Rev. 981, 990 & fn. 33.) Such beliefs and convictions may be deeply and sincerely held, but in the end they do not have a place in civil rights jurisprudence. "Our obligation is to define the liberty of all, not to mandate our own moral code." (*Lawrence v. Texas* (2003) 539 U.S. 558, 571, quoting *Planned Parenthood of Southeastern Pa. v. Casey* (1992) 505 U.S. 833, 850.)

mixing of races presumably suffered a similar psychic injury after the Court invalidated California's miscegenation laws, but that did not prevent the Court from doing justice. Ultimately, it is quite telling that the State's *amici* spend so much time using such amorphous, abstract language to attempt to describe the harm that would come if marriage equality were achieved.

VIII. *AMICI*'S OTHER ARGUMENTS

A. The City Is Not Barred From Challenging The Constitutionality Of The Marriage Exclusion.

The Pacific Justice Institute (PJI) contends the City does not have "standing" to sue, invoking the rule that a political subdivision of the state generally does not have the legal capacity to challenge the constitutionality of state statutes.[26] This contention has several fatal flaws.

First, no party has raised the issue of the City's capacity to sue at any level of these proceedings. Accordingly, the issue has been waived. The rule PJI invokes is not a standing rule in the jurisdictional sense. Although courts often refer to it in shorthand as the "no standing" rule, they recognize that, in actuality, it is a "capacity to sue" rule that is not jurisdictional. (See, e.g., *City of New York v. State* (1995) 86 N.Y.2d 286, 292 ["The issue of lack of capacity to sue does not go to the jurisdiction of the court, as is the case when the plaintiffs lack standing. Rather, lack of capacity to sue is a ground for dismissal which must be raised by motion and is otherwise waived"]; *Rogers v. Brockette* (5th Cir. 1979) 588 F.2d 1057, 1068 [noting that the political subdivision cases "do not deal with 'standing,' in the sense

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[26] (See Brief of Pacific Justice Institute and Capitol Resource Institute in Support of Petitioners Proposition 22 Legal Defense and Education Fund and Campaign for California Families Regarding Party Standing of Petitioners and Respondent City and County of San Francisco (PJI Br.) 4-21.)

in which we use the term, at all"]; cf. *Star-Kist Foods, Inc. v. County of Los Angeles* (1986) 42 Cal.3d 1, 5-6 ["The term 'standing' in this context refers not to traditional notions of a plaintiff's entitlement to seek judicial resolution of a dispute, but to a narrower, more specific inquiry focused upon internal political organization of the state . . . ."].)

Second, even if the issue had not been waived, PJI mischaracterizes the nature of the City's lawsuit. The "no standing" rule holds that a subdivision of the state "may not challenge state action as violating *the entities' rights* under the due process or equal protection clauses . . ." (*Star-Kist Foods*, 42 Cal.3d at 6, italics added.) The City has not challenged the marriage exclusion on the ground that it violates the City's own equal protection rights. Rather, the City contends that it has a beneficial interest in the outcome of the litigation because the marriage laws force it to violate the constitutional rights of its citizens by denying them marriage licenses. (See RA 4 [First Amended Complaint for Declaratory Relief at ¶ 14].) Under these circumstances, the City has the capacity to challenge the validity of those laws in a declaratory and writ relief action, as it has done here. Indeed, that is the City's *only* choice, since this Court has ruled that the City may not simply decline to enforce the marriage exclusion. Courts from this and other states have recognized the principle that municipalities may sue to prevent states from forcing them to violate the constitutional rights of their citizens in a variety of contexts. (See, e.g., *City of New York*, 86 N.Y.2d at 292 ["capacity" rule does not bar suit where " 'the municipal challengers assert that if they are obliged to comply with the State statute they will by that very compliance be forced to violate a constitutional proscription,' " quoting *Matter of Jeter v. Ellenville Cent. School Dist.* (1977) 41 N.Y.2d 283, 287]; *Central Delta Water Agency v. State Water*

Resources Control Bd. (1993) 17 Cal.App.4th 621, 630 ["a political subdivision of the State may challenge the constitutionality of a statute or regulation on behalf of its constituents where the constituents' rights under the challenged provision are 'inextricably bound up with' the subdivision's duties under its enabling statutes," quoting *Selinger v. City Council* (1989) 216 Cal.App.3d 259, 271]; *Zee Toys, Inc. v. County of Los Angeles* (1979) 85 Cal.App.3d 763, 780, aff'd sub. nom. *Sears, Roebuck and Co. v. County of Los Angeles* (1981) 449 U.S. 1119 ["The conflict between the duties of the supervisors under the Constitution of the United States and those which were imposed by Revenue And Taxation Code section 225 justifies the assertion of the constitutional claims by the county . . ."]; cf. *City of Carmel-by-the-Sea v. Young* (1970) 2 Cal.3d 259, 262-63 [considering the city's challenge to state statute without discussing "no standing" rule but noting that law would impact local government administrative functions].)[27]

The consequences of PJI's proposed "standing" rule would be dramatic indeed. Imagine, for example, that the state enacted a law requiring city police departments to take suspects into custody without reading them their Miranda rights. As set forth in *Lockyer*, those departments do not have the authority to disobey the statute. Under PJI's

[27] Incidentally, there is no doubt the City has "standing" in the jurisdictional sense of the term. "A party enjoys standing to bring his complaint into court if his stake in the resolution of that complaint assumes the proportions necessary to ensure that he will vigorously present his case." (*Harman v. City and County of San Francisco* (1972) 7 Cal.3d 150, 159.) The City's "stake in the resolution" of this case is enormous – its resolution will determine whether the City must, from its perspective, continue to violate the constitutional rights of its citizens. Furthermore, the City has demonstrated that the marriage exclusion inflicts financial harm upon it. (RA 213.) And the City has indeed "vigorously present[ed]" its case; indeed it has served as the lead plaintiff throughout these proceedings.

approach, the cities would also be precluded from seeking redress in the courts; their only option would be to continue violating the rights of their citizens until one of those citizens succeeded in getting the statute overturned. Such a result is contrary to both common sense and to the law. (Cf. *Thompson v. South Carolina Com. on Alcohol and Drug Abuse* (1976) 267 S.C. 463, 467 [peace officers charged with enforcing state criminal law had capacity to challenge, on equal protection grounds, constitutionality of state statute governing enforcement of those laws].)

In sum, the City cannot be forced to violate the constitutional rights of its citizens without being given any measure of legal redress. Nor should the Court even entertain PJI's far-reaching argument in a case where the State and its allies have failed to raise the issue in any brief or at any hearing in the trial court, the Court of Appeal, or this Court.

B. The Fund And CCF Lack Standing.

The City has already demonstrated that the Proposition 22 Legal Defense and Education Fund ("Fund") and Campaign for California Families ("CCF") lack standing in this case. To summarize, this Court's decision in *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055 ("*Lockyer*") eliminated all illegal expenditures by the City, rendering moot any taxpayer claims that the Fund and CCF might have asserted, thereby stripping them of their standing as taxpayers to seek a declaratory judgment on the validity of the marriage exclusion. (City Ans. 17-21.) Nor can these groups independently seek a declaratory judgment on the validity of the marriage exclusion as parties "beneficially interested," because their status as initiative supporters does not give them injury-based standing. To grant injury-based standing to "supporters" of legislation would open the floodgates to litigation for no good purpose, since the State is charged with

defending its laws, and since supporters of the State may participate as *amici*. (*Id.* at 21-30.)

PJI contends that, notwithstanding the mootness of the taxpayer claims and the lack of injury-based standing to assert a claim for declaratory relief on the validity of the marriage exclusion, the Court should treat the groups as parties. That is because, according to PJI, "the issues raised by CCF and the Fund in their respective actions are issues of general public interest that are likely to arise in the future, and notions of fundamental fairness and judicial economy favor allowing CCF and the Fund to pursue their claims." (PJI Br. 24.)

This argument makes no sense. It is true that California courts sometimes rule on moot issues when those issues are important and likely to arise in the future. But that doctrine presupposes that if a court were to dismiss a claim as moot, the issue would not be adjudicated. The doctrine has no relevance here, where even if the Court rules that the Fund and CCF lack standing, it will proceed to rule on the constitutionality of the marriage exclusion. After all, there remain parties with a beneficial interest on both sides of the case. And the efforts of those parties – combined with the considerable efforts of *amici* – ensure that the case is vigorously contested and all issues thoroughly addressed. PJI's argument provides no basis for the Court to depart from well-established precedent on taxpayer and injury-based standing.

C. A Ruling In Favor Of Marriage Equality Would Not Require Rulings In Favor Of Polygamists.

Several *amici* raise the alarm that a ruling for marriage equality would set the stage for constitutional challenges to anti-polygamy laws. But there is a fundamental difference between these two legal issues which

all *amici* ignore. A decision striking down the marriage exclusion would be based on a principle of equality – the principle that same-sex couples must be treated equally to heterosexual couples, and both must be given access to the institution of marriage on equal terms.

In contrast, a polygamist is already granted access to the institution of marriage on equal terms as heterosexual couples. The State already treats him equally. A claim by a polygamist to marry more than one partner would be a claim for *differential* treatment – for special treatment. Equal protection does not require that. Accordingly, there is nothing about a ruling in favor of marriage equality in this case that would require future courts to strike down anti-polygamy laws.

D. *Perez* And *Loving* Are Highly Relevant To This Case.

Like the majority below, four African-American pastors attempt to brush aside the holdings of *Perez v. Sharp* (1948) 32 Cal.2d 711, and *Loving v. Virginia* (1967) 388 U.S. 1, on the ground that they were race cases.[28] It is of course true they were race cases, and that one of the most offensive aspects of the miscegenation laws was their goal of relegating African-Americans and other minorities to inferior status. But the context in which those cases arose does not make them irrelevant here. As the Supreme Court has stated, "[t]he Court's opinion [in *Loving*] could have rested solely on the ground that the statutes discriminated on the basis of race in violation of the Equal Protection Clause. But the Court went on to hold that the laws arbitrarily deprived the couple of a fundamental liberty protected by the Due Process Clause, the freedom to marry." (*Zablocki v.*

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[28] (See generally Brief of African-American Pastors in California in Support of Respondents.)

Redhail (1978) 434 U.S. 374, 383; see also *Perez*, 32 Cal.2d at 714 ["Marriage is thus something more than a civil contract subject to regulation by the state; it is a fundamental right of free men. There can be no prohibition of marriage except for an important social objective . . . ."].)

Lest anyone doubt the doctrinal and historical parallels between this case and *Perez*, the brief of California NAACP should put that doubt to rest. The brief shows that the words of Justice Traynor's opinion in *Perez* apply almost verbatim to the arguments for marriage equality, while the words of Justice Shenk's dissent apply almost verbatim to the arguments against it. Similarly, the words of the majority and dissenting opinions of the Massachusetts Supreme Judicial Court on the issue of marriage equality apply almost verbatim to the arguments over the controversial issue of interracial marriage that took place half a century before.[29]

E. A Ruling For Marriage Equality Would Not Subject Religious Groups To Liability Or The Deprivation Of Government Benefits.

The Beckett Fund for Religious Liberty argues that if the Court rules for marriage equality, churches who wish to retain their own definition of marriage that excludes same-sex couples would be subject to legal liability and deprivation of government funding.[30] That is not true. A ruling for marriage equality would have no impact whatsoever on the law governing the interaction between government and religion.

Today, the law recognizes a distinction between: (1) core religious institutions; and (2) public benefit organizations that are affiliated with a

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[29] (Brief of California NAACP in Support of Parties Challenging the Marriage Exclusion 4-14.)

[30] (Brief of the Beckett Fund for Religious Liberty in Support of State Defendants 7-26.)

particular religion. (See *Catholic Charities of Sacramento v. Superior Court* (2004) 32 Cal.4th 527, 542-43.) The first type of institution is typically exempt from antidiscrimination laws, because to apply those laws could interfere with "internal church governance." (*Id.* at 542.) A ruling by this Court for marriage equality would not hamper the ability of core religious institutions to practice their faith without fear of legal liability or recrimination from the government. Certainly no religious group would be required to solemnize marriages that are contrary to its religious teachings.

In contrast, the institutions in the second category – public benefit organizations – are already subject to the antidiscrimination laws of this State. (See, e.g., *id.* at 542-43.) For example, they already cannot discriminate in employment on the basis of sex, religion, or sexual orientation. (*Id.* at 543.) That is true whether or not the Court rules in favor of the marriage exclusion. In short, in terms of the relationship between government and religion, marriage equality would change nothing.

F. Discrimination Against Lesbians And Gay Men Throughout The Country Is No Basis For Permitting Discrimination In California.

In the never-ending quest to fabricate justifications for the marriage exclusion that sound "nicer to gays,"[31] one of the State's *amici* argues as follows: Virtually all states currently decline to recognize marriages between same-sex couples, and the federal government similarly refuses to provide benefits to same-sex couples who are married. Allowing same-sex couples to marry in California would "mislead" them into thinking their relationships enjoy greater recognition than they actually do. Therefore, it

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[31] (Yoshino, *Too Good for Marriage*, New York Times (July 14, 2006).)

is permissible, under the California Constitution, to relegate same-sex couples to the institution of domestic partnership.[32] In other words, because same-sex couples are victims of discrimination by other governmental entities in our federal system, California should be allowed to perpetuate that discrimination.

This is a remarkable argument. First, it is based on the insulting and wholly unrealistic assumption that same-sex couples are unaware that other governmental entities discriminate against them. Second, it ignores the fact that domestic partner status creates far more confusion and difficulty for same-sex couples than would married status. (See City Supp. Br. 9-10, 12-15; see also New York Times, *New Jersey: A Flawed Law* (Nov. 11, 2007) [discussing the practical and moral failures of New Jersey's civil union law].) But more fundamentally, *amici*'s argument posits that even if an act of discrimination would *normally* violate the California Constitution, it should be construed *not* to violate the California Constitution if most other governments engage in similar discrimination. The California Constitution is a document of independent force; its protections cannot be expanded and contracted to accommodate the policies of other jurisdictions. To tell lesbians and gay men that the only thing preventing them from getting married in California is the fact that other jurisdictions might still treat them as second-class citizens would make a mockery the California Constitution's guarantee of equal protection of the laws.

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[32] (Brief of John Coverdale, Scott Fitzgibbon, Martin R. Gardner, Kris W. Kobach, Earl M. Maltz, Laurence C. Nolan, and John Randall Trahan, Professors of Law in Support of Appellees 8-18.)

CONCLUSION

The arguments of the State's *amici* provide no basis for upholding the marriage exclusion.

Dated: November 13, 2007

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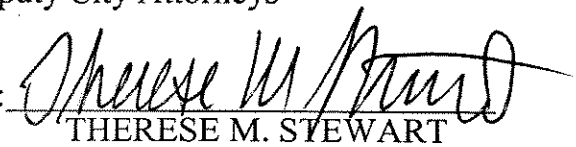
By: 
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CERTIFICATE OF COMPLIANCE

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 10,148 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 November 13, 2007.

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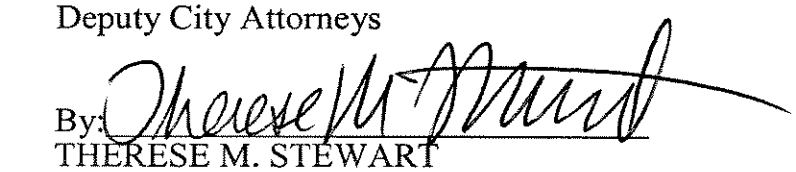
By: 
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PROOF OF SERVICE

I, HOLLY TAN, 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 November 13, 2007, I served:

CITY AND COUNTY OF SAN FRANCISCO'S CONSOLIDATED ANSWER TO *AMICUS CURIAE* BRIEFS

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: *holly.tan@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 November 13, 2007, at San Francisco, California.

HOLLY TAN

In Re Marriage Cases
Supreme Court Case No. S147999

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