S147999

IN THE SUPREME COURT OF CALIFORNIA

IN RE MARRIAGE CASES

AFTER A DECISION BY THE COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIVISION THREE
CASE NOS. A110449, A110450, A110451, A110463, A110651, A110652

APPLICATION TO FILE BRIEF OF AMICUS CURIAE CALIFORNIA NAACP;
BRIEF OF AMICUS CURIAE CALIFORNIA NAACP IN SUPPORT OF PARTIES CHALLENGING THE MARRIAGE EXCLUSION

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IN THE SUPREME COURT OF CALIFORNIA

IN RE MARRIAGE CASES

APPLICATION TO FILE BRIEF OF AMICUS CURIAE CALIFORNIA NAACP

INTRODUCTION

Pursuant to California Rules of Court, rule 8.520, the California State Conference of the National Association for the Advancement of Colored People (the California NAACP) respectfully requests leave to file the attached brief of amicus curiae in support of the parties in these consolidated cases who are challenging California's prohibition of marriage by same-sex couples.

THE APPLICANT'S INTEREST AND HOW THIS BRIEF WILL ASSIST THE COURT (Cal. Rules of Court, rule 8.520)

The California NAACP is part of a national network of more than 2,000 NAACP affiliates covering all 50 states and the District of Columbia. Founded in 1909 by a group of black and white citizens committed to social justice, the NAACP is the nation's largest and strongest civil rights organization. Total national membership currently exceeds 500,000. The NAACP's principal objective is to ensure the political, educational, social and economic equality of minority citizens of the United States and eliminate race prejudice.

This amicus curiae brief is submitted by the California NAACP, which has 72 branches and youth units across the state. The California NAACP believes that civil justice is a right for every citizen, regardless of race, color, national origin, disability, age, creed or sexual orientation.

The African-American struggle for civil rights will forever stand as one of the great civil rights movements in modern history. The California NAACP believes that as it continues the struggle for total equality in America, it must also fight for total equality for others, whether another race or another group, and that it must join the fight for equal protection for gay and lesbian couples to help them overcome the same irrational arguments that were once used to justify slavery, the "separate but equal" laws, and prohibitions against interracial marriage.

The California NAACP is familiar with the issues before this court and the scope of their presentation, and believes this brief will assist the court by providing a perspective that is beyond the scope of the parties' briefs – a juxtaposition of the debate over marriage by same-sex couples with the

California Supreme Court's decision on marriage by interracial couples in *Perez v. Sharp* (1948) 32 Cal.2d 711.

CONCLUSION

For the foregoing reasons, the California NAACP respectfully requests that the court accept the accompanying brief for filing in this case.

Dated: September 24, 2007

Respectfully submitted,

By _______________________________

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IN THE SUPREME COURT OF CALIFORNIA

IN RE MARRIAGE CASES

BRIEF OF AMICUS CURIAE CALIFORNIA NAACP IN SUPPORT OF PARTIES CHALLENGING THE MARRIAGE EXCLUSION

INTRODUCTION

An eloquent voice in favor of marriage by same-sex couples can be found in California's legal history. It is the voice of Roger J. Traynor.

This brief shows – in the words of Justice Traynor and others – how the debate over marriage by same-sex couples is like the debate a half-century ago over marriage by interracial couples.

LEGAL DISCUSSION

I.

TODAY'S ARGUMENTS ON MARRIAGE BY SAME-SEX COUPLES REPRISE THE 1948 ARGUMENTS ON MARRIAGE BY INTERRACIAL COUPLES IN *PEREZ V. SHARP*.

A. Same-sex couples – pro.

Here is a constitutional argument in favor of marriage by same-sex couples. It is quoted almost verbatim from portions of Justice Traynor's historic opinion in *Perez v. Sharp* (1948) 32 Cal.2d 711, which held that California legislation prohibiting marriage by interracial couples was unconstitutional as a violation of equal protection. The only changes in Justice Traynor's words are to replace "different races," "race," "ancestry" and the like with "same-sex," "gender," "sexual orientation" and the like.

* * *

If the prohibition of marriage by same-sex couples is discriminatory and irrational, it unconstitutionally restricts the liberty to marry.

Marriage is something more than a civil contract subject to regulation by the state; it is a fundamental right. There can be no prohibition of marriage except for an important social objective and by reasonable means. Legislation infringing such rights must be based upon more than prejudice and must be free from oppressive discrimination to comply with the constitutional requirements of due process and equal protection of the laws.

Since the right to marry is the right to join in marriage with the person of one's choice, a statute that prohibits an individual from marrying a person

of a gender the same as his own restricts the scope of his choice and thereby restricts his right to marry. It must therefore be determined whether the state can restrict that right on the basis of sexual orientation alone without violating equal protection.

Distinctions between citizens solely because of their sexual orientation are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. Since the essence of the right to marry is freedom to join in marriage with the person of one's choice, a gender-restriction statute for marriage necessarily impairs the right to marry.

Appellants' position is based upon grounds similar to those set forth in *Scott v. State* (1869) 39 Ga. 321, 324: "The amalgamation . . . is not only unnatural, but is always productive of deplorable offspring." Modern experts are agreed, however, that children raised by same-sex couples are not inferior. There is no scientific proof that one sexual orientation is superior to another.

There are now so many persons in the United States of open same-sex orientation that the tensions upon them are already diminishing and are bound to diminish even more in time. Certainly the fact alone that the discrimination has been sanctioned by the state for many years does not supply justification.[1/]

* * *

This exercise in jurisprudential juxtaposition demonstrates that Justice Traynor's reasoning of a half-century ago in support of legalizing marriage by interracial couples applies just as forcefully in today's debate over marriage by same-sex couples.

1/ For verbatim quotations from Justice Traynor's opinion, see Appendix A.

B. Same-sex couples – con.

Here, in contrast, is an argument against marriage by same-sex couples. This is the voice of Justice John W. Shenk, who dissented in *Perez v. Sharp*. This language is taken almost verbatim from Justice Shenk's dissent, substituting words like "same-sex" for words like "intermarriage."

* * *

Such laws have been in effect in this country since before our national independence and in this state since our first legislative session. They have a valid legislative purpose even though they may not conform to the sociogenetic views of some people.

The determination of proper standards of behavior must be left to the Congress or to the state legislatures in order that the well being of society as a whole may be safeguarded or promoted. The institution of matrimony is the foundation of society, and the community at large has an interest in the maintenance of its integrity and purity.

If there is a rational basis for the law, if it is reasonable, there is no violation of the due process or equal protection clauses. Earnest conflict of opinion makes it especially a question for the Legislature and not for the courts. Courts are neither peculiarly qualified nor organized to determine the underlying questions of fact with reference to which the validity of the legislation must be determined. Ideas of public policy do not properly concern them. Text and authorities which constitute the factual basis for the legislative finding involved in the statute here in question indicate only that there is a difference of opinion as to the wisdom of the policy underlying the enactments.

Homosexuality is biologically undesirable and should be discouraged. There is not only some but a great deal of evidence to support the legislative

determination that marriage by same-sex couples is incompatible with the general welfare and therefore a proper subject for regulation under the police power.[2/]

* * *

Justice Shenk's dissent is shocking in its overt racism: "[T]he crossing of the primary races leads gradually to retrogression and to eventual extinction of the resultant type unless it is fortified by reunion with the parent stock. . . . [T]he free mixing of all the races could in fact only lower the general level. . . [W]here two such races are in contact the inferior qualities are not bred out, but may be emphasized in the progeny, a principle widely expressed in modern eugenic literature." (*Perez v. Sharp*, *supra*, 32 Cal.2d at pp. 756-757 (dis. opn. of Shenk, J.).) No reasonable person in America today would endorse such views. Yet, two other justices signed onto this dissent. In 1948, those views were still in the mainstream. Justice Traynor and three colleagues had the courage and foresight to repudiate them.

Today's arguments against marriage by same-sex couples are Justice Shenk's arguments against marriage by interracial couples.

2/ For verbatim quotations from Justice Shenk's dissenting opinion, see Appendix B.

C. Interracial couples – con.

This exercise in jurisprudential juxtaposition works the other way, too. Here is an argument against legalizing marriage by interracial couples. These words are taken almost verbatim from a dissenting opinion in *Goodridge v. Dept. of Public Health* (2003) 440 Mass. 309 [798 N.E.2d 941], where the majority held that denial of marriage licenses to same-sex couples violates the equal protection and due process guarantees of the Massachusetts Constitution. The only changes are that words like "same-sex" are replaced with words like "interracial."

* * *

Although it may be desirable for many reasons to extend to interracial couples the benefits and burdens of civil marriage, that decision must be made by the Legislature, not the court. Because a conceivable rational basis exists upon which the Legislature could conclude that the marriage statute furthers the legitimate State purpose of ensuring, promoting, and supporting an optimal social structure for the bearing and raising of children, it is a valid exercise of the State's police power.

Interracial relationships, although becoming more accepted, are certainly not so deeply rooted in this nation's history and tradition as to warrant enhanced constitutional protection. The law always lags behind the most advanced thinking in every area, and must await some common ground, some consensus. The law with respect to interracial marriages must be left to develop through legislative processes, subject to the constraints of rationality, lest the court be viewed as using the liberty and due process clauses as vehicles merely to enforce its own views regarding better social policies.

A family defined by same-race marriage continues to be the most prevalent social structure into which the vast majority of children are born,

nurtured, and prepared for productive participation in civil society. We must assume that the Legislature might consider and credit scholarly commentary contending that children and families develop best when mothers and fathers are of the same race.

The Legislature could rationally conclude that the raising of children by interracial couples presents an alternative structure for child rearing that has not yet been proved beyond reasonable scientific dispute to be as optimal as the racially-based marriage norm. The Legislature could conceivably conclude that declining to recognize interracial marriages remains prudent until empirical questions about its impact on the upbringing of children are resolved. The Legislature could conclude that redefining the institution of marriage to permit interracial couples to marry would impair the State's interest in promoting and supporting same-race marriage as the social institution that it has determined best normalizes, stabilizes, and links the acts of procreation and child rearing.

So long as the question is at all debatable, it must be the Legislature that decides.[3/]

* * *

Déjà vu? It's Justice Shenk redux. Such views on marriage by same-sex couples are acceptable to some people now, but a half-century from now they will likely be just as shocking as Justice's Shenk's racist ideology.

3/ For verbatim quotations from the dissenting opinion in *Goodridge*, see Appendix C.

D. Interracial couples – pro.

Here, finally, is a constitutional argument in favor of legalizing marriage by interracial couples. This is the voice of the majority in *Goodridge*, with words like "same-sex" replaced with words like "interracial."

* * *

We have recognized the long-standing statutory understanding, derived from the common law, that "marriage" means the lawful union of persons of the same race. But that history cannot and does not foreclose the constitutional question.

Civil marriage anchors an ordered society by encouraging stable relationships over transient ones. Civil marriage has long been termed a "civil right." Whether and whom to marry, how to express sexual intimacy, and whether and how to establish a family – these are among the most basic of every individual's liberty and due process rights.

Under both the equality and liberty guarantees, regulatory authority must, at very least, serve a legitimate purpose in a rational way. Protecting the welfare of children is a paramount State policy. Restricting marriage to same-race couples, however, cannot plausibly further this policy. The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household.

Excluding interracial couples from civil marriage prevents children of interracial couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure in which children will be reared, educated, and socialized. It cannot be rational under our laws, and indeed it is not permitted, to penalize children by depriving them of State benefits because the State disapproves of their parents' interracial relationship.

To label the court's role as usurping that of the Legislature is to misunderstand the nature and purpose of judicial review. We owe great deference to the Legislature to decide social and policy issues, but it is the traditional and settled role of courts to decide constitutional issues.[4/]

* * *

Looking backwards, the *Goodridge* majority opinion sounds like Justice Traynor in *Perez v. Sharp*. Again, the juxtaposition is striking. *Goodridge* is *Perez*.

The voices of Justices Traynor and Shenk resonate today, in a new context. This court should listen to Justice Traynor.

II.
JUSTICE TRAYNOR'S FOCUS ON THE PUBLIC INTEREST IN MATTERS OF MARRIAGE AND FAMILY FAVORS MARRIAGE BY SAME-SEX COUPLES.

Justice Traynor's "enduring achievement has been the widespread influence of his articulation of the public interest." (Field, Activism in Pursuit of the Public Interest: The Jurisprudence of Chief Justice Roger J. Traynor (Berkeley Pub. Policy Press for the Cal. Supreme Ct. Historical Society 2003) p. 132 (hereafter Field).) He believed the law's articulation of the public interest calls for adaptation to changing times.

"Traynor understood the law to operate within a societal context." (Field, *supra*, at p. 8.) "Traynor feared that if judges did not take into account

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4/ For verbatim quotations from the *Goodridge* majority opinion, see Appendix D.

the dramatic changes occurring in society the common law would atrophy and perhaps become a complete anachronism." (*Id.* at p. 9.) "The stability of the law depended not on its permanence, but on its flexibility." (*Id.* at p. 16.) Thus, "Traynor built on the great Anglo-American judicial tradition of adaptation rather than perpetuating a mindless faithfulness to rules that no longer were responsive to the realities of modern California society." (Field, *supra*, at p. x [Foreword by Harry N. Scheiber]; see also *Metropolitan Water District of Southern California v. Superior Court* (2004) 32 Cal.4th 492, 512 (conc. & dis. opn. of Brown, J.) ["the essence of the common law [is] the evolution of court-crafted jurisprudence to address new circumstances and legal questions"].)

In matters of marriage and family, Justice Traynor said: "The family is the basic unit of our society, the center of the personal affections that ennoble and enrich human life. It channels biological drives that might otherwise become socially destructive; it ensures the care and education of children in a stable environment; it establishes continuity from one generation to another; it nurtures and develops the individual initiative that distinguishes a free people. Since the family is the core of our society, the law seeks to foster and preserve marriage." (*De Burgh v. De Burgh* (1952) 39 Cal.2d 858, 863-864.)

Justice Traynor would have searched, within this articulation, for a public interest in legalizing marriage by same-sex couples. And he would have found it in his own vision of a solid family environment. In the same-sex context, as in the interracial context, marriage serves each of Justice Traynor's articulated goals by fostering stability in intimate relationships and child-rearing. Those goals underlie recent decisions by the California Supreme Court endorsing second-parent adoption (*Sharon S. v. Superior Court* (2003) 31 Cal.4th 417) and affording parental rights and obligations to same-sex

couples (*Elisa B. v. Superior Court* (2005) 37 Cal.4th 108), and they likewise provide a solid public-interest foundation for marriage by same-sex couples. Like second-parent adoption, marriage by same-sex couples "encourages and strengthens family bonds." (*Sharon S., supra,* 31 Cal.4th at p. 439.) Like affording parental rights and obligations to same-sex couples, marriage by same-sex couples gives the children of such families "a source of both emotional and financial support." (*Elisa B., supra,* 37 Cal.4th at p. 123.)

In California today, there have been dramatic changes in concepts of intimacy and child-rearing. Stable same-sex relationships have become as common as interracial relationships had become in Justice Traynor's time. (See *Perez v. Sharp, supra,* 37 Cal.2d at p. 727 ["There are now so many persons in the United States of mixed ancestry, that the tensions upon them are already diminishing and are bound to diminish even more over time"].) Second-parent adoption "has become routine in California." (*Sharon S. v. Superior Court, supra,* 31 Cal.4th at p. 440, internal quotation marks omitted.) So has artificial insemination for same-sex couples. (See *Jhordan C. v. Mary K.* (1986) 179 Cal.App.3d 386.)

The idea of family has changed. The essence of Justice Traynor's public-interest jurisprudence is that the law must adapt to such change – an idea well-known to the drafters of the United States Constitution. "They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." (*Lawrence v. Texas* (2003) 539 U.S. 558, 579 [123 S.Ct. 2472, 2484, 156 L.Ed.2d 508, 526].)

CONCLUSION

Pragmatic jurisprudence is not intended to be timeless, but it can be. Justice Traynor's opinion in *Perez v. Sharp* is one of those timeless gems. It answers the issue before this court today as nobly as it answered a similar issue of its time.

Dated: September 24, 2007 Respectfully submitted,

By

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APPENDIX A

The following are quotations from Justice Traynor's opinion in *Perez v. Sharp* (1948) 32 Cal.2d 711, with italicizing and bracketing indicating language substitutions in the text of this brief.

- "If *the law* [*the prohibition of marriage by same-sex couples*] . . . is discriminatory and irrational, it unconstitutionally restricts . . . the liberty to marry . . . ." (*Id.* at pp. 713-714.)

- "Marriage is . . . something more than a civil contract subject to regulation by the state; it is a fundamental right . . . . There can be no prohibition of marriage except for an important social objective and by reasonable means." (*Id.* at p. 714.)

- "Legislation infringing such rights must be based upon more than prejudice and must be free from oppressive discrimination to comply with the constitutional requirements of due process and equal protection of the laws." (*Id.* at p. 715.)

- "Since the right to marry is the right to join in marriage with the person of one's choice, a statute that prohibits an individual from marrying a *member of a race other than* [*person of a gender the same as*] his own restricts the scope of his choice and thereby restricts his right to marry. It must therefore be determined whether the state can restrict that right on the basis of *race* [*sexual orientation*] alone without violating . . . equal protection . . . ." (*Ibid.*)

- "Distinctions between citizens solely because of their *ancestry* [*sexual orientation*] are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." (*Ibid.*, internal quotation marks omitted.)

- "Since the essence of the right to marry is freedom to join in marriage with the person of one's choice, a *segregation* [*gender-restriction*] statute for marriage necessarily impairs the right to marry." (*Id.* at p. 717.)

- "*Respondent's* [*Appellants'*] position is based upon . . . grounds similar to those set forth in . . . *Scott v. State*, (1869), 39 Ga. 321, 324: 'The amalgamation . . . is not only unnatural, but is always productive of deplorable . . . offspring . . . .'" (*Perez v. Sharp, supra,* 323 Cal.2d at p. 720.)

- "Modern experts are agreed [*, however,*] that *the progeny of marriages between persons of different races* [*children raised by same-sex couples*] are not inferior . . . ." (*Ibid.*)

- "There is no scientific proof that one *race* [*sexual orientation*] is superior to another . . . ." (*Id.* at p. 723.)

- "There are now so many persons in the United States of *mixed ancestry* [*open same-sex orientation*] that the tensions upon them are already diminishing and are bound to diminish even more in time." (*Id.* at p. 727.)

- “Certainly the fact alone that the discrimination has been sanctioned by the state for many years does not supply . . . justification.” (*Ibid.*)

APPENDIX B

The following are quotations from Justice Shenk's dissenting opinion in *Perez v. Sharp* (1948) 32 Cal.2d 711, with italicizing and bracketing indicating language substitutions in the text of this brief.

- "[S]uch laws have been in effect in this country since before our national independence and in this state since our first legislative session." (*Id.* at p. 742.)

- "[T]hey have a valid legislative purpose even though they may not conform to the sociogenetic views of some people." (*Ibid.*)

- "The determination of proper standards of behavior must be left to the Congress or to the state legislatures in order that the well being of society as a whole may be safeguarded or promoted." (*Id.* at p. 745.)

- "The institution of matrimony is the foundation of society, and the community at large has an interest in the maintenance of its integrity and purity." (*Ibid.*)

- "[I]f there is a rational basis for the law, if it is reasonable, . . . there is no violation of the due process or equal protection clauses . . . ." (*Id.* at p. 746.)

- "Earnest conflict of opinion makes it especially a question for the Legislature and not for the courts." (*Id.* at p. 754.)

- "Courts are neither peculiarly qualified nor organized to determine the underlying questions of fact with reference to which the validity of the legislation must be determined. . . . [I]deas of public policy do not properly concern them." (*Id.* at p. 755.)

- "Text and authorities which constitute the factual basis for the legislative finding involved in the statute here in question indicate only that there is a difference of opinion as to the wisdom of the policy underlying the enactments." (*Id.* at p. 756.)

- "[*T*]*he crossing of distinct races* [*Homosexuality*] is biologically undesirable and should be discouraged." (*Id.* at p. 758.)

- "[T]here is not only some but a great deal of evidence to support the legislative determination . . . that *intermarriage between Negroes and white persons* [*marriage by same-sex couples*] is incompatible with the general welfare and therefore a proper subject for regulation under the police power." (*Id.* at p. 759.)

APPENDIX C

The following are quotations from the dissenting opinion of Cordy, J., in *Goodridge v. Dept. of Public Health* (2003) 440 Mass. 309 [798 N.E.2d 941], with italicizing and bracketing indicating language substitutions in the text of this brief.

- "Although it may be desirable for many reasons to extend to *same-sex* [*interracial*] couples the benefits and burdens of civil marriage . . . , that decision must be made by the Legislature, not the court." (*Id.* at p. 983.)

- "Because a conceivable rational basis exists upon which the Legislature could conclude that the marriage statute furthers the legitimate State purpose of ensuring, promoting, and supporting an optimal social structure for the bearing and raising of children, it is a valid exercise of the State's police power." (*Ibid.*)

- "*[S]ame sex* [*Interracial*] relationships, although becoming more accepted, are certainly not so deeply rooted in this nation's history and tradition as to warrant . . . enhanced constitutional protection." (*Id.* at p. 987, internal quotation marks omitted.)

- "[T]he law always lags behind the most advanced thinking in every area, and must await some common ground, some consensus." (*Id.* at p. 990, internal quotation marks omitted.)

- “[T]he law with respect to *same-sex* [*interracial*] marriages must be left to develop through legislative processes, subject to the constraints of rationality, lest the court be viewed as using the liberty and due process clauses as vehicles merely to enforce its own views regarding better social policies . . . .” (*Id.* at p. 991.)

- “A family defined by *heterosexual* [*same-race*] marriage continues to be the most prevalent social structure into which the vast majority of children are born, nurtured, and prepared for productive participation in civil society . . . .” (*Id.* at p. 997.)

- “We must assume that the Legislature . . . might consider and credit . . . scholarly commentary contending that children and families develop best when mothers and fathers are *partners in their parenting* [*of the same race*] . . . .” (*Id.* at pp. 998-999.)

- “[T]he Legislature could rationally conclude that . . . the raising of children by *same-sex* [*interracial*] couples . . . presents an alternative structure for child rearing that has not yet been proved beyond reasonable scientific dispute to be as optimal as the *biologically* [*racially*] based marriage norm.” (*Id.* at pp. 999-1000.)

- “[T]he Legislature could conceivably conclude that declining to recognize *same-sex* [*interracial*] marriages remains prudent until empirical questions about its impact on the upbringing of children are resolved.” (*Id.* at p. 1000.)

- "[T]he Legislature could conclude that redefining the institution of marriage to permit *same-sex* [*interracial*] couples to marry would impair the State's interest in promoting and supporting *heterosexual* [*same-sex*] marriage as the social institution that it has determined best normalizes, stabilizes, and links the acts of procreation and child rearing." (*Id.* at pp. 1001-1002.)

- "So long as the question is at all debatable, it must be the Legislature that decides." (*Id.* at p. 1004.)

APPENDIX D

The following are quotations from the majority opinion of Marshall, C.J., in *Goodridge v. Dept. of Public Health* (2003) 440 Mass. 309 [798 N.E.2d 941], with italicizing and bracketing indicating language substitutions in the text of this brief.

- "We have recognized the long-standing statutory understanding, derived from the common law, that 'marriage' means the lawful union of *a woman and a man* [*persons of the same race*]. But that history cannot and does not foreclose the constitutional question." (*Id.* at p. 953.)

- "Civil marriage anchors an ordered society by encouraging stable relationships over transient ones." (*Id.* at p. 954.)

- "[C]ivil marriage has long been termed a 'civil right.'" (*Id.* at p. 957.)

- "[W]hether and whom to marry, how to express sexual intimacy, and whether and how to establish a family – these are among the most basic of every individual's liberty and due process rights." (*Id.* at p. 959.)

- "Under both the equality and liberty guarantees, regulatory authority must, at very least, serve a legitimate purpose in a rational way . . . ." (*Id.* at p. 960, internal quotation marks omitted.)

- “Protecting the welfare of children is a paramount State policy. Restricting marriage to *opposite-sex* [*same-race*] couples, however, cannot plausibly further this policy. The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household.” (*Id.* at pp. 962-963, internal quotation marks omitted.)

- “Excluding *same-sex* [*interracial*] couples from civil marriage . . . prevent[s] children of *same-sex* [*interracial*] couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure in which children will be reared, educated, and socialized.” (*Id.* at p. 964, internal quotation marks omitted.)

- “It cannot be rational under our laws, and indeed it is not permitted, to penalize children by depriving them of State benefits because the State disapproves of their parents’ *sexual orientation* [*interracial relationship*].” (*Ibid.*)

- “To label the court’s role as usurping that of the Legislature . . . is to misunderstand the nature and purpose of judicial review. We owe great deference to the Legislature to decide social and policy issues, but it is the traditional and settled role of courts to decide constitutional issues.” (*Id.* at p. 966.)

CERTIFICATE OF WORD COUNT

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DATED: September 24, 2007.

____
Jon B. Eisenberg

PROOF OF SERVICE

I, Mary B. Cunniff, declare that I am over the age of eighteen years and I am not a party to this action. My business address is 180 Montgomery Street, Suite 2200, San Francisco, California, 94104.

On September 24, 2007, I served the document listed below on the interested parties in this action in the manner indicated below:

- **APPLICATION TO FILE BRIEF OF AMICUS CURIAE CALIFORNIA NAACP; and**

- **BRIEF OF AMICUS CURIAE CALIFORNIA NAACP IN SUPPORT OF PARTIES CHALLENGING THE MARRIAGE EXCLUSION**

[ ] **BY OVERNIGHT DELIVERY:** I caused such envelopes to be delivered on the following business day by FEDERAL EXPRESS service.

[ ] **BY PERSONAL SERVICE:** I caused the document(s) to be delivered by hand.

[X] **BY MAIL**: I am readily familiar with the business practice for collection and processing correspondence for mailing with the United States Postal Service. I know that the correspondence was deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelopes were sealed, and with postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices, in the United States mail at San Francisco, California.

[ ] **BY FACSIMILE**: I transmitted such documents by facsimile

INTERESTED PARTIES:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct; that this declaration is executed on September 24, 2007, at San Francisco, California.

____
Mary B. Cunniff

SERVICE LIST
City and County of San Francisco v. California, et al.
San Francisco Superior Court Case No. CGC-04-429539
Court of Appeal No. A110449

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Woo, et al. v. California, et al.
San Francisco Superior Court Case No. CPF-04-504038
Court of Appeal Case No. A110451

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Tyler, et al. v. California, et al.
Los Angeles Superior Court Case No. BS088506
Court of Appeal Case No. A110450

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Clinton, et al. v. California, et al.
San Francisco Superior Court Case No. 429548
Court of Appeal Case No. A110463

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Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco
San Francisco Superior Court Case No., CPF-04-503943
Court of Appeal Case No. A110651

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Campaign for California Families v. Newsom, et al.
San Francisco Superior Court Case No. CGC 04-428794
Court of Appeal Case No. A110652

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Courtesy Copy to:

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