

**No. S147999**

**IN THE SUPREME COURT OF THE STATE OF  
CALIFORNIA**

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**In re MARRIAGE CASES**

**Judicial Council Coordination Proceeding No. 4365**

First Appellate District No. A110463 (Consolidated on appeal with Nos. A110449, A110450,  
A110451, A110651, A110652)

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**GREGORY CLINTON, et al.,**

Plaintiffs-Petitioners, and Respondents,

v.

**STATE OF CALIFORNIA, et al.,**

Defendants-Respondents, and Appellants.

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**REPLY BRIEF ON THE MERITS**

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California *Family Code* section §308.5

California Constitution Article 1, § 7(a)

California Constitution Article 1, § 1

#### **Other**

[http://www.freedomtomarry.org/images/pdfs/mildred\\_loving-statement.pdf](http://www.freedomtomarry.org/images/pdfs/mildred_loving-statement.pdf)

## INTRODUCTION

It is undisputed that all individuals possess the fundamental right to marry. Loving v. Virginia, (1967), 388 U.S. 1, 12; Zablocki v. Redhail, (1978), 434 U.S. 374, 383; Turner v. Safley, (1987) 482 U.S. 78, 95; In re Carrafa, (1978) 77 Cal.App.3d 788,791; Perez v. Sharp, (1948) 32 Cal. 2d 711, 714-715. From this central premise, the debate shifts to whether certain individuals should be excluded from the institution of marriage because the person with whom they are in love, and with whom they wish to spend the rest of their life, is of the same gender. While this reply brief addresses the constitutionality of this exclusion and the State's arguments supporting it, it is essential to remember that these issues operate to actually deprive the Clinton Petitioners and other Californians like them from participating in the ultimate expression of love between two people that is the institution of marriage.

At the outset, Mildred Loving candidly expresses this sentiment in her reflection on the 40th anniversary of the historic decision of the United States Supreme Court in Loving vs. Virginia, which overturned anti-miscegenation laws nationally:

My generation was bitterly divided over something that should have been so clear and right. The majority believed that what the judge said, that it was God's plan to keep people apart, and that government should discriminate against people in love. But I have lived long enough now to see big changes. The older

generation's fears and prejudices have given way, and today's young people realize that if someone loves someone they have a right to marry.

Surrounded as I am now by wonderful children and grandchildren, not a day goes by that I don't think of Richard and our love, our right to marry, and how much it meant to me to have that freedom to marry the person precious to me, even if others thought he was the "wrong kind of person" for me to marry. I believe all Americans, no matter their race, no matter their sex, no matter their sexual orientation, should have that same freedom to marry. Government has no business imposing some people's religious beliefs over others. Especially if it denies people's civil rights.

I am still not a political person, but I am proud that Richard's and my name is on a court case that can help reinforce the love, the commitment, the fairness, and the family that so many people, black or white, young or old, gay or straight seek in life. I support the freedom to marry for all. That's what Loving, and loving, are all about.

Mildred Loving, Loving for All, June 12, 2007, 2007.  
[http://www.freedomtomarry.org/images/pdfs/mildred\\_loving-statement.pdf](http://www.freedomtomarry.org/images/pdfs/mildred_loving-statement.pdf).

The Clinton Petitioners<sup>1</sup> seek this same freedom to marry and they are denied this same right by California *Family Code* §§300 and 308.5 ("Family Code sections"). In their answering brief, the State of California<sup>2</sup>

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<sup>1</sup> The terms "Clinton Petitioner" and "Petitioners" refers collectively to Gregory Clinton, PhD., Gregory Morris, Dr. Anthony Bernan, Andrew Neugenbauer, Stephanie O'Brien, Janet Levy, Joseph Faulkner, Arthur Healey, Kristen Anderson, Michele Bettega, Derrik Anderson, and Wayne Edfors II.

<sup>2</sup> The Clinton Petitioners do not directly respond to the arguments raised by Campaign for California Families or Proposition 22 Legal Defense and Education Fund, as the Clinton Petitioners agree with and do not contest the portion of the Court of Appeal's ruling that they lack standing.

(“State” or “Respondent”) tries to justify this significant deprivation on several unsupportable grounds.

First, the State argues that the *Family Code* sections do not discriminate based on gender because they do not prefer one gender over the other. Therefore, the State reasons that the plain language of the statutes applies equally to men and women, and does not discriminate. State Answering Brief, p. 18. However, the judicial record in this case is clear that the statutes’ gender-specific terminology was intended to specifically exclude same-gender couples from marriage. Accordingly, the purposeful inclusion of gender-specific terms in the *Family Code* sections mean they facially classify based upon gender. As a result, the marriage exclusion violates Petitioners right to equal protection of the laws under the California Constitution by discriminating on this basis. Additionally, the State’s “equal application argument” is equally specious because California courts have repeatedly struck down statutory schemes whose practical impact and ultimate effect is discriminatory.

Next, the State endeavors to bolster the “equal application” argument by arguing precedent set in cases overturning anti-miscegenation, where courts found the “equal application” theory insufficient, are distinguishable from the issue now before this Court. State Answering Brief, p. 20 To that end, the State tenuously asserts the central distinguishing characteristic in cases such as Perez and Loving was

prevention of invidious racial discrimination while here, there is no evidence that the laws at issue were designed to discriminate against males or females. State Answering Brief, pgs. 20-21. As set forth below, this conclusion conveniently ignores the established fact that the gender-specific language was added to achieve the invidious goal of excluding gay men and lesbians from the institution of marriage. Moreover, the State even *admits* that the history of discrimination against gays and lesbians is “undeniable.” State Answering Brief, p. 38. Against this background of discrimination, coupled with the established motive behind enacting gender-based classifications to purposefully exclude gays and lesbians from marriage, there is clear discriminatory intent behind these sections to trigger strict judicial scrutiny of them. Finally, despite the State’s vigorous effort to distinguish the anti-miscegenation cases from the issues before this Court, the fact remains that the anti-miscegenation cases—like the instant matter—involved denying the right to marry to a particular group based upon nothing more than prejudice and fear.

Next, the State improperly reasons that gays and lesbians do not comprise a suspect class because “a suspect classification is appropriately recognized only for minorities who are unable to use the political process to address their needs.” State Answering Brief, p.25. However, this conclusion incorrectly interprets relevant case law because California courts have never identified lack of political power as required indicia in

the determination of a “suspect class.” On the contrary, gay men and lesbians bear all relevant indicia of a “suspect class.” As a result, this Court should apply strict judicial scrutiny to the Family Code sections because they classify based upon sexual orientation.

Additionally, the State goes to great lengths to rationalize its interest in maintaining the “traditional” definition of marriage as the union of a man and a woman by devoting significant attention to its defense of the status quo. State Answering Brief, pgs. 43-54. Essentially, the State suggests that denying same-gender couples the right to marry while providing them with access to domestic partnerships is a system that “ain’t broke” so why fix it. State Answering Brief at p.44. Despite this presumptive statement, one only need ask any of the same-gender couples in these consolidated cases, who are deprived of the right to marry the person of their choice, whether or not the States current treatment of same-gender couples is “broke.” Particularly troubling about the State’s argument is its underlying rationale: the State will *tolerate* homosexuals by providing domestic partnerships, while explicitly concluding that these relationships are not entitled to the same worth, dignity and acceptance as heterosexual unions.

To that end, the State’s “tradition” argument is also based on the premise that same-gender couples do not have a fundamental right to marry. State Answering Brief, pgs. 55-63. Indeed, the State claims that this Court would need to first establish a new fundamental right for same-

gender marriage. State Answering Brief, p.57. Again, this incorrectly characterizes the issues before the Court. Specifically, Petitioners do not seek a right to “same-sex marriage.” Rather, they only seek removal of a restriction in the current laws that entirely excludes them from the ability to marry to the person of their choice.

## ARGUMENT

### **I. Excluding same-gender couples from marriage violates their rights under California’s equal protection clause and invokes strict judicial scrutiny**

The California Constitution guarantees that no citizen shall be denied equal protection of the laws. Cal. Const. art. 1, § 7(a). In re Gary W., (1971) 5 Cal.3d 296, 303, (“The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment”), *citing* Purdy & Fitzpatrick v. State of California, (1969) 71 Cal.2d 566, 578.

Further, the California Constitution’s equal protection clause is valid independent of the Fourteenth Amendment so that a violation of equal protection guaranteed by the state Constitution can be remedied on state grounds alone. Molar v. Gates, (1979) 98 Cal.App.3d 1, 12. Here, the

*Family Code* sections violate California's equal protection clause by facially discriminating on the basis of gender and sexual orientation.

**A. California's *Family Code* §§308 and 308.5 discriminate on the basis of gender in violation of the equal protection clause**

Contrary to the State's assertions, the California Constitution affords greater protection from discrimination to a broader range of groups than its federal counterpart. King v. McMahon, (1986), 186 Cal.App.3d 648, 656-57. To that end, *gender* is one area afforded greater protection.

Specifically, this Court established gender as a "suspect" classification requiring strict judicial scrutiny of laws that discriminate on this basis.

Sail'er Inn, Inc. v. Kirby, (1971), 5 Cal.3d 1, 17.

In its brief, the State argues that are not gender-based because they do not prefer one gender over the other and instead apply equally to men and women. State Answering Brief, p. 18. Next, the State tries bolstering this "equal application" analysis by arguing that "analogy to the anti-miscegenation cases (Perez and Loving) is inapposite." State Answering Brief p. 20. As support, the State tries distinguishing Loving and Perez as dealing with express racial discrimination on the one hand while in this case arguing there is no reason to believe that "California's marriage laws were devised to discriminate against males or females." State Answering Brief pgs. 20-21. But as the First Appellate District noted in this case,

creating a gender-based classification is in fact *the very function and purpose* of these sections. In re Marriage Cases, *supra*, 49 Cal. Rptr. 3d 675, 710, *citing to* Sen. Com. On Judiciary Analysis, (“the Legislature’s *manifest purpose* in enacting the 1977 amendments to *Family Code* section 300 [to include gender specifications] *was to exclude same-sex couples* from the institution of marriage”). Emphasis added. As a result, the express gender-based distinctions in §§300 and 308.5 exclude certain individuals—the Clinton Petitioners among them—from marriage. Specifically, under this current definition of marriage, an individual’s gender is the only thing preventing him from marrying his chosen partner. Goodridge v. Dept. of Public Health, (2006), 400 Mass., 309, 346, Baker v. State, (1999), 170 Vt. 194, 253.<sup>3</sup>

Additionally, in Perez this Court stated that “[t]he decisive question, however, is not whether different races, each considered as a group, are equally treated. **The right to marry is the right of individuals, not of racial**

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<sup>3</sup> In Goodridge the Massachusetts Supreme Court held that language similar to California *Family Code* §§ 300 and 308.5 created a “self-evident” sex-based classification. See, e.g., Goodridge, p. 345-346. Other states have held that substantially similar language to that used in the *Family Code* creates a gender classification. See, e.g., Deane v. Conaway, (2006), WL 148145. (rejecting equal application theory and finding discrimination on the basis of gender), Baehr v. Lewin, (HI. 1993) 74 Haw. 530, 564. (“It is the state’s regulation of access to the status of married persons, on the basis of the applicant’s sex, that gives rise to the question whether the applicant couples have been denied the equal protection of the laws....”). Baker v. State (Vt. 1999) 170 Vt. 194, 253. (“Thus, the [Vermont] statutes [recognizing marriage as between a man and a woman only] impose a sex-based classification”). Brause v. Bureau of Vital Statistics, (Alaska Super. 1998) 1998 WL 88743 \*6 (Not reported in P.2d). (“specific prohibition of same-gender marriage does implicate the Constitution’s prohibition of classifications based on sex or gender....”).

groups.” Perez, supra, 32 Cal.2d at p. 716. Emphasis added. Similarly, in Loving the United States Supreme Court rejected “the notion that the mere ‘equal application’ of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment’s proscription of all invidious racial discriminations....” Loving v. Commonwealth of Virginia, (1967), 388 U.S. 1, 8. Clearly, both this Court in Perez and the U.S. Supreme Court in Loving rejected the “equal application” argument because they looked beyond a purported “equal application” of the law and recognized the true intent and practical effect was to perpetuate a system of inequality and discrimination on the basis of a suspect classification.

To that end, time and again California Courts have consistently stricken laws on equal protection grounds by focusing on the practical impact and ultimate effect of the law, despite “equal application” arguments by proponents of the laws. Borden v. Dept. of Edu. (1976), 59 Cal.App.3d 250, 257, (court strikes down employment law that the state argued was devoid of gender classification and applied equally to men and women), Parr v. Municipal Court, (1971), 3 Cal.3d 861, 863-864, (Court strikes down ordinance on equal protection grounds that City argued was equally applicable to all. Instead, the court found that the ordinance was discriminatory and invalid as the ordinance was motivated by hostility and prejudice instead of a concern for the public good.)

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Further, this Court has determined that “the unlawful administration by state officers of a state statute that is fair on its face, which results in unequal application to persons who are entitled to be treated alike, denies equal protection if it is the product of intentional or purposeful discrimination.” Baluyut v. Superior Court, (1996) 12 Cal.4th 826, 832.

Here, it is evident that the actual purpose of including gender-specific terminology in the marriage statutes is to preclude same-gender couples from marrying. In re Marriage Cases, *supra*, 49 Cal. Rptr. 3d 675, 710, *citing to Sen. Com. On Judiciary Analysis*, (“the Legislature’s *manifest purpose* in enacting the 1977 amendments to *Family Code* section 300 [to include gender specifications] *was to exclude same-sex couples* from the institution of marriage”). Emphasis added. As a result, it is undeniable that the *Family Code* sections were enacted with a hostile intent toward homosexuals designed to deny them the fundamental right to marry. And because the statutes create improper gender-specific classifications, they are subject to strict judicial scrutiny.

**B. The *Family Code* sections also discriminate on the basis of sexual orientation**

California case law, actions of the California Legislature and the record before this Court all indicate that sexual orientation is a “suspect

class” and any classification based upon sexual orientation is subject to strict judicial scrutiny.

*1. Sexual orientation meets all relevant indicia of a “suspect class”*

Previously, this Court has set forth a number of mutually-exclusive factors to determine what constitutes a “suspect class.” Specifically, when this Court found that gender was a “suspect” classification it stated:

[S]ex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex from nonsuspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classifications is that the characteristic frequently bears no relation to ability to perform or contribute to society. The result is that the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members. Where the relation between characteristic and evil to be prevented is so tenuous, courts must look closely at classifications based on that characteristic lest outdated social stereotypes result in invidious laws or practices. Another characteristic which underlies all suspect classifications is the stigma of inferiority and second class citizenship associated with them. Sail’er Inn, Inc., *supra*, 5 Cal.3d at pgs. 18-19.

As the holding in Sail’er Inn demonstrates, this Court focuses on two central aspects to analyze “suspect” classifications. First, the Court looks to see if the characteristic bears no relation to the ability to perform or contribute to society. *Id.* Second, the Court focuses on whether the class bears the stigma of inferiority and second-class citizenship as shown by historically laboring under severe legal and social disabilities. *Id.* at p.19.

In this case, the State does not contest that gays and lesbians have been discriminated against throughout history and into the present, nor that

one's sexual orientation has no bearing on their ability to contribute to society; Nor does the State even contest that homosexuality is an immutable characteristic. State Answering Brief p. 24. However, the State does incorrectly assert that one factor is an exclusive prerequisite to establishing a "suspect class." Specifically, in Bowens v. Superior Court, (1991), 1 Cal. 4<sup>th</sup> 36, this Court, citing to the U.S. Supreme Court, stated that "the determination of whether a suspect class exists focuses on whether '[t]he system of alleged discrimination and the class it defines have [any] of the traditional indicia of suspectness: [such as a class] saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" Bowens at p. 42, *citing* San Antonio School Dist. v. Rodriguez, (1973) 411 U.S. 1, 28. From this, the State disingenuously argues that "a suspect classification is appropriately recognized *only* for minorities who are unable to use the political process to address their needs." State Answering Brief p. 25, emphasis added.

As context for its argument, the State also cites fn. 4 in United States v. Carolene Products, (1938), 304 U.S. 144, where the U.S. Supreme Court states only that "whether prejudice against discrete and insular minorities may be a special condition, which tends to seriously curtail the operation of those political processes ordinarily to be relied on to protect minorities, and

which may call for a correspondingly more searching judicial inquiry.” Carolene Products, p. 152, fn.4.) Additionally, the State’s brief analyzes subsequent California and federal cases to conclude that if a “minority group can adequately defend itself in the political process, the justification for strict scrutiny disappears.” State Answering Brief, p. 34. However, this flawed conclusion is based on a skewed analysis of Carolene Products and its progeny, particularly with respect to decisions of this Court.

At the outset, it is necessary to recognize that the California Constitution is a document of independent force and in certain instances grants its citizens greater rights than those contained in the parallel provisions of the United States Constitution. Committee to Defend Reproductive Rights v. Myers, (1981) 29 Cal.3d 252, 261 and fn. 4, 5. To that end, when constitutional challenges regarding civil liberties arise, California courts’ first referent is California law and the full panoply of rights Californians have come to expect under their own constitution. Id. In this respect, although U.S. Supreme Court decisions are persuasive authority, they should only be followed by California courts when they provide no less individual protection than is guaranteed under California law. Am. Acad. of Pediatrics v. Van De Kamp, (1989) 214 Cal. App. 3d 831, 839-840.

Therefore, while the State’s citations to federal case law concerning determinations of “suspect classes” are worthy of consideration, this

Court's review properly focuses first on how *this* Court has determined indicia of "suspect" classes under the California Constitution's equal protection analysis. In this respect, the State's brief *admits* that equal protection analysis under California's Constitution varies from tests applying the U.S. Constitution, but still asserts that this Court should use the federal analysis, rooted in Carolene Products, to apply California's Constitution. State Answering Brief, p. 31. However, this argument should fail because this Court—along with California's appeals courts—has never held a showing of lack of political power to address discrimination as a deciding factor in analyzing "suspect" classifications. Instead, while some California courts have considered this as a factor, it has never been viewed as a requirement. So the State's representation is misleading in this regard.

Similarly, the State's brief cites several California decisions which do not support its conclusions. State Answering Brief, pgs. 31-33. For example, the cases referenced do not contain a factual analysis of how this Court determines what constitutes a new "suspect class," but rather only illustrate an analysis of existing "suspect classes." See, e.g., Raffaelli v. Committee on Bar Examiners, (1972) 7 Cal.3d 288, 292 (equal protection claim discussed in the context of the Fourteenth Amendment and United States Supreme Court cases which already established alienage as a suspect class), Kennealy v. Medical Bd., (1994) 27 Cal.App.4th 489, 496, (cursory statement that physicians in general do not belong to a suspect class), and

Tain v. State Bd. Of Chiropractic Examiners, (2005), 130 Cal.App.4th 609, 630, (As a general rule licensed physicians do not belong to a suspect class). Other cases cited in the State’s brief on this issue do not add support for its position.<sup>4</sup>

Importantly, the Bowens analysis in the State’s brief was gleaned from the U.S. Supreme Court’s holding in Rodriguez where the Court, applying the Bowens indicia, found that district wealth was not a “suspect class.” San Antonio School Dist v. Rodriguez, (1973), 411 U.S. 959. However, this holding *directly contradicts* this Court’s finding in Serrano v. Priest, where this Court found that district wealth *is* a “suspect classification.” Serrano v. Priest, (1971), 5 Cal.3d 584, 610-614 (Serrano I).

Significantly, even *after Rodriguez*, this Court reaffirmed Serrano I, specifically referencing the independent validity of the California Constitution’s equal protection clause as the Court’s first referent to ensure the full panoply of rights Californians have come to expect as their due. Serrano v. Priest, (1976) 18 Cal.3d 728, 764-766 (Serrano II). Under the same rationale this Court should find that classifications based upon sexual

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<sup>4</sup> For example, in Hansen v. City of San Buenaventura, (1986), 42 Cal. 3d 1172, 1189, the only grounds asserted by nonresident taxpayers in support of their argument for treatment as a suspect class—rejected by the court—was that they lacked political power. Additionally, in Schmidt v. Superior Court, (1989), 48 Cal. 3d 370, 389, this Court stated that decisions in California and other jurisdictions declined to equate age classifications on a constitutional par with those that classify based on race or ethnic origin and the Court saw no reason for equating the two.

orientation to be “suspect” requiring strict scrutiny. As a result, the State’s argument that homosexuals are not members of a suspect class lacks merit because it improperly extends the “political power” test as determinative in the face of established California authority to the contrary.

**2. *The Family Code sections discriminate based on sexual orientation***

In its brief, the State argues that the *Family Code* sections do not facially discriminate against gay men and lesbians because they do not refer to sexual orientation and “it is wrong to assume that the mere desire to preserve a definition of marriage necessarily shows an intent to discriminate on the basis of sexual orientation.” State’s Answering Brief, p. 23. The State’s position, however, is contrary to the record before this Court.

Specifically, as the First Appellate District noted, it is evident that the actual purpose of including the gender-specific terminology in the marriage statutes was to preclude same-gender couples from marrying. In re Marriage Cases, *supra*, 49 Cal. Rptr. 3d at 710. Further, this Court has already acknowledged that the legislative history of the bill behind the 1977 amendment to California’s marriage laws redefining marriage as only between a man and a woman shows that the law was designed to prohibit persons of the same gender from marrying. Lockyer v. City and County of San Francisco, (2004), 33 Cal.4th 1055, 1076, fn. 11. Thus, it is already

apparent to California courts that the clear intent of lawmakers in passing these laws was to discriminate against homosexuals. Therefore, because the direct intent behind the *Family Code* sections is to discriminate on the basis of sexual orientation, the laws should be subject to strict judicial scrutiny and the State's argument to the contrary should be rejected.

**II. California *Family Code* §§308 and 308.5 impermissibly infringe on the fundamental right to marry the person of one's choice**

All persons have the fundamental right to marry. Loving v. Virginia, *supra*, 388 U.S. at p. 12, Zablocki v. Redhail, (1978), 434 U.S. 374, 383, Turner v. Safley, *supra*, 482 U.S. at p. 95; In re Carrafa, *supra*, 77 Cal.App. 3d at p. 791; Perez v. Sharp<sup>5</sup>, *supra*, 32 Cal. 2d at 714-715. The California Constitution provides that no person may be deprived of life, liberty, or property without due process of law or denied equal protection of the laws. Cal. Const. art. 1 § 7 (a). Additionally, the due process clause of the California Constitution contains a substantive component that forbids government intrusion on fundamental rights. Dawn

D. v. Superior Court, (1998), 17 Cal.4th 932, 939-940. Indeed, to satisfy the constitutional requirements of due process, laws may not interfere directly and substantially with the fundamental right to marry. Zablocki v. Redhail, *supra*, 434 U.S. at p. 387. To that end, legislation infringing on fundamental 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.” Perez, *supra*, 32 Cal.2d at p. 715. Here, because the *Family Code* sections abridge this fundamental right by making it impossible for Petitioners to marry the individual of their choice, the statutes violate the California Constitution’s equal protection and due process clauses.

In response to this crystal-clear authority, the State argues that Petitioners are not protected by the California Constitution because there is no fundamental right to “same-sex marriage.” State Answering Brief, p. 57-63. On this point, the State simply misses the mark. Petitioners do not seek—nor is it necessary—for this Court to create a “new” fundamental right to “same-sex marriage” because the fundamental interest in marriage

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<sup>5</sup> In what appears to be an attempt to undercut the significance of this historic decision the State notes that *Perez* is a plurality opinion and therefore the propositions and principles contained in the decision lack precedential authority. State Answering Brief p.7-8 fn. 8. Regardless of this comment, the significance and persuasive opinion of Justice Traynor can certainly still be considered by this Court as it has been by countless others since it was first decided over sixty years ago. Additionally, it is important to note that in his concurring opinion Justice Edmonds stated that he agreed with the conclusion that marriage is a fundamental right but chose to place his concurrence “upon a *broader*

recognized in Perez is equally applicable to Petitioners. As a result, Petitioners merely want this Court to remove a discriminatory barrier that entirely excludes them from marrying the person they choose and with whom they wish to spend the rest of their life. Depriving same sex couples of their right to marry violates due process because it infringes upon their fundamental right. To illustrate this point in holding that prison inmates cannot be denied the right to marry, the U.S. Supreme Court listed the attributes of marriage that make it a fundamental right. Turner v. Safely, (1987), 482 U.S. 78, 95-96. These include its (1) public expression of emotional support and commitment, (2) spiritual significance that may make it an exercise of religious faith, and (3) precondition to the receipt of government benefits. Id.

Applied to this case, the institution in which Petitioners seek to participate embodies public expressions of support and commitment identical with those of any other married couple. Also, recognition of their marriages would allow them to enjoy the marital rights and benefits that are now provided only to heterosexual married couples. Moreover, some of the Petitioners are also deeply religious, and marriage is essential in complying with the values ingrained in their respective faiths. Thus, there

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ground than that the challenged statutes are discriminatory and irrational.” (*Perez, supra*, 32 Cal.2d at p. 741 (conc. Opn. Of Edmonds,J.). (emphasis added).)

is nothing about Petitioners that justifies enforcing a limit on their ability to exercise their right to marriage.

In sum, this Court need not first establish a new right to same-gender marriage because the fundamental right to marry is the right of the individual to choose the spouse of his or her choice, and it is a right that cannot properly be withheld from the Clinton Petitioners while given to heterosexual individuals and couples. The liberty interest at stake is fundamental. As a result, the State's argument that a fundamental right is not even at stake here should be rejected.

### **III. Excluding same-gender couples from marriage is not even rationally related to any legitimate state interest**

Although well-settled legal analysis permits this Court to invoke strict judicial scrutiny of the *Family Code* sections, the State's brief also fails to articulate even a legitimate state interest justifying the exclusion of same-gender couples from the institution of marriage. As a result, these sections do not even withstand judicial rational-basis review because under this standard, there must be some rational relationship between a legitimate goal of the legislature and the class singled out for disparate treatment. Young v. Haines, (1986) 41 Cal.3d 883, 899-900. Under this analysis, the party challenging a law must show that no legitimate government interest

exists to justify the disparate treatment. D'Amico v. Board of Medical Examiners, (1974), 11 Cal.3d 1, 17.

In its brief, the State asserts an interest in maintaining a “traditional” definition of marriage to describe the benefits that accrue to members of society when they respect the teachings of their predecessors. State Answering Brief, pgs. 43-44. Of course, under this rationale the State must concede that it has an important interest in excluding same-gender couples from marriage because same-gender couples are not worthy of the same tangible and psychological benefits that accrue to heterosexuals. Such unfairness shows that the State’s rationale cannot be an important or even a legitimate State interest.

Indeed, if this Court in Perez had used the same “historical definition of marriage” rationale now asserted by the State, the Perez opinion may have looked more like Justice Shenk’s dissenting opinion when he reasoned, “[i]t is difficult to see why such [miscegenation] laws, valid when enacted and constitutionally enforceable in this state for nearly 100 years and elsewhere for a much longer period of time, are now unconstitutional under the same Constitution and with no change in the factual situation.” Perez, supra, 32 Cal.2d at 742 (Shenk, J., dissenting). In hindsight, this Court correctly rejected that rationale by focusing on marriage as a whole and holding that the right to marry is the right to marry the person of one’s

*choice*. Perez, *supra*. 32 Cal.2d at p.715; *see also*, Loving, *supra*, 388 U.S. at 12.

The State's brief also appeals to this Court's emotion when it argues to maintain tradition that "has proven durable and functional over many generations in order to avoid the social risks inherent in overly rapid change that rends the fabric of society in ways that cannot be readily assimilated and that may prompt backlash reactions." State's Answering Brief at p. 2. But fear of future consequences does not a legitimate state interest make. And as is always the case when an oppressed minority seeks and attains equality, "backlashes" are plausible but fearing them does not justify upholding a discriminatory law.

The State also argues it has a legitimate interest in maintaining the status quo while providing same-gender couples similar rights as domestic partners. State Answering Brief, p. 45. And while the State acknowledges domestic partnerships as a "separate but equal" system analogous to racially-segregated school facilities, it nonetheless advocates such a system because domestic partnerships "were not conceived by a majority group for the purpose of oppressing a minority group." State Answering Brief p. 46.

However, providing some economic benefits while excluding some citizens from the institution of marriage cannot absolve the State of its failure to accord all persons equal protection under the law. Further, as discussed in Petitioners' Supplemental Briefing, domestic partnerships and

marriage are not even equal institutions in California. At the center of this issue, marriage is a universally understood and revered institution and as the Third Appellate District noted, “marriage is considered a more substantial relationship and is accorded a greater stature than domestic partnership.” Knight v. Superior Court, (2005) 128 Cal.App.4th 14, 30.

To that end, this Court observed that in analyzing the State’s asserted interest, the state consider matters of legitimate concern to the state but the “legislation, however, must be based on tests of the individual, not on arbitrary classifications of groups or races, and must be administered without discrimination.” Perez, supra, 32 Cal.2d at p.718.

In this case, the State does have and has not articulated any legitimate interests in denying homosexuals access to the institution of marriage. Instead, the “State interest” attacks liberty, self-determination, and providing California’s children with stable home environments. Perpetuating a tradition of discrimination is not a legitimate state interest. On the contrary, maintaining a tradition of discrimination for its own sake is quite simply an illegitimate state interest.

In sum, while the State has legitimate interests in regulating marriage, none of its *legitimate* interests bear a rational relation to excluding homosexuals from the institution. Accordingly, the *Family Code* sections fail rational basis review.

#### **IV. The *Family Code* sections also violate the right to privacy protected by California's Constitution**

The California Constitution proclaims, “[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and *privacy*.” Cal. Const. art. I, § 1 (emphasis added). In many instances, the scope and application of the California state constitutional right to privacy is broader and more protective of privacy than its federal counterparts. *American Academy of Pediatrics v. Lungren*, (1997), 16 Cal.4th 307, 326. To that end, the right to privacy under California's Constitution includes the right of personal autonomy and also ensures the freedom of intimate association. *Ortiz v. Los Angeles Relief Association*, (2002), 98 Cal. App. 4th 1288, 1302-1303. Indeed, under California law the right to marry is a specific and legally-protected right under our constitution's right to privacy. *Ortiz*, *supra*, 98 Cal. App. 4th at 1303.

In its brief, the State again asserts that Petitioners have no privacy protections under California's Constitution because there is no fundamental right to “same-sex” marriage. *State Answering Brief*, p.64. But for the same reasons discussed in Section II, the State's argument fails because the fundamental right at issue—the right to marry the person of one's choice—includes the Clinton Petitioners.

Of course, while the right to privacy is not absolute, it can only be abridged when there is a compelling and opposing state interest. Kahn v. Superior Court, (1987), 188 Cal. App. 3d 752, 765. Here, the state provides no compelling interest to warrant such substantial interference with the right to privacy protecting the fundamental right to marry. In the instant matter, the State's interest in marriage is to foster life-long unions in pursuit of liberty, happiness and self-determination. This interest applies to homosexual citizens in the exact same way as it applies to heterosexual individuals. As a result, *Family Code* §§300 and 308.5 impermissibly infringe on the fundamental right to marry and the right to privacy under California's Constitution by excluding an entire group of Californians from the marital institution. Accordingly, this Court should strike these sections as violations of the right to privacy.

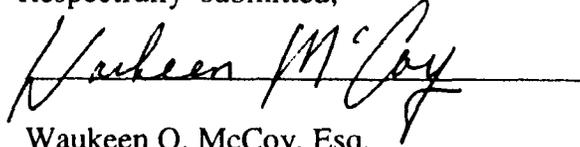
### CONCLUSION

California *Family Code* §§300 and 308.5 are unconstitutional under the California Constitution because they impermissibly abridge the individual's fundamental right to marry, include classifications based on gender and sexual orientation, and violate the right to privacy. In its brief, the State fails to provide a compelling or even a legitimate interest to justify the practical effect of disqualifying the Clinton Petitioners—and countless other Californians—from participating in this institution of fundamental

importance. Accordingly, the Clinton Petitioners respectfully request that this Court reverse the decision of the First Appellate District.

Dated August 17, 2007

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Waukeen McCoy", written over a horizontal line.

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## CERTIFICATE OF COMPLIANCE

I certify that the attached Reply Brief on the Merits uses a 13-point Times New Roman font and contains 5,536 words according to the word count feature of the computer program used to prepare this document.

Dated August 18, 2007

Respectfully submitted,

  
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**PROOF OF SERVICE**

I, Aldon L. Bolanos, declare that I am over the age of eighteen years and I am not a party to this action. My business address is The Law Offices of Waukeen McCoy, The Central Tower, 703 Market Street, Suite 1407, San Francisco, California, 94103.

On August 16, 2007, I served the document listed below on the interested parties in this action in the manner listed below:

**Reply brief on the merits, Case No. S147999**

**By: OVERNIGHT DELIVERY**

I caused such envelopes to be delivered on the following business day by Federal Express service.

**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 August 16, 2007, at San Francisco, California.

A handwritten signature in cursive script, reading "Aldon L. Bolanos", written over a horizontal line.

Aldon L. Bolanos, Esq.