Case No. S147999

IN THE

Supreme Court of the State of California

In re MARRIAGE CASES

Judicial Council Coordination Proceeding No. 4365

After a Decision by the Court of Appeal,
First Appellate District, Division Three,
Nos. A110449, A110450, A110451 A110463, A110651, A110652
San Francisco Superior Court Case Nos. JCCP4365, 428,794, 429539,
429548, 503943, 504038, Los Angeles Superior Court No. BC088506
Honorable Richard A. Kramer, Judge

PROPOSITION 22 LEGAL DEFENSE AND EDUCATION FUND ANSWER TO PETITIONERS' OPENING BRIEFS ON THE SUBSTANTIVE ISSUES

ALLIANCE DEFENSE FUND
BENJAMIN W. BULL, Arizona State Bar No. 009940*
GLEN LAVY, Arizona State Bar No. 022922*
15333 North Pima Road, Suite 165
Scottsdale, Arizona 85260
Telephone: (480) 444-0020
Facsimile: (480) 444-0028
bbull@telladf.org
glavy@telladf.org

ALLIANCE DEFENSE FUND
TIMOTHY DONALD CHANDLER, State Bar No. 234325
101 Parkshore Drive, Suite 100
Folsom, California 95630
Telephone: (916) 932-2850
Facsimile: (916) 932-2851
tchandler@telladf.org

Additional Counsel on Following Page

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glavy@telladf.org

ALLIANCE DEFENSE FUND
TIMOTHY DONALD CHANDLER, State Bar No. 234325
101 Parkshore Drive, Suite 100
Folsom, California 95630
Telephone: (916) 932-2850
Facsimile: (916) 932-2851
tchandler@telladf.org

Additional Counsel on Following Page

ADVOCATES FOR FAITH AND FREEDOM
ROBERT HENRY TYLER, State Bar No. 179572
24910 Las Brisas Road, Suite 110
Murrieta, California 92562
Telephone: (951) 304-7583
Facsimile: (951) 894-6430
rtyler@faith-freedom.com

LAW OFFICES OF TERRY L. THOMPSON
TERRY L. THOMPSON, State Bar No. 199870
1804 Piedras Circle
Alamo, California 94507
Telephone: (925) 855-1507
Facsimile: (925) 820-6034
tl_thompson@earthlink.net

LAW OFFICES OF ANDREW P. PUGNO
ANDREW P. PUGNO, State Bar No. 206587
101 Parkshore Drive, Suite 100
Folsom, California 95630
Telephone: (916) 608-3065
Facsimile: (916) 608-3066
andrew@pugnolaw.com

Attorneys for the Plaintiff-Respondent
Proposition 22 Legal Defense and Education Fund

*Admitted *Pro Hac Vice*

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INTRODUCTION

Respondent Proposition 22 Legal Defense and Education Fund (the "Fund")[1] hereby rebuts the arguments of the City and County of San Francisco (the "City"), Joshua Rymer, et al. ("Rymer"),[2] Robin Tyler, et al. ("Tyler"), and Gregory Clinton, et al. ("Clinton") (collectively "Petitioners") in their opening briefs.

Petitioners all studiously avoid mentioning the meaning of the term "marriage," despite the fact that the Court of Appeal's decision turned largely on the meaning of that term. Without *first* redefining the meaning of "marriage," as used in the California Constitution, California case law, and federal law, none of Petitioners' arguments carry any weight.

Petitioners' arguments turn on numerous unspoken and unsupportable assumptions. All Petitioners assume that the term "marriage" has an unspecified meaning that includes same-sex relationships. By ignoring the meaning of "marriage," they then assume that the marriage laws are a "marriage ban" or "prohibition of marriage" instead of the codification of the positive meaning of marriage. Consequently, they argue that there must be at least a rational basis for a "ban" rather than for codifying the historical definition of marriage. Petitioners assume that the purpose of marriage, which they fail to identify, is just as well served by same-sex relationships as opposite-sex ones. They then assume that same-sex couples are similarly situated with opposite-sex couples for equal protection purposes, without

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[1]The Fund is a Petitioner in regard to the Court of Appeal's decision on justiciability, but is a Respondent in regard to the decision on the substantive issues, which this brief addresses.

[2]The Rymer parties' opening brief is designated "Respondents' Opening Brief on the Merits," and they refer to themselves as "Respondents" throughout. However, since they are appealing the Court of Appeal's decision on the substantive issues, they are more appropriately designated "Petitioners."

analysis or evidence. This fallacy leads them to assume that they have met the threshold requirements for an equal protection claim without even attempting to do so. Finally, Petitioners assume that the marriage laws are discriminatory. But that assumption cannot stand alone – if marriage has a meaning and purpose that do not include same-sex relationships, the marriage laws do not involve invidious discrimination.

The gravamen of Petitioners' impassioned appeals is that they are asking this Court to determine what *social policy* on marriage *ought* to be, not what the *law* regarding marriage *is*. What the *social policy* on marriage *ought* to be is a political and moral question. The *legal* question before the Court is what marriage *is*. Under California law and federal law, marriage is and always has been the union of a man and a woman. The political question of whether the meaning of marriage *ought* to be *changed* to include same-sex couples was decided by the Legislature when it enacted California Family Code § 300.[3] That rejection of pressure to redefine marriage was later affirmed and strengthened by the voters when they enacted § 308.5 by citizen initiative. In view of the initiative status of § 308.5 ("Proposition 22"), only the voters have the ability to redefine the term "marriage."

I. THE COURT OF APPEAL PROPERLY RECOGNIZED THAT "MARRIAGE" HAS A SETTLED MEANING.

The Court of Appeal majority observed that it is "beyond dispute that our society has historically understood 'marriage' to refer to the union of a man and a woman." (*In re Marriage Cases* (2006) 49 Cal.Rptr.3d 675, 685.) Because of that meaning, the majority clearly understood that what the Petitioners are asking from the Courts is a "new right." It ruled that "Courts simply do not have the authority to create new rights, especially when doing

[3]Unless otherwise designated, subsequent statutory references will be to the California Family Code.

so involves changing the definition of so fundamental an institution as marriage." (*Ibid*.) Quoting this Court, the majority observed that "'[t]he role of the judiciary is not to rewrite legislation to satisfy the court's, rather than the Legislature's, sense of balance and order. Judges are not knight[s]-errant, roaming at will in pursuit of [their] own ideal of beauty or of goodness.'" (*Ibid*. [citation and quotation marks omitted].) Accordingly, the majority held that the marriage laws do not deprive individuals of a fundamental right or discriminate against a suspect class. (*Id*. at p. 686.) It logically ruled that the laws pass rational basis review.

A. Marriage Has a Clearly Defined Meaning.

Marriage is the oldest institution in history. As recognized by *Baker v. Nelson* (1971) 291 Minn. 310, 312 [191 N.W.2d 185], *appeal dismissed for want of a substantial federal question*, (1972) 409 U.S. 810, "marriage as the union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis."[4] From the oldest English dictionaries in the Library of Congress to modern times, the primary meaning of the term "marriage" has been a legal union of a man and a woman, a husband and wife. (*See, e.g.*, THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY (1740) [Marriage: "that honourable contract that persons of different sexes make with one another"]; JAMES BUCHANAN, LINGUAE BRITANNICAE VERA PRONUNCIATIO (1757) [Marriage: "A civil contract, by which a man and a woman are joined together"]; NOAH WEBSTER, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE 185 (1806)

[4]The reference to "Genesis" has to do with the antiquity of marriage, not a religious aspect. In fact, marriage as a secular institution involving the union of a man and a woman is at least 4,000 years old. (*See* DAVID BLANKENHORN, THE FUTURE OF MARRIAGE 48 [2007].) Genesis is simply a convenient reference because it is the oldest book with which most Americans would be familiar – at least in 1971.

[Marriage: "the act of joining man and woman"]; Noah Webster, An American Dictionary of the English Language 518 (1830) [Marriage: "The act of uniting a man and woman"]; JAMES KNOWLES, A CRITICAL PRONOUNCING DICTIONARY OF THE ENGLISH LANGUAGE 425 (1851) [Marriage: "The act of uniting a man and woman"]; MERRIAM WEBSTER'S COLLEGIATE DICTIONARY–TENTH EDITION 713 (1993) ["**1 a**: the state of being married **b**: the mutual relation of husband and wife: WEDLOCK"].)[5] Justice Holmes observed that "some form of permanent association between the sexes" is one of the elementary characteristics of civilization. (Oliver Wendell Holmes, Jr., *Natural Law*, 32 HARV. L. REV. 40, 41 (1918).)

Furthermore, "marriage" has always meant the union of a man and a woman in California. (*See Harman v. Harman* (1850) 1 Cal. 215, 215 [referring to marriage as "the union of a man and woman"]; *In re DeLaveaga's Estate* (1904) 142 Cal. 158, 171 [75 P. 790] [referring to marriage as "'the union for life of one man and one woman'"] [citation omitted]; *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1128 [17 Cal.Rptr.3d 225] ["Since the earliest days of statehood, California has recognized only opposite-sex marriages"] [conc. & dis. opn. of Kennard, J.]; *see also Baker v. State* (2000) 170 Vt. 194, 199 [744 A.2d 864] ["there is no doubt that the plain and ordinary meaning of 'marriage' is the union of one man and one woman as husband and wife"].) This meaning of marriage was incorporated into the California Constitution from the common law. (*See In re Baldwin's Estate* (1912) 162 Cal. 471, 489 [123 P. 267] [common law of marriage was rule in California prior to adoption of statutes]; *Dow v. The Gould and Curry Silver Mining Co.* (1867) 31 Cal. 629, 640 [common law was basis of every right in

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[5]Marriage is also defined as the union of a man and woman in federal law and in Black's Law Dictionary. (1 U.S.C. § 7; Black's Law Dictionary (5th ed. 1979) p. 876.)

Constitution except for right of husband and wife to own separate property, which was included in Cal. Const. 1849, Art. 11, § 14].) The Constitution and early statutes retained the common law meaning of marriage, but did not attempt "to state its manifold incidents and consequences . . . ." (*Sesler v. Montgomery* (1889) 78 Cal. 486, 487 [21 P. 185].)

Ironically, the Tyler Petitioners get one crucial factor right: marriage itself is not a creature of statutory law. (Tyler Open Br. at p. 16.) The United States Supreme Court recognized long ago that states may "regulate the mode of entering [marriage], but they do not confer the right." (*Meister v. Moore* (1877) 96 U.S. 76, 78.) In other words, the institution of marriage pre-exists the states and even our nation. The right existed at common law. (*Id*. at p. 79.) Before any statutes regulated marriage, there was a "common-law right to form the marriage relation by words of present assent." (*Id*.; *cf. Jones v. Hallahan* (Ky. 1973) 501 S.W.2d 588, 589 ["Marriage was a custom long before the state commenced to issue licenses for that purpose"].) In fact, proof of a common law marriage did not even require evidence that words of assent had been spoken; evidence of a man and woman living together and publicly presenting each other as husband and wife was sufficient. (*Travers v. Reinhardt* (1907) 205 U.S. 423, 440, 441-42.) Common law marriages existed in California before it became a state, and could be formed in California until 1895. (*Norman v. Norman* (1898) 121 Cal. 620, 628 [54 P. 143].) When California enacted a constitutional provision early in its history with "certain provisions, different from the rules of the common law, . . . there [was] no attempt made to change the essential nature of marriage . . . ." (*Sesler, supra*, 78 Cal. at pp. 486-87.)

Prior to the decision in *Goodridge v. Department of Pub. Health* (2003) 440 Mass. 309 [798 N.E.2d 941], there was never a time in the history of California or the United States that marriage, in a legal sense, meant anything

other than the union of a man and a woman. Accordingly, when the California voters adopted the various versions of the Constitution, and when the Legislature passed laws relating to marriage, they were merely recognizing a pre-existing fact: that marriage means the union of a man and a woman. (*See Lockyer, supra,* (2004) 33 Cal. 4th at p. 1128 [conc. & dis. opn. of Kennard, J.] ["Since the earliest days of statehood, California has recognized only opposite-sex marriages"].) Contrary to Petitioners' rash of assumptions, such recognition is not a "ban" on same-sex "marriage."

B. Petitioners' Arguments Make No Sense Without Redefining "Marriage."

Petitioners dispute that they are seeking a "new right." Yet they fail to explain how the right they are seeking can fit within the meaning of marriage. The way Petitioners use the term "marriage" is reminiscent of a famous passage by Lewis Carroll:

> "When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean – neither more nor less." "The question is," said Alice, "whether you *can* make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master – that's all."

(Carroll, Through the Looking Glass (1934 ed.) p. 205.) The body with the power to revise the meaning of words is indeed the "master." The Court of Appeal majority properly recognized that redefining terms and fundamental social institutions is not the role of the courts. (*Marriage Cases, supra,* 49 Cal.Rptr.3d at pp. 685-86.)

Without redefining marriage to mean something other than the union of a man and a woman, all of Petitioners' arguments about the fundamental right to marriage and a marriage exclusion are meaningless. It just is not true that Petitioners "simply seek to exercise the same fundamental right to marry that is accorded all other persons." (Rymer Open Br. at p. 58.) Every homosexual person has the right and ability to participate in the institution of

marriage, to enter a union of a man and a woman, that heterosexual persons have.[6] Indeed, the City has admitted that "some gays and some lesbians do marry people of the opposite sex . . . ." (Reporter's Transcript ["RT"] 327, lns. 26-27 [Dec. 23, 2004, Hearing].) However, the right to "participate in the institution of marriage" does not include "the right to turn marriage into another word for any private adult relationship of choice." (DAVID BLANKENHORN, THE FUTURE OF MARRIAGE 183 [2007].) Petitioners are not interested in a right to enter "marriage" as it has been defined for centuries. When Petitioners speak of a "marriage ban," a "marriage exclusion," their "fundamental right" to marry, or the right to marry the "person of one's choice," they are arguing from the false assumption that "marriage" inherently includes same-sex relationships. Indeed, even in referring to the right to choose one's own spouse, Petitioners assume a different meaning for marriage, given that "spouse" continues to mean "married person: HUSBAND, WIFE."[7]

To say that the term "marriage" when used in California and federal law means the union of a man and a woman is not an argument that what always has been must always be. (*See Marriage Cases, supra*, 49 Cal.Rptr.3d at p. 685.) Instead, pointing out that marriage has a meaning emphasizes the elementary truth that rational discourse cannot occur without a mutual understanding of the meaning of the words used. (*See id*. at p. 729 [Parrilli, J., concurring] ["a common understanding and meaning of the word 'marriage,' or the term 'to marry,' *is* required before the word, and the

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[6]A lifetime commitment to another person is a decision, not a pre-determined fate beyond a person's choice. Thus, if Petitioners are "excluded" from marriage, they are excluded by choice, not by law. They have the legal ability to exercise the fundamental right to marry if"marriage," as it has always been known, is what they choose.

[7]Merriam-Webster Online Dictionary, www.m-w.com/dictionary/spouse (last visited June 13, 2007).

institution, can be discussed intelligently. Or we must admit *we* are redefining the historical understanding to accommodate this discussion"] [emphasis original].) Petitioners do the Court a great disservice when they use the term "marriage" to mean something other than the union of a man and a woman without explaining what they mean.

The City asserts that "[f]ar from retaining the same definition and meaning over the years, [civil marriage] has evolved significantly – often at the behest of the judiciary." (City Open Br. at p. 19.) However, the City cannot cite any authority for a change in definition. Indeed, in its seven pages of discussing the "evolution" of marriage, the City nowhere mentions a change in definition – it simply describes changes in the legal incidents of marriage.[8] The definition of marriage has never been dependent upon its legal incidents, and the "evolution" of marriage in America has never changed the meaning of the term. Despite the apparent effort to conflate the legal incidents of marriage with the legal definition of marriage, it is undeniable that the legal incidents of marriage in California historically were afforded to a specific kind of relationship – the union of a man and woman. That specific kind of relationship has defined marriage throughout the history of the English term "marriage," which is some 700 years old. (*See* MERRIAM WEBSTER'S COLLEGIATE DICTIONARY – TENTH EDITION 713 (1993) [giving date of origin of term].)

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[8]The legal incidents of marriage should not be confused with its definition. The definition of marriage is a universal across time, culture, and religion; the legal incidences of marriage are variables across time, culture, and religion. Marriage in California has never been *defined* by the variables. The California Constitution and laws regarding marriage did not attempt "to state its manifold incidents and consequences . . . ." (*Sesler, supra*, 78 Cal. at p. 487.)

The City concludes its discussion of the "evolution" of marriage by stating that "[t]he tradition of marriage is, in fact, one of steady evolution." (City Open Br. at p. 26.) But the changes in the incidents of marriage do not authorize the Courts to redefine the term. As the concurring intermediate appellate judge in *Hernandez v. Robles* (N.Y. App. Div. 2005) 805 N.Y.S.2d 354, 364 [26 A.D.3d 98], observed, "[t]he concept of marriage has traditionally been accepted by courts throughout the United States as the union of a man and a woman. Any change in that frequently articulated [opposite-sex] construct would be a *revolution* in the law rather than *evolution*." ([Catterson, J., concurring; emphasis added], *aff'd*, (2006) 7 N.Y.3d 338 [855 N.E.2d 1].)

C. Elimination of the Miscegenation Laws Left the Meaning of "Marriage" Intact.

In his recent book David Blankenhorn, a self-identified liberal democrat who cares deeply about children, argues that attempting to achieve "equal dignity" through same-sex "marriage" is misguided. (THE FUTURE OF MARRIAGE, *supra*, at p. 172 [emphasis original].) Blankenhorn acknowledges that the quest for "equal dignity" is what provides the fuel for analogizing same-sex "marriage" to interracial marriage. But as he points out, "the analogy is false – not simply intellectually weak, not merely confusing or misleading, but entirely and totally false." (*Id*. at p. 174.) The reason the analogy is false arises from the core purpose of marriage, and the way that both anti-miscegenation laws and same-sex "marriage" are hostile to its core purpose:

> Across history and cultures, marriage is socially approved sexual intercourse between a woman and a man. Marriage is in part a private relationship, but it is also, and fundamentally, a social institution, with rules and forms that create public meaning intended to solve important problems and meet basic needs. The core problem that marriage aims to solve is sexual embodiment

> – the species' division into male and female – and its primary consequence, sexual reproduction. The core need that marriage aims to meet is the child's need to be emotionally, morally, practically, and legally affiliated with the woman and the man whose sexual union brought the child into the world. That is not *all* that marriage is or does, but nearly everywhere on the planet, that is *fundamentally* what marriage is and does.
>
> Accordingly, it is *not* true that the only constant in the history of marriage is that it is always changing. It is *not* true that marriage is only incidentally connected to sex, or to children, or to bridging the male-female divide. Most of all, it is *not* true that marriage in essence is an expression of love, a private relationship of commitment between consenting adults.

(*Id*. at p. 175 [emphasis original].) The anti-miscegenation laws undermined the institution of marriage because they were using marriage to enforce racial segregation, "a public value that is alien and even hostile to the institution's core forms, meanings, and reasons for being." (*Id*. at p. 176.) In the same way, proponents of same-sex "marriage" are trying to use marriage for a social goal that is *unrelated to the purpose of marriage*. This puts the advocates of same-sex "marriage" on the same ground as the advocates of anti-miscegenation laws. (*Id*. at p. 179.)

Blankenhorn fully endorses the purpose underlying the pursuit of same-sex "marriage," "to gain social recognition of the dignity of homosexual love. Or as Andrew Sullivan puts it, the purpose is to win acceptance of gays and lesbians as full and equal members of the human race." (*Id*. at p. 178.) But he gives four reasons for disagreeing that marriage is the way to achieve what he calls "that good purpose":

> First, using marriage to achieve that good purpose would require eradicating in law, and weakening in culture, the form of opposites (marriage as man-woman), which arguably is marriage's single most foundational form.

> Second, using marriage . . . would also mean largely eradicating in law and public discourse the form of sex (marriage involves sexual intercourse). For as we've seen, although their reasons are different, today's civic and judicial proponents of gay marriage easily rival the most sex-averse early Christian fathers in their adamant insistence that marriage is not intrinsically connected to sexual intercourse. . . . Whether the form of two (marriage is for two people) could remain standing once the other two basic forms have been tossed aside is at best an open question – especially since many proponents of gay marriage are earnest opponents of this form as well.
>
> Third, using marriage . . . would require publicly and legally renouncing the idea of a mother and a father for every child. Across history and cultures, as earlier chapters demonstrated, marriage's *single most fundamental idea* is that every child needs a mother and a father. Changing marriage to accommodate same-sex couples would nullify this principle in culture and in law. . . .
>
> Fourth, and more generally, using marriage . . . would mean marriage's complete or nearly complete deinstitutionalization. . . .The idea of marriage as a pro-child social institution would be replaced by a much smaller idea: marriage as another name for a private committed relationship.

(*Ibid*.) Thus, regardless of how compelling the stories of the couples before the Court, redefining marriage is not a good social solution. As Blankenhorn points out, redefining marriage would not be a small social change like other judicial changes to marriage. Nor would it leave the institution of marriage intact, like the overturning of the miscegenation laws. Instead, it would have huge societal consequences. (*Id*. at pp. 202-09.)[9] Such fundamental social

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[9]In 2004, Blankenhorn convened three one-day seminars involving many leading family scholars, a few for same-sex "marriage" and a few against, with most undecided. They compiled a list of anticipated consequences of redefining marriage, with twenty-three pro, twenty-four con, and twelve that they could not agree on whether they were positive or negative. (*Id*.)

questions are not within the realm of judicial authority. (*See* Section III, *infra*.)

II. CALIFORNIA HAS NOT ADOPTED THE "COMMITMENT" RATIONALE FOR MARRIAGE.

In 2000 the California voters resoundingly adopted Proposition 22, which affirmed California's adherence to the historical meaning of marriage. Proposition 22 established a public policy and definition of marriage that cannot be overturned by the Legislature. (Cal. Const. Art. 2, § 10(c).) Nor can it be overturned by the courts unless it violates a pre-existing public policy embodied in the Constitution.

In adopting Proposition 22 the voters rejected the idea that "marriage" should be redefined. The ballot arguments for Proposition 22, submitted to the Court of Appeal by the City's Request for Judicial Notice ("CRJN"), expressly addressed the issue: "It's tough enough for families to stay together these days. Why make it harder by telling children that marriage is just a word anyone can re-define again and again until it no longer has any meaning?" (CRJN Ex. 2, Ex. B at 52 [Argument in Favor of Proposition 22].) Another ballot argument stated: "THE TRUTH IS, we respect EVERYONE'S freedom to make lifestyle choices, but draw the line at re-defining marriage for the rest of society." (*Id*., Ex. B at p. 53 [Rebuttal to Argument Against Proposition 22].) Thus, by enacting Proposition 22 the voters chose to retain the historical definition of "marriage" in California and to retain the historical rationale.

Nevertheless, Petitioners argue from an unarticulated assumption that the state's reason for regulating marriage has something to do with honoring the "commitment" of persons in a long term relationship. The few cases where courts have redefined marriage necessarily adopted this "commitment" rationale for marriage. (*See, e.g., Goodridge*, *supra*, 440 Mass. at p. 312 ["The exclusive commitment of two individuals to each other nurtures love and

mutual support; it brings stability to our society"]; *Brause v. Bureau of Vital Statistics* (Alaska Super. 1998) 1998 WL 88743, *6 [construing fundamental right to marriage as "the decision to choose one's life partner"] [overturned by constitutional amendment]; *Fourie v. Minister of Home Affairs* [South Africa Supreme Court of Appeals 2004, Case No. 232-2003 at p. 11 ["the question is whether the capacity for commitment, and the ability to love and nurture and honour and sustain, transcends the incidental fact of sexual orientation"].)

No state or federal appellate court, other than *Goodridge*, has adopted this "commitment" view of marriage.[10] Instead, most appellate decisions subsequent to *Goodridge* have either criticized the decision for reliance on the "commitment" rationale, or extensively quoted from the dissenting justices. A New York intermediate appellate court repeatedly quoted the reasoning of the dissenting justices in *Goodridge*, and criticized the trial court for redefining "marriage." (*Hernandez, supra*, 805 N.Y.S.2d at pp. 358-62.) The New York high court's affirmance likewise cited the *Goodridge* dissenting justices. (*Hernandez, supra*, 7 N.Y.3d at pp. 366 [plurality], 385 [Graffeo, J., concurring.) This repeated recitation of the *Goodridge* dissents echoed the Indiana Court of Appeals' criticism of *Goodridge*:

> We . . . find that the *Goodridge* majority opinion is largely devoid of discussion of why the Commonwealth of Massachusetts might have chosen in the first place to extend marriage benefits to opposite-sex couples but not same-sex couples. It may well be, as the [plurality] stated, that for many people "it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children,

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[10]The New Jersey Supreme Court focused on the "commitment" of same-sex couples in ruling that they were entitled to the same benefits as marriage, but did not rule that they were entitled to "marriage." (*Lewis v. Harris* (2006) 188 N.J. 415, 463 [908 A.2d 196].) Such a ruling would have no impact in California, since same-sex couples already have benefits similar to those given to married couples.

> that is the sine qua non of civil marriage." However, *that does not answer the question of why the government may choose to bestow benefits on one type of permanent commitment and not another*.

(*Morrison v. Sadler* (Ind. Ct. App. 2005) 821 N.E.2d 15, 29 [emphasis added].) And the Washington Supreme Court likewise recently rejected the *Goodridge* "commitment" rationale for marriage in favor of the traditional procreation rationale. (*Andersen v. King Co.* (2006) 158 Wash.2d 1, 35-40 [138 P.3d 963.])

The *Goodridge* court began its opinion with the premise that marriage is a social institution that reflects "[t]he exclusive commitment of two individuals to each other . . . ." (*Goodridge, supra*, 440 Mass. at p. 312.)[11] That myopic premise conflicts with the traditional and prevailing societal view of marriage as a union between a man and a woman. It was properly rejected in New York, Washington, and Indiana, and was also rejected by the California voters when they passed Proposition 22.

Petitioners have suggested no viable reason for this Court to adopt a commitment rationale for marriage. This Court should not accept Petitioners' implicit invitation to reach a decision on the basis of an unsubstantiated assumption that the state regulates marriage because of its respect for commitment.

III. CALIFORNIA COURTS DO NOT HAVE THE POWER TO REDEFINE "MARRIAGE."

Contrary to the arguments of Petitioners, the Court of Appeal properly fulfilled its role when it held that redefining marriage is beyond the power of the courts. The majority recognized that what the dissent engaged in was "an

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[11]The *Goodridge* court acknowledged that it was redefining marriage. (*Goodridge, supra*, 440 Mass. at p. 337.) However, it did not seem to realize that, in true circular fashion, it used its new definition of marriage as the foundation for deciding that the historical definition was unconstitutional.

impassioned policy lecture on why marriage should be extended to same-sex couples" rather than legal analysis of "controlling precedent." (*Marriage Cases, supra*, 49 Cal.Rptr.3d at p. 685.) The majority then properly described its role:

> the court's role is not to define social policy; it is only to decide legal issues based on precedent and the appellate record. The six cases before us ultimately distill to the question of *who gets to define marriage in our democratic society*. We believe this power rests in the people and their elected representatives, and courts may not appropriate to themselves the power to change the definition of such a basic social institution.

(*Ibid*. [emphasis added].)

Any other approach to such policy-oriented litigation would violate the separation of powers principles of the California Constitution. (Cal. Const. Art. III, § 3.) As this Court has held, "[t]he doctrine of separation of powers is firmly entrenched in the law of California, and a court should not lightly encroach on matters which are uniquely in the domain of the Legislature." (*People v. Wingo* (1975) 14 Cal.3d 169, 174 [121 Cal.Rptr. 97].) California courts have historically held that "[t]he regulation of marriage is *solely* within the province of the legislature." (*Estate of DePasse* (2002) 97 Cal. App. 4th 92, 99 [118 Cal.Rptr.2d 143] [emphasis added].) Pursuant to this authority, the Legislature has statutorily excluded a number of relationships from marriage, including same-sex relationships (Cal. Fam. Code § 300), group relationships (Cal. Fam. Code § 2201), first cousin relationships (Cal. Fam. Code § 2200), and parent/child relationships (Cal. Fam. Code § 2200). However, to the extent the Legislature ever had the power to *define* marriage, the citizenry has removed that power by enacting Proposition 22. But because marriage is a common law concept incorporated into the Constitution, it can be redefined only through an express constitutional amendment.

A. Recent Changes in Law Cannot Invalidate Proposition 22.

If any legislation enacted after the adoption of Proposition 22 in March of 2000 is interpreted in a manner that undermines the definition of marriage, it would become unconstitutional. Proposition 22 was enacted through a voter initiative on March 7, 2000. (*See* Cal. Fam. Code § 308.5.) The Legislature may not overturn a voter initiative without submitting the issue to a vote of the people. (Cal. Const. Art. 2, § 10(c).) California Family Code § 297.5 ("A.B. 205"), which is the primary statute upon which the Petitioners rely, was not submitted to the people for a vote. If the Legislature were able to invalidate a voter initiative by enacting subsequent, inconsistent legislation, the voter initiative provisions of the Constitution would be useless.

"Declaring it 'the duty of the courts to jealously guard the right of the people,' the courts have described the initiative and referendum as articulating 'one of the most precious rights in our democratic process.'" (*Associated Homebuilders of the Eastbay, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591 [135 Cal.Rptr. 41] [citations omitted].) Absent explicit authorization for the Legislature to modify an initiative statute without voter approval, "the Legislature [is] prohibited from making even minor, technical alterations to an initiative to correct drafting errors or facilitate the initiative's operation in changed circumstances." (*Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1256 [48 Cal.Rptr.2d 12].) This precludes legislative action that would operate indirectly to invalidate a voter initiative: "[T]he Legislature cannot indirectly accomplish . . . what it cannot accomplish directly by enacting a statute which amends the initiative's statutory provisions." (*Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1487 [76 Cal.Rptr.2d 342].)

Petitioners repeatedly cite to recent changes in California statutes, and judicial construction of those statutes, to argue that the marriage laws are now

unconstitutional. In fact, the City argues that "the closer domestic partnership comes to marriage in its tangible incidents, the more arbitrary the State's marriage exclusion becomes." (City Open Br. at p. 48.) Rymer quotes Judge Kramer's trial court ruling that the fact that "California has granted marriage-like rights to same-sex couples points to the conclusion that there is no rational state interest in denying them the rites of marriage as well." (Rymer Open Br. at p. 72 [quoting AA, p. 115].)

Because this Court must "jealously guard" the initiative power of the people, it may not rely upon legislative policies inconsistent with Proposition 22 to invalidate it. (*See* Section VII, *infra* and Proposition 22 Legal Defense and Education Fund Opening Brief at pp. 27-32 for a discussion of the scope of Proposition 22.) The Court of Appeal strained to reconcile A.B. 205 with Proposition 22 without having to invalidate A.B. 205. If this Court should conclude that the two provisions cannot both be upheld, it should rule that A.B. 205 is unconstitutional.

B. "Marriage" Is a Common Law Concept Incorporated in the California Constitution.

Common law concepts incorporated into the California Constitution may not be changed without amending the Constitution itself. Significantly, the common law meaning of marriage as the union of a man and a woman has remained in the California Constitution unchanged from 1849 through the present.

The California Constitution of 1849 incorporated the historical and common law meaning of marriage – the relationship of a husband and a wife – even as it departed from the common law incidents of marriage by explicitly providing for a wife to own separate property. (*See Dow, supra,* (1867) 31 Cal. at p. 640 ["The only marked exception [to the common law basis of the Constitution] is found in the section . . . providing for the separate property of

the wife and the common property of both husband and wife"].) In protecting the separate property of married women, the Constitution expressly referred to marriage, husbands, and wives. (Cal. Const. 1849, Art. 11, § 14 [emphasis added].)

The Constitution has contained some version of the marital property provision from 1849 through the present. Until 1970 the provision retained the references to "marriage," "husband," and "wife." (*See* West's Ann. Cal. Const. Art. 1, § 21 [referencing prior Art. 20, § 8].) The legislative history of the shortened provision adopted in 1970 makes clear that there was no intent to depart from the common law definition of marriage. (*See* CT:593 [Legislative Counsel explanation that "[t]his measure would restate this section *without substantive change*"] [emphasis added]; CT:601 [Assembly Committee on Elections and Constitutional Amendments summary stating that revision "[r]etains and rewords section identifying the separate property rights of *husband and wife*" and retains "the status quo"] [emphasis added].) Even though the terms "husband" and "wife" are no longer contained in the Constitution, the common law meaning of "marriage" was retained. Thus, the marriage laws cannot violate the California Constitution because the Constitution itself retains the common law definition of marriage.[12]

It is well settled that only a constitutional amendment may change the meaning of provisions adopted into the Constitution from the common law. This Court has ruled that "the common law, except so far as it is inapplicable to our conditions, or has been modified by statute, still remains in force." (*In re Estate of Elizalde* (1920) 182 Cal. 427, 433 [188 P. 560].) Statutes – or

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[12]"Rudimentary principles of construction dictate that when constitutional provisions can reasonably be construed so as to avoid conflict, such a construction should be adopted." (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 371 [285 Cal.Rptr. 231].)

constitutional provisions – are presumed to codify the common law unless there is clear evidence of an intent to change a common law rule. (*See Saala v. McFarland* (1965) 63 Cal.2d 124, 130 [45 Cal.Rptr. 144].)

The most familiar example of the presumption that a common law concept has been codified in the Constitution involves the right to trial by jury. As was most recently described by the Court of Appeal:

> "It is the right to trial by jury *as it existed at common law* which is preserved; and what that right is, is a purely historical question, a fact which is to be ascertained like any other social, political or legal fact."

(*Wisden v. Superior Ct.* (Ct.App. 2004) 124 Cal.App.4th 750, 754 [21 Cal.Rptr.3d 523] [emphasis added], quoting *People v. One 1941 Chevrolet Coup* (1951) 37 Cal.2d 283, 287 [231 P.2d 832].) The constitutional provision creating a right to a jury trial has been amended numerous times, but the right remains "as it existed at common law." (*See id*.)

Absent some change to the Constitution that was expressly intended to change the common law meaning of marriage, the term "marriage" in Article 1, section 21 retains its common law meaning of the union of a man and a woman. (*See Wisden, supra,* 124 Cal.App.4th at p. 754; *One 1941 Chevrolet Coup, supra,* 37 Cal.2d at p. 287.) That provision retains the essence of the common law meaning of marriage – the union of a man and a woman – but not its incidents and consequences. (*Sesler, supra,* 78 Cal. at p. 487.) The incidents and consequences are subject to legislative control. (*See Ex parte Mana* (1918) 178 Cal. 213, 214 [172 P. 986] [while meaning of jury is fixed, qualifications for jurors "is a matter subject to legislative control"].)

The consistent, clear meaning of the term "marriage" in the Constitution by no means precludes judicial review of the marriage laws. The courts may overturn discriminatory provisions such as the now-defunct miscegenation

laws and interference with an inmate's decision to marry. They may not, however, redefine marriage.

The Rymer parties relied below on Justice Chin's concurrence in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1080 [108 Cal.Rptr.2d 409] to argue that the inclusion of "marriage" in the Constitution does not fix its meaning. The issue in *Price* was whether the right to a jury trial, which at common law included a right to be tried in the county where the crime occurred, precluded the government from prosecuting in one trial multiple, related crimes that occurred in multiple counties. Justice Chin concluded that the right to a trial in the county where the crime occurred was *an incident* of the common law right, not *an essential attribute*. (*Id*. at p. 1074.) Accordingly, the joint trial did not violate the common law right to a jury trial. (*Id*. at p. 1079.) Therefore, the comments about changes in things like modern transportation and communication related to the process, not the essence, of the right to a jury trial. (*Id*. at p. 1080.)

Rymer also erroneously compared the Fund's argument about the term "marriage" in the Constitution with an argument that the term "jury" in the Constitution would preclude women from serving on juries. In *Ex parte Mana*, a defendant convicted of a crime by a jury that included women appealed on the ground that a statute permitting women to serve on juries violated the constitutional right to a trial by a jury composed of men. This Court concluded that under the California Constitution of 1879 and the Fourteenth Amendment, the defendant had a right to a jury of men. (*Ex parte Mana, supra,* 178 Cal. at p. 215.) However, in 1911, California amended its Constitution to give women the right to vote and hold office. (*Id*. at pp. 215-16.) This gave the Legislature the authority to enact a law permitting women

to serve on juries. (*Id*. at p. 216.)[13] Absent the 1911 amendment, the term "jury" in the Constitution could not be construed to include women. (*Id*. at p. 215.) The Court was not willing to change the common law meaning without an intervening constitutional amendment expressly giving women additional rights.

Finally, Rymer relied on *Perez v. Sharp* (1948) 32 Cal.2d 711 [198 P.2d 17], for the proposition that the presence of "marriage" in the California Constitution did not prevent this court from striking down the miscegenation law. *Perez* does not help Petitioners. As demonstrated above, the miscegenation laws are a false analogy to the marriage issue. (*See* Section I.C., *supra*.) More importantly, this Court's decision in *Perez* did not change the definition of marriage; it merely removed a statutory impediment to marriage that never existed at common law. The Arizona Court of Appeals rejected a similar effort to rely upon the invalidity of anti-miscegenation laws to overturn marriage laws:

> Implicit in *Loving* [*v. Virginia* (1967) 388 U.S. 1] and predecessor opinions is the notion that marriage, often linked to procreation, is a union forged between one man and one woman. Thus, while *Loving* expanded the traditional scope of the fundamental right to marry by granting interracial couples unrestricted access to the state-sanctioned marriage institution, that decision was anchored to the concept of marriage as a union involving persons of the opposite sex. In contrast, recognizing a right to marry someone of the same sex *would not expand the established right to marry, but would redefine the legal meaning of "marriage*."

(*Standhardt v. Superior Ct.* (Ariz. Ct. App. 2003) 206 Ariz. 276, 283 [77 P.3d 451] [emphasis added].) It is evident that the decisions in *Perez* and *Loving*

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[13]The ability of women to serve on a jury in some other states did not arise until the adoption of the Nineteenth Amendment. (*See In re Opinion of the Justices* (1921) 237 Mass. 591, 593-94[130 N.E. 685].)

simply invalidated a discriminatory application of the historical marriage laws; they did not redefine marriage. Common sense and case law make it clear that the outcome in *Perez* and *Loving* would have been very different if the arguments had been presented by two men or two women of different races. (*See Marriage Cases, supra*, 49 Cal.Rptr.3d at p. 728 n.3 [Parilli, J. concurring] ["Had [*Perez* and *Loving*] involved same-sex couples of different races, one can imagine the opinions would have read very differently"; *see also Baker v. Nelson, supra,* 291 Minn. 310 [no right to same-sex "marriage" under federal constitution], *appeal dismissed for want of a substantial federal question*, (1972) 409 U.S. 810.)[14]

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[14]The Supreme Court's dismissal of the *Baker* appeal for want of a substantial federal question was a ruling that federal due process and equal protection guarantees are not violated by defining marriage as the union of one man and one woman. This has been noted in many state and federal decisions, including by Justice Kennard of this Court in *Lockyer*. (*See, e.g., Lockyer, supra,* 2004) 33 Cal. 4th at p. 1127 [conc. & dis. opn. of Kennard, J.] ["[T]he high court's summary decision in *Baker v. Nelson* [cit.] prevents lower courts and public officials from coming to the conclusion that a state law barring marriage between persons of the same sex violates the equal protection or due process guarantees of the United States Constitution"]; *Hernandez, supra*, 805 N.Y.S.2d at p. 369 [Catterson, J., concurring] ["The [Supreme Court's] dismissal of the appeal [in *Baker*] is an adjudication on the merits of the federal constitutional claims raised, including due process and equal protection, which lower courts are bound to follow"]; *McConnell v. Nooner* (8th Cir. 1976) 547 F.2d 54, 56 ["[T]he Supreme Court's dismissal of the [*Baker*] appeal for want of a substantial federal question constitutes an adjudication of the merits which is binding on lower federal courts"]; *Wilson v. Ake* (M.D. Fla. 2005) 354 F. Supp.2d 1298, 1304-05 [finding *Baker* controlling as to whether federal Defense of Marriage Act is constitutional]; *Adams v. Howerton* (C.D. Cal. 1980) 486 F. Supp. 1119, 1124 [Supreme Court's dismissal of *Baker* appeal was "an important adjudication on the merits"], *aff'd on other grounds* (9th Cir. 1982) 673 F.2d 1036, 1039 n.2 [noting that the Supreme Court's dismissal of the *Baker* appeal "operates as a decision on the merits"]; *In re Cooper* (N.Y. App. Div. 1993) 592 N.Y.S.2d 797, 800 [187 A.D. 128][dismissal in *Baker* "is a holding that the constitutional challenge was considered and rejected"] [quoting trial court

Because "marriage" was incorporated from the common law into the California Constitution, its meaning cannot be changed without amending the Constitution. Furthermore, its presence in the Constitution limits what may be deemed discriminatory in regard to a marriage – only a limitation on a person entering the union of a man and a woman.

IV. THE COURT OF APPEAL PROPERLY HELD THAT THERE IS NO FUNDAMENTAL RIGHT TO SAME-SEX "MARRIAGE."

The Court of Appeal's conclusion that there is no fundamental right to same-sex "marriage" is compelled by controlling and persuasive law, by the legal history of California and the United States, and by the social history of the institution of marriage. Against this overwhelming weight of authority, Petitioners' theme is that the fundamental right to marry is the right to "marry" the "person of one's choice" without regard to sex. But this is no more than a rhetorical convenience to portray case law on the "fundamental right to marry" as supporting Petitioners' cause, when it does not.

A. The Fundamental Right to Marry Is the Right to Enter a Union Between a Man and a Woman.

The fundamental right to marry has always meant the right to enter a legal union between a man and a woman. This was demonstrated in the last great legal challenge to marriage: the battle to legitimize polygamy. Following a nearly fifty-year battle over the structure of marriage, Congress enacted laws in the late Nineteenth Century that were designed to prevent any territory from becoming a state unless it prohibited polygamy. These acts criminalized polygamy in U.S. territories and prohibited polygamists from voting in territorial elections. The U.S. Supreme Court upheld these laws based upon the historical meaning of marriage in England and the colonies. (*See Reynolds v. United States* (1878) 98 U.S 145, 166 [upholding criminal conviction for

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opinion with approval].)

polygamy against First Amendment challenge]; *Murphy v. Ramsey*, (1885) 114 U.S. 15,44-45 [upholding law prohibiting polygamists from voting].) The Court clearly articulated the meaning of marriage in *Murphy*:

> [C]ertainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the coordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of *one man and one woman* in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.

(*Id*. at p. 45 [emphasis added].) Three years later the Court described marriage "as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution . . . ." (*Maynard v. Hill* (1888) 125 U.S. 190, 205.) The *Maynard* Court further described marriage as "the foundation of the family and of society, without which there would be neither civilization nor progress." (*Id*. at p. 211.) The *Maynard* description of the importance of marriage, in turn, has been cited in cases articulating the fundamental right to marry such as *Loving v. Virginia* (1967) 388 U.S. 1, 12 (invalidating law criminalizing marriages between Caucasians and African-Americans), and *Zablocki v. Redhail* (1978) 434 U.S. 374, 384 (invalidating law prohibiting remarriage for individuals who failed to pay child support).

The U.S. Supreme Court was likewise referring to a union of a man and a woman when it articulated the importance of marriage in *Griswold v. Connecticut* (1965) 381 U.S. 479, 486:

> We deal with a right of privacy older than the Bill of Rights–older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.

> It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

The noble purpose is the same as that evoked in *Maynard*, the foundation of society.[15]

Every U.S. Supreme Court case discussing the fundamental right to marry involved a man and a woman. (*Loving, supra,* 388 U.S. at p. 12 [black man and white woman]; *Zablocki, supra,* 434 U.S. at p. 384 [man delinquent on child support payments who wanted to marry a woman]; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541[explicitly tying marriage to procreation, obviously an opposite-sex issue]; *Turner v. Safley* (1987) 482 U.S. 78, 95-96 [prison inmates asserting right to enter legal union between man and woman while incarcerated].)[16]

The Washington Supreme Court cited these cases last year when it rejected the suggestion that recent U. S. Supreme Court cases indicate "that marriage as a fundamental right is no longer anchored in the tradition of marriage as between a man and a woman." (*Andersen, supra*, 158 Wash.2d at p. 29.) Indeed, for a court to find "that there is a fundamental right to marry a person of the same sex . . . is an astonishing conclusion, given the lack of any

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[15]The context of this description of marriage – contraception – is particularly relevant to the right it was describing. (*Id*. at p. 485.) A right to use contraception can hardly have application for anyone but opposite-sex couples.

[16]These cases emphasize the fact that the Supreme Court has never redefined a fundamental right in order to apply it in another context. These cases did not redefine or even broaden the right to marry, but merely removed recent statutory impediments to marriage without changing the fundamental right. There were interracial marriages long before *Loving*, second marriages of deadbeat dads long before *Zablocki*, and married prisoners long before *Turner*. There is no similar history of "marriages" of same-sex couples.

authority supporting it; *no* appellate court applying a federal constitutional analysis has reached this result." (*Id*. [emphasis in original].)

The U. S. Court of Appeals for the Eighth Circuit was equally certain in its analysis:

> In the nearly one hundred and fifty years since the Fourteenth Amendment was adopted, to our knowledge no Justice of the Supreme Court has suggested that a state statute or constitutional provision codifying the traditional definition of marriage violates the Equal Protection Clause or any other provision of the United States Constitution. Indeed, in *Baker v. Nelson*, when faced with a Fourteenth Amendment challenge to a decision by the Supreme Court of Minnesota denying a marriage license to a same-sex couple, the United States Supreme Court dismissed "for want of a *substantial* federal question."

(*Citizens for Equal Protection v. Bruning* (8th Cir. 2006) 455 F.3d 859, 870-71, *reh'g by panel and reh'g en banc denied* (2006) [citing *Baker v. Nelson, supra,* 291 Minn. at p. 186, *app. dism. for want of a subst. fed. question*, 409 U.S. 810 (1972)] [emphasis in original].)

Even when the U. S. Supreme Court pronounced unconstitutional a state's criminal prosecution of private, consensual sexual conduct between adults of the same sex, the Court was careful to note that state protection of marriage was not impacted by the ruling. The majority opinion in *Lawrence v. Texas* cautions that its narrow holding does not involve "an institution the law protects," or "involve . . . public conduct . . . [or] whether the government must give formal recognition to any relationship that homosexual persons seek to enter." (*Lawrence v. Texas* (2003) 539 U.S. 558, 567, 578.)[17] Justice

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[17]The Utah Supreme Court recently noted that marriage involves public conduct outside the narrow scope of *Lawrence*: "[Polygamy] implicates the public institution of marriage, an institution the law protects, . . . [i]n other words, this case presents . . . conduct identified by the Supreme Court in *Lawrence* as outside the scope of its holding." (*Utah v. Holm* (Utah 2006)

O'Connor further emphasized that "[u]nlike the moral disapproval of same-sex relations – the asserted state interest in this case – other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group." (*Lawrence, supra,* 539 U.S. at p. 585 [O'Connor, J., concurring].)[18]

All other state or federal appellate courts that have addressed the issue of whether the fundamental right to marriage extends to same-sex couples have ruled that it does not:

- "The right to marry someone of the same sex, however, is not 'deeply rooted'; it has not even been asserted until relatively recent times." (*Hernandez*, *supra*, 7 N.Y.3d at p. 362);
- Court agreed with "courts in other jurisdictions that have declined to find a 'fundamental right' to government-recognized same-sex marriage." (*Morrison, supra,* 821 N.E.2d at pp. 32-33);
- "The history of the law's treatment of marriage as an institution involving one man and one woman, together with recent, explicit reaffirmations of that view, lead invariably to the conclusion that the

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137 P.3d 726, 743, *cert. denied*,127 S.Ct. 1371 (U.S. 2007).)

[18]Petitioners assert that recent federal cases such as *Lawrence, supra,* 539 U.S. 558 and *Romer v. Evans* (1996) 517 U.S. 620 compel the conclusion that marriage must be extended to same-sex couples. No court has agreed with this proposition to date. (*See, e.g., Lockyer*, *supra*, 33 Cal.4th at p. 1126 [conc. & dis. opn. of Kennard, J.] ["the high court's summary decision in *Baker v. Nelson* [cit.] prevents lower courts and public officials from coming to the conclusion that a state law barring marriage between persons of the same-sex violates the equal protection or due process guarantees of the United States Constitution"]; *Citizens for Equal Protection, supra,* 455 F.3d at p. 868 and n.3 [distinguishing *Lawrence* and *Romer*] *Standhardt, supra*, 206 Ariz. at pp. 281-82 [disagreeing that *Lawrence* created a right to same-sex "marriage"].)

right to enter a same-sex marriage is not a fundamental right." (*Standhardt, supra*, 206 Ariz. at p. 285);

- "We do not" hold that "plaintiffs are entitled to a marriage license." (*Baker v. State, supra*, 177 Vt. at p. 226);
- Court rejected argument that "a denial of a marriage license to a same-sex couple destroys a fundamental right." (*Storrs v. Holcomb* (N.Y. App. Div. 1996) 645 N.Y.S.2d 286, 287);
- "I speak now for the division majority; we conclude that same-sex marriage is not a 'fundamental right.'" (*Dean v. District of Columbia* (D.C. App. 1995) 653 A.2d 307, 331);
- Same-sex "couples do not have a fundamental constitutional right to same-sex marriage arising out of the right to privacy or otherwise." (*Baehr v. Lewin* (1993) 74 Haw. 530, 557 [852 P.2d 44], overturned on other grounds by constitutional amendment);
- "The due process clause of the Fourteenth Amendment is not a charter for restructuring [marriage] by judicial legislation." (*Singer v. Hara* (1974) 11 Wash.App. 247, 264 [522 P.2d 1187] [rejecting claim that marriage laws violate fundamental right to marriage]);
- Court rejected "the assertion that the right to marry without regard to the sex of the parties is a fundamental right of all persons . . . ." (*Baker v. Nelson*, *supra*, 291 Minn. at p. 312).

Even the New Jersey Supreme Court did not find there to be a fundamental right to same-sex "marriage" when the court ordered the State of New Jersey to extend the legal benefits and duties of marriage to same-sex couples under its state constitution's equal protection guarantee: "[W]e cannot find that a right to same-sex marriage is so deeply rooted in the traditions, history, and conscience of the people of this State that it ranks as a fundamental right . . . [N]o jurisdiction, not even Massachusetts, has declared that there is a

fundamental right to same-sex marriage under the federal or its own constitution." (*Lewis, supra,* 188 N.J. at p. 441.) All of these cases recognized that when the fundamental right to marriage cases used the term "marriage," they meant the union of a man and a woman.

This Court likewise has *always* meant the union of a man and a woman when it referred to marriage or the fundamental right to marriage. In *DeLaveaga's Estate, supra,* 142 Cal. at p. 171, the Court quoted *Murphy* and *Maynard* in describing the importance of marriage and families, clearly using the term "marriage" to mean the union of a man and a woman. The Court likewise used "marriage" in its historical sense when it observed that "'[t]he joining of the man and woman in marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime.'" (*Elden v. Sheldon* (1988) 46 Cal. 3d 267, 274-75 [250 Cal.Rptr. 254], quoting *Marvin v. Marvin* (1976) 18 Cal. 3d 660, 684 [134 Cal.Rptr. 815].)

In every instance where this Court has mentioned the fundamental right to marriage, it relied upon federal law as the source of the right. Indeed, in *Perez* the Court cited *Meyer v. Nebraska* (1923) 262 U.S. 390, 399, *Pierce v. Society of Sisters* (1925) 268 U.S. 510, 534, and *Skinner, supra,* 316 U.S. at p. 536, in articulating the right, rather than any California law. The Court's references to marriage as a fundamental right in *Conservatorship of Valerie N.* (1985) 40 Cal. 3d 143, 161 [219 Cal.Rptr. 387], and *People v. Belous* (1969) 71 Cal. 2d 954, 963 [80 Cal.Rptr. 354], gave no new expansive meaning to the right. Indeed, when referencing "this court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex" in *Belous*, the Court cited only one California case addressing marriage – *Perez*, a case that was decided on the basis of the Fourteenth Amendment.

(*See Belous, supra*, 71 Cal. 2d at p. 963.)[19] Thus, there is no precedent from this Court deriving a fundamental right to marry from the California Constitution; all of the precedent relies upon the federal Fourteenth Amendment.

It is disingenuous to claim that the U.S. Supreme Court's discussions of the fundamental right to marry in cases like *Skinner*, *Loving*, *Zablocki* or *Turner*, or any invocation of that line of precedent by this Court, refer to a broad right to unite with any "person of one's choice" rather than a narrower right to enter a legal union between a man and a woman. Even the Massachusetts Supreme Judicial Court recognized in its controversial *Goodridge* decision that same-sex couples cannot be given the right to "marriage" without redefining the term. (*Goodridge, supra,* 440 Mass. at p. 337 ["our decision today marks a significant change to the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries"].)

Indeed, as the New York high court put it last summer:

> The idea that same-sex marriage is even possible is a relatively new one. Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex. A court should not lightly conclude

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[19]The California Courts of Appeal decisions recognizing a right to marriage, whether under a right to privacy or as a fundamental due process right, also involve the right to enter a union of a man and a woman. (*See Ortiz v. Los Angeles Police Relief Ass'n, Inc.* (2002) 98 Cal. App. 4th 1288 [120 Cal.Rptr.2d 670] [discussion of a privacy right to marriage clearly related to the relationship of a man and a woman]; *McCourtney v. Cory* (1981) 123 Cal. App. 3d 431, 438 [176 Cal.Rptr. 639] [addressing law that allegedly interfered with judges' widows remarrying]; *Boren v. Department of Employment Dev.* (1976) 59 Cal. App. 3d 250, 259 [130 Cal.Rptr. 683] [quoting U.S. Supreme Court case referring to the right to marriage].)

> that everyone who held this belief was irrational, ignorant or bigoted. We do not so conclude.

(*Hernandez, supra*, 7 N.Y.3d at p. 361.) Constitutional provisions long predating the idea that same-sex "marriage" could even exist cannot be a legitimate basis for challenging the marriage laws today. To claim that the fundamental right to marriage encompasses same-sex unions evokes Justice Holmes' cogent admonition that "[i]f a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it . . . ." (*Jackman v. Rosenbaum Co.* (1922) 260 U.S. 22, 31, quoted in *Washington v. Glucksberg* (1997) 521 U.S. 702, 723.)

B. Petitioners' Careless Description of the Right Asserted Cannot Bring Same-Sex "Marriage" Within the Established Test for a Fundamental Right.

The Court of Appeal majority followed the proper fundamental rights analysis to determine whether the "right" to same-sex "marriage" is fundamental. (*See Marriage Cases, supra,* 49 Cal.Rptr.3d at pp. 701-702.) This Court uses the methodology for determining whether a right is fundamental set forth in *Glucksberg*. (*See Dawn D. v. Superior Ct.* (1998) 17 Cal. 4th 932, 941 [72 Cal.Rptr.2d 871].) The Court described the methodology as follows:

> First, the court must make a "'careful description' of the asserted fundamental liberty interest." . . . Second, the court must determine whether the asserted interest, as carefully described, is one of our fundamental rights and liberties; central to this determination is whether the asserted interest finds support in our history, our traditions, and the conscience of our people.

(*Dawn D., supra,* 17 Cal. 4th at p. 940 [quoting *Glucksberg*, 521 U.S. at pp. 720-21].) In *Dawn D.* the Court rejected the putative father's broad characterization of an alleged fundamental right "to develop a parental

relationship with his offspring." (*Id*. at p. 938.) Instead, the Court held that "[c]arefully described, the interests for which the alleged biological father . . . seeks constitutional protection is his interest in establishing a relationship with his child born to a woman married to another man . . . ." (*Id*. at p. 941.) The Court held there is no such right. (*Ibid*.)

Petitioners' claim that same-sex couples simply want the right to "marriage" is as carelessly described as the broad parental right demanded in *Dawn D*. But as with *Dawn D.*, the description of the right must be carefully described within the actual legal framework – here, a legal union with a member of the opposite sex. Calling a same-sex union "marriage" cannot qualify as a carefully described right within the meaning of *Dawn D.* because same-sex couples do not seek to enter a legal union with a member of the opposite sex.

Applying the test of support for the asserted right in our history and traditions, the Court of Appeal found that since "the term 'marriage' has traditionally been understood to describe only opposite-sex unions," therefore, "Respondents, who are as free as anyone to enter such opposite-sex marriages, clearly seek something different here." (*Marriage Cases, supra,* 49 Cal.Rptr.3d at p. 702.) And as the Court of Appeal understood, some fundamental rights are not universal, in the sense that they only apply to certain individuals in certain situations:

> [Although some] forcefully argue that a fundamental right should not be defined based on the group that is seeking to exercise it, the due process clause does not require us to blind ourselves to reality. Where the identity of individuals who claim a fundamental right is relevant in defining the precise liberty interest asserted, courts have not ignored such pertinent facts . . . .
>
> Constitutionally protected fundamental rights need not be defined so broadly that they will inevitably be exercised by

> everyone. For example, although the ability to make personal decisions regarding child rearing and education has been recognized as a fundamental right, this right is irrelevant to people who do not have children. Yet, everyone who has children enjoys this fundamental right to control their upbringing. A similar analogy applies in the case of marriage. Everyone has a fundamental right to "marriage," but, because of how this institution has been defined, this means only that everyone has a fundamental right to enter a public union with an opposite-sex partner. That such a right is irrelevant to a lesbian or gay person does not mean the definition of the fundamental right can be expanded by the judicial branch beyond its traditional moorings.

(*Ibid.* [internal citation and footnote omitted].)[20]

Finally, the Court of Appeal turned to the analytical principle that "for purposes of a due process analysis, only rights that are 'objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that 'neither liberty nor justice would exist if they were sacrificed"' are recognized as fundamental." (*Marriage Cases, supra,* 49 Cal.Rptr.3d at p. 703.) The Court of Appeal documented at length why "[i]t is this prong of the analysis that dooms respondents' fundamental rights claim." (*Ibid.* [discussing judicial, legislative and scholarly reactions to *Goodridge*].)

Rymer argues that referring to the right at issue as "same-sex marriage" is like saying that the right at issue in *Loving, supra,* (1967) 388 U.S. 1 and *Perez, supra,* (1948) 32 Cal.2d 711 was "interracial marriage," the right at issue in *Zablocki, supra,* (1978) 434 U.S. 374 was the "right of those who fail to pay child support to remarry," and that *Turner, supra,* (1987) 482 U.S. 78 was about the right to "inmate marriage." (Rymer Open Br. at 59.) That,

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[20]The Court of Appeal could just as easily have analogized to the right to abortion, which is a decision available only to women. (*See* discussion of privacy, subsection C.1., *infra*.)

however, drives the "careful description" into irrelevant detail. No amount of additional detail changes the fact that a union between a man and a woman defines the right at issue in those cases as well as here. Moreover, interracial marriages are as old as recorded history – in fact, the criminal prosecution in *Loving* was the result of the couple having married; deadbeat dads were marrying long before the law in Wisconsin attempted to prevent them from continuing to do so; and there were obviously married inmates before *Turner* – the issue there was only whether prisoners had the right to *enter* marriage while incarcerated, not whether they could *be* married. The right at issue in all those cases was the same: marriage. That is not the right at issue here.

The right at issue, carefully described, is the right to *same-sex* "marriage," which requires redefining the term "marriage." It is beyond dispute that there is no deeply rooted history or tradition of same-sex "marriage" in California. Therefore, there is no fundamental right to it.

C. The Right to Privacy Does Not Add Anything to Petitioners' Claim of a Right to "Marriage."

The unique privacy provision in the California Constitution does not change the analysis of the fundamental right to marriage. This Court's seminal interpretation of the privacy initiative established three essential elements for a privacy claim: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy, based on widely accepted community norms; and (3) a serious invasion of the privacy interest that constitutes an egregious breach of the social norms underlying the privacy right. (*Hill v. National Collegiate Athletic Ass'n* (1994) 7 Cal.4th 1, 35-37 [26 Cal.Rptr.2d 834].) These essential elements provide a threshold for making a privacy claim under article I, section 1.

1. Petitioners Cannot Establish a Legally Protected Privacy Interest.

There simply is no legally protected privacy interest in same-sex "marriage." The autonomy privacy interest protected under article I, section 1 of the California Constitution is premised on "the federal constitutional tradition of safeguarding certain intimate and personal decisions from government interference in the form of penal and regulatory laws." (*Id*. at p. 36.)[21] As already established, the federal autonomy privacy interest does not encompass same-sex "marriage." And as noted above, the California case law addressing the fundamental right to marriage is based upon the federal Constitution. Petitioners cannot make same-sex "marriage" a legally protected privacy interest without redefining the term.[22]

Rymer confuses the liberty interest in private, intimate association identified in *Lawrence* with the fundamental right to marriage.[23] (Rymer Open Br. at 54.) Whatever the outer bounds of the liberty interest in *Lawrence*, the Court expressly stated that its holding did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." (*Lawrence, supra,* 539 U.S. at p. 578.)

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[21]The marriage laws do not in any way interfere with or penalize the relationships of same-sex couples. Thus, they do not infringe on an autonomy privacy interest.

[22]The fact that the scope and application of the California right to privacy is broader than the federal right at times does not help Petitioners. (*See* Clinton Open Br. at p. 35; City Open Br. at p. 82.) There is no precedent for extending that right to redefine marriage.

[23]Rymer also confuses the privacy argument with the free expression argument. (Rymer Open Br. at pp. 55, 59 [referring to message that same-sex couples wish to express].) Ironically, the Rymer Petitioners' privacy arguments are incompatible with their free expression argument that the core of marriage is public expression. (*See infra*, Section VI.) There can be no privacy involved in public expression.

Rymer claims that "the scope of a fundamental privacy interest is defined by the nature of the underlying interests it protects, not by the people who seek to exercise it." (Rymer Open Br. at 59.) Marriage is not the only fundamental right identified by this Court that is defined by those with the right to exercise it. It is undisputable that "the woman's right to choose" is a constitutional right of women. (*See American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 333 [66 Cal.Rptr.2d 210] [referring to "the woman's right to choose"]; *Belous, supra,* 71 Cal.2d at p. 973 n.15 [same].) Because the interest at issue in abortion is whether the woman is going to give birth, this Court is obviously not going to invalidate the right simply because men have not been given equal rights in the decision-making process. Here, the nature of the underlying interest that marriage protects is the procreation and raising of children. (*See* Section V.A., *infra*.) That interest does not implicate same-sex couples any more than the interest in giving women the "right to choose" automatically extends equal decision-making to men. The fact that men may want to have an equal voice in the abortion decision and same-sex couples may want to have their relationships called marriages does not change the analysis.

The Court of Appeal decision in *Ortiz, supra,* 98 Cal. App.4th 1288, is of no help to Petitioners. The *Ortiz* court erroneously stated that, "under the state Constitution, the right to marry and the right of intimate association are virtually synonymous." (*Ortiz, supra,* 98 Cal. App.4th at p. 1303.) Neither of the cases relied upon by *Ortiz* support this proposition. (*See Roberts v. United States Jaycees* (1984) 468 U.S. 609, 619-20; *Warfield v. Peninsula Golf & Country Club* (1995) 10 Cal.4th 594, 626 [42 Cal.Rptr.2d 50].) In fact, both *Roberts* and *Warfield* involved the First Amendment freedom of association in the context of a *social* club, not a right of privacy. These are separate rights grounded in distinct constitutional provisions.

In addressing the Jaycees' First Amendment right of association in *Roberts*, the U.S. Supreme Court never once uttered the word "privacy" or referenced any form of privacy right. (*See Roberts, supra*, 468 U.S. at pp. 609-31.) When this Court addressed the associative rights of the members of the Peninsula Golf & Country Club, it invoked the jurisprudence of *Roberts*, and summarily rejected a claimed violation of the state privacy right. (*See Warfield, supra*, 10 Cal.4th at pp. 624-26, 629-30.) Thus, neither *Roberts* nor *Warfield* support the proposition that "the right to marry and the right of intimate association are virtually synonymous." Furthermore, the U.S. Supreme Court clearly did not view the autonomy right to intimate association and the right to marriage as virtually synonymous in *Lawrence* because it said its decision did not implicate public recognition of the intimate relationship. (*See Lawrence, supra*, 539 U.S. at p. 578.)

Furthermore, the right of intimate association and the right to marry obviously are not the same thing. All people have a right of intimate association that is not impacted by the marriage laws. That right includes, among other things, the right to live with persons not related by blood or by law. (*See City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123 [164 Cal.Rptr. 539]), cited in *Hill, supra*, 7 Cal.4th at p. 34 n.11; *see also Marvin, supra,* 18 Cal.3d at p. 684 [cohabitation recognized, but not treated as marriage].) California's marriage laws do not prohibit homosexual persons from pursuing consensual relationships. The laws simply do not provide for calling same-sex relationships "marriage." Without interfering with same-sex couples' ability to pursue intimate relationships, the marriage laws do not interfere with their right of intimate association. (*Hill, supra*, 7 Cal.4th at p. 36 [autonomy privacy right prohibits interfering with intimate and personal decisions by penalizing them or regulating them]; *Morrison*, *supra*, 821 N.E.2d at p. 34 [rejecting claim of interference with right of intimate association].)

Simply put, intimate acts within the institution of the marital relationship are afforded a cloak of privacy. However, entry to marriage requires overtly public acts:

> Section 350 [of the California Family Code] provides: "Before entering a marriage, or declaring a marriage pursuant to Section 425, the parties *shall first obtain a marriage license from a county clerk*." (Italics added.) The marriage license shall show the parties' identities, real and full names, places of residence, and ages. (§ 351.) The applicants may be required to present identification and the clerk may examine them under oath or request additional documentary proof as to the facts stated. (§ 354.) A marriage license shall not be granted if either of the applicants lacks the capacity to enter into a valid marriage or is under the influence of alcohol or drugs at the time he or she applies for the license. (§ 352.) A marriage license expires 90 days after it is issued. (§ 356.)

(*Estate of Depasse, supra,* 97 Cal. App.4th at p. 100.) In addition, the parties must publicly declare that they take each other as husband and wife. (§ 420(a).) These statutory requirements, similar to those in most states, serve to underscore the fallacy of Petitioners' privacy arguments. There is no privacy interest in the *formation* of marriage under the California Constitution.

2. California Community Norms Preclude Petitioners from Having a Reasonable Expectation of Privacy in Same-Sex "Marriage."

Same-sex couples do not have a reasonable expectation of privacy in regard to marriage. As the Court noted in *Hill*, "customs, practices, and physical settings surrounding particular activities may create or inhibit reasonable expectations of privacy. . . . A 'reasonable' expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms." (*Hill, supra*, 7 Cal.4th at pp. 36-37.) There is no custom, practice, or broadly-based and widely accepted community norm of same-sex "marriage" in California. Indeed, the marriage laws, adopted from the common law and most recently affirmed by the voters in 2000, are conclusive

evidence that the only broadly-based and widely accepted community norm in California is that marriage is the union of one man and one woman.

Again assuming that "marriage" has some other meaning and some purpose unrelated to procreation and child rearing, the City essentially asserts that the burden of proof is reversed as to this second prong of the *Hill* test – that a reasonable expectation of privacy exists, unless one can prove otherwise. (City Open Br. at p. 85 [citing *Lungren, supra*, 16 Cal.4th at pp. 338-39].) In other words, the City asserts that if the Respondents are unable to demonstrate that persons do not have reasonable expectations of privacy in same-sex "marriage," those expectations then exist as a matter of law. However, *Lungren* did not alter the burden of proof, which still must be carried by the Petitioners, and it did not create a rebuttable presumption of an expectation. Rather, *Lungren* addressed the legalities surrounding one aspect of privacy, a woman's "right to choose." Here, there is no well recognized or deeply rooted tradition of same-sex "marriage." Although a creative effort, the City cannot manufacture an expectation of privacy in same-sex "marriage" by shifting the burden of proof.

In an alternate and less creative effort to reach the same result, the Rymer Petitioners advocate that the "community norm" in California now favors same-sex "marriage." (Rymer Open Br. at pp. 61-63.) For this proposition they rely upon *Lawrence* and A.B. 205. They argue that "[i]n *Lawrence*, the [Supreme] Court found the connection to be obvious, based in part on society's 'emerging recognition' that lesbians and gay men have relationships and create families essentially like those of heterosexuals." (Rymer Open Br. at 62). Yet, this concept appears nowhere within the text of *Lawrence*. The "emerging recognition" in *Lawrence* was "protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." (*See Lawrence, supra,* 539 U.S. at p. 572.) In arguing that A.B. 205

creates the community norm, Rymer ignores both Proposition 22 and the legislative choice by the California Legislature *not* to redefine marriage when it chose to provide benefits to same-sex couples. There is no legal standard nor competent evidence that same-sex "marriage" is a social norm in California or the United States, and it does *not* have "emerging recognition" in America outside of Massachusetts.

3. The Marriage Laws Are Not a Serious Invasion of a Privacy Interest.

In sum, "[a]ctionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute *an egregious breach of the social norms* underlying the privacy right." (*Hill, supra*, 7 Cal.4th at p. 37 [emphasis added].) There is no such social norm here, and Petitioners have failed to establish a privacy interest.

V. PETITIONERS HAVE FAILED TO MAKE THE THRESHOLD SHOWING FOR AN EQUAL PROTECTION CHALLENGE.

This Court has held that "[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." (*In re Eric J.* (1979) 25 Cal. 3d 522, 530 [159 Cal.Rptr. 317].) The groups must be "similarly situated with respect to the legitimate purpose of the law . . . ." (*Purdy & Fitzpatrick v. State* (1969) 71 Cal.2d 566, 578 [79 Cal.Rptr. 77].) The Courts of Appeal have stated this as a threshold requirement: "At the threshold, the proponent of an equal protection claim must demonstrate that the challenged state action results in disparate treatment of persons who are similarly situated with regard to a given law's legitimate purpose." (*People v. Raszler* (1985) 169 Cal.App.3d 1160, 1166-67 [215 Cal.Rptr. 770]; *see also People v. Moore* (1991) 226 Cal.App.3d 783, 786 [277 Cal.Rptr. 82]; *People v. Caddick* (1984) 160 Cal.App.3d 46, 50-51 [206 Cal.Rptr. 454]; *In re Strick* (1983) 148 Cal.App.3d 906, 912 [196 Cal.Rptr.

293]; *cf. Johnson v. Robison* (1974) 415 U.S. 361, 382-83 [no invidious discrimination where two groups "are, in fact, not similarly circumstanced"].) The burden of establishing that challengers are similarly situated is on the proponents of the equal protection challenge, and they must establish that they are similarly situated "*with respect to the legitimate purpose of the law*." (*Purdy, supra*, 71 Cal.2d at p. 578 [emphasis added]; *see also Strick, supra*, 148 Cal.App.3d at p. 913.) If a party fails to carry its threshold burden of proof by a preponderance of the evidence, there is no reason for the Court to ever reach the question of the standard of review – the party has no equal protection claim. (*In re Eric J., supra*, 25 Cal.3d at pp. 531-33.)

Petitioners made no effort below to carry their burden of identifying the legitimate purpose behind California's recognition of marriage, or to prove that same-sex couples are similarly situated to opposite-sex couples with regard to that purpose. Even though the Fund raised the issue of this burden of proof (CT:573-75), the trial court failed to require Petitioners to meet it. Worse yet, the Court of Appeal assumed that Petitioners met their burden, when they did not. Petitioners' failure to meet their burden of proof requires rejection of the equal protection claim.

A. Petitioners Have Not Identified the State's Interest in Regulating Marriage.

Petitioners nowhere identify the legitimate purpose of the marriage laws. Rather, they appear to assume that the purpose of the marriage laws is to give affirmation to "committed" relationships. But as the Indiana Court of Appeals noted, even if "commitment" were the essence of marriage, that does not explain why the government regulates marriage. (*Morrison*, *supra*, 821 N.E.2d at p. 29.) The intermediate appellate court in *Hernandez* put it more bluntly: "Marriage laws are not primarily about adult needs for official recognition and support . . . ." (*Hernandez*, *supra*, 805 N.Y.S.2d at p. 360.)

Based upon the history of marriage in California, the state's interest in regulating marriage is to steer procreation into that institution. The Court of Appeal wrongly rejected that interest because the Attorney General disavowed it and because of recent legislation equating same-sex parents with married parents. (*Marriage Cases, supra*, 49 Cal.Rptr.3d at p. 723 n.33.) But under rational basis review, the Court must consider every reasonably conceivable basis for giving an advantage to a specific group, and sustain the law "if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." (*Romer, supra,* 517 U.S. at p. 632.) The analysis is not limited by an Attorney General's choice of politically acceptable arguments. In addition, as an independent party, the Fund has the right to defend the marriage laws through arguments the Attorney General has not chosen to make, whether addressing rational basis or strict scrutiny.

California courts have long recognized, consistently with other jurisdictions, that there is a fundamental relationship between procreation and marriage. Indeed, the interest in procreation is so strong that the law has provided for an annulment if either the man or the woman, knowing that he or she was unable or unwilling to bear children, concealed that fact prior to marriage. This Court held in 1859 that "the first purpose of matrimony, by laws of nature and society, is procreation. A woman, to be marriageable, must, at the time, be able to bear children to her husband . . . ." (*Baker v. Baker* (1859) 13 Cal. 87, 103 [granting annulment because woman was pregnant by another man at time of marriage]; *see also Security-First Nat'l Bk. of Los Angeles v. Schaub* (1945) 71 Cal. App. 2d 467, 478 [162 P.2d 966] ["first purpose of matrimony, by the laws of nature and society, is procreation"].) In another early case, the Court recognized that one of the "'principal ends of marriage . . . [is] the procreation of children *under the shield and sanction of*

the law.'" (*Sharon v. Sharon* (1888) 75 Cal. 1, 33 [16 P. 345] [citation omitted; emphasis added].) Courts have held that because procreation "is vital to the conjugal relationship, . . . the very essence of the marriage relation, . . . concealment of . . . sterility is a fraud that vitiates the marriage contract." (*Vileta v. Vileta* (1942) 53 Cal. App. 2d 794, 796 [128 P.2d 376] [citing *Baker v. Baker*]; *see also*, *Hultin v. Taylor* (1970) 6 Cal. 3d 802, 805 [100 Cal.Rptr. 385] [man's false representation before marriage of desire to have children sufficient to warrant annulment]; *In re Marriage of Liu* (1987) 197 Cal. App. 3d 143, 148 [242 Cal.Rptr 649] [marriage properly annulled where woman entered marriage for purpose of obtaining 'green card,' did not intend to engage in sexual relations or to perform her marital duties, and parties never cohabited as husband and wife].) In fact, one of the objections to interracial marriage raised in *Perez* was to the potential for procreation – that the progeny of interracial couples would be inferior. (*See Perez, supra*, 32 Cal.2d at p. 727.)

California law is consistent with other jurisdictions in recognizing that the relationship between natural procreation and marriage is the reason for state recognition, promotion and regulation of the institution. The U.S. Supreme Court has long recognized the importance of marriage to society in regard to procreation, calling marriage "the foundation of the family and of society, without which there would be neither civilization nor progress." (*Maynard, supra,* 125 U.S. at p. 211.) Indeed, the D.C. Court of Appeals noted in *Dean, supra,* 653 A.2d at p. 332 that the U.S. Supreme Court "has called this right [to marriage] 'fundamental' *because* of its link to procreation" (emphasis added). Until recently, every major civilization throughout history, transcending religion and culture, has recognized and fostered only opposite-sex relationships within marriage. (PETER LUBIN & DWIGHT DUNCAN, *FOLLOW THE FOOTNOTE OR THE ADVOCATE AS HISTORIAN OF SAME-SEX MARRIAGE*, 47

CATH. U. L. REV. 1271, 1324 (1998).) Government has an interest in promoting responsible procreation where children will be more likely to be raised by their biological, married mother and father.

Almost every court that has addressed this issue has found that adoption and promotion of this norm is a principle basis for the definition of marriage. In one of the nation's first challenges to the opposite-sex nature of marriage, a Washington court found that marriage "is based upon the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children." (*Singer, supra,* 11 Wash.App. at p. 259.) Even though not every married couple has children, "[t]he fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race." (*Id.*) The fact that some couples cannot or choose not to procreate does not undermine the inherent connection. Usually only one of the two members of an infertile couple has a problem conceiving a child. Men often remain fertile well into their late years. And birth control sometimes fails. In all of these cases, the marital relationship serves the state purpose of steering procreative capacity away from conception of children out of wedlock.

Petitioners claim that *Turner v. Safley* demonstrates the decoupling of procreation and the fundamental right of marriage in federal constitutional analysis. But the Washington Supreme Court recently rejected this same assertion, noting that "most inmates would eventually be released and thus most inmate marriages were formed in the expectation they would be fully consummated." (*Andersen, supra,* 158 Wash.2d at p. 29 [citing *Turner, supra,* 482 U.S. at p. 96].) Moreover, marriage in *Turner* was noted often to be "a precondition to [among other things] benefits such as legitimation of children

born out of wedlock." (*Id.*) In the final analysis, as the *Andersen* court observed:

> Like *Skinner*, *Loving*, and *Zablocki*, *Turner* involved burdens on individuals seeking opposite-sex marriage. While the Court did not expressly link marriage to procreation and other rights related to procreation and children as it had in other cases, we also do not find in *Turner* any signal that the case marked a turning point in the definition of marriage as a fundamental right. We do not agree that the Court in *Turner* intended its analysis to mean that marriage as a fundamental right is no longer anchored in the tradition of marriage as between a man and a woman.

(*Andersen, supra,* 158 Wash.2d at p. 29)

The overwhelming weight of federal and state court decisions have recognized that steering procreation into marriage (and raising for the offspring that opposite-sex couples naturally produce) is the state's legitimate interest in regulating marriage. (*Citizens for Equal Protection, supra,* 455 F.3d at p. 867 [finding that "responsible procreation" was a rational basis for Nebraska limiting marriage to opposite-sex couples]; *Wilson, supra,* 354 F. Supp.2d at pp. 1308 - 09 (finding that Federal Defense of Marriage Act was rationally related to government interest in "encouraging the raising of children in homes consisting of a married mother and father"]; *Smelt v. County of Orange* (C.D. Cal. 2005) 374 F. Supp.2d 861, 880["The Court finds it is a legitimate interest to encourage the stability and legitimacy of what may reasonably be viewed as the optimal union for procreating and rearing children by both biological parents"] (rev'd in part on other grounds, 447 F.3d 673); *Andersen, supra,* (2006) 158 Wash.2d 1 at p. 42 ["We conclude that limiting marriage to opposite-sex couples furthers the State's interests in procreation and encouraging families with a mother and father and children biologically related to both"]; *Hernandez, supra*, 7 N.Y.3d at p. 360 [finding that it was rational for the Legislature to limit marriage to opposite-sex couples because

of procreation and for the benefit and stability of children]; *Morrison, supra*, 821 N.E.2d at pp. 30-31 ["The State of Indiana has a legitimate interest in encouraging opposite-sex couples to enter and remain in, as far as possible, the relatively stable institution of marriage for the sake of children who are frequently the natural result of sexual relations between a man and a woman"]; *Standhardt, supra*, 206 Ariz. at pp. 287-88 [reasonable for state to conclude that it is important to steer opposite-sex couples into marriage for the benefit of children]; *see also Lofton v. Dept. of Children & Family Services* (11th Cir. 2004) 358 F.3d 804, 818-19, *cert. denied* (2005) 125 S.Ct. 869.)

The issue is not whether any individual parent is or can be a good parent – parenting skills can be learned. Nor is the issue one of whether some children raised in "alternative" family structures do well, or even excel – some surely do. The issue, as the Seventh Circuit Court of Appeals pointed out in a case involving an exceptional plaintiff, is that "law and policy are based on the general rather than the idiosyncratic . . . ." (*Irizarry v. Board of Ed.* (7th Cir. 2001) 251 F.3d 604, 608 [rejecting equal protection challenge to domestic partner benefits policy for same-sex couples only].) Procreation and parenting are not natural consequences of any same-sex relationship. Parenthood occurs *only* by intentional involvement of third parties. Same-sex couples will never unintentionally become parents, and they can never both be the biological parents of their "offspring."

The state's interest in responsible, natural procreation is a legitimate purpose for recognizing and regulating marriage. Same-sex couples cannot procreate, are not similarly situated with opposite-sex couples in regard to this legitimate state interest, and cannot implicate the state's interest in regulating marriage.

B. Petitioners Have Not Established that Same-sex Couples Are Similarly Situated with Opposite-Sex Couples.

Petitioners have made no effort to prove that same-sex couples are similarly situated with opposite-sex couples in regard to the legitimate purpose of the marriage laws. At most, they assume that same-sex couples are similarly situated with opposite-sex couples because they enter committed, long-term relationships and may raise children in those relationships. But even if that were normative, they have not established that the purpose of the marriage laws is to affirm the commitment of all couples in long-term relationships. At best, Petitioners can raise a dispute about whether same-sex parenting has similar outcomes with married couples. The New York high court recently held that same-sex parenting "studies on their face do not establish beyond doubt that children fare equally well in same-sex and opposite-sex households. What they show, at most, is that rather limited observation has detected no marked differences." (*Hernandez, supra*, 7 N.Y.3d at p. 360.) One of the *Goodridge* dissents likewise acknowledged the methodological problems in same-sex parenting studies, and concluded that there is inadequate evidence to find that same-sex parenting is "as optimal as the biologically based marriage norm." (*Goodridge, supra*, 440 Mass. at pp. 387-90 [Cordy, J., dissenting].)

In contrast, the Fund presented a solid body of current social science research below supporting the conclusion that the state has a legitimate interest in steering procreation into stable, married households because that is the optimal context not only for natural procreation, but also for child rearing. (*See*, *e.g.* Carlson Decl., ¶¶ 6-7, 10, CT:369, 371; Young Decl., CT:422, 437-440, 444; Rekers Decl. ¶¶ 5-19.)

As one of the Fund's experts concluded:

> Thus, dual-gender and heterosexual parenting in which married mothers and fathers live together in the same home

> provide stable and secure environments for children. This natural family structure provides greater benefits for nearly every aspect of children's well-being, including better emotional and physical health, less substance abuse, lower rates of early sexual activity by girls, better educational opportunity, and less delinquency for boys. Only the family headed by a mother and father has the necessary parent figures for providing the best environment to promote stable psychological development of most children.

(Rekers Decl., ¶ 19.)

Even if a same-sex couple engages a third party to "procreate," they cannot provide a child the same benefits the child's own biological parents would. Every child raised in a same-sex home has been deliberately deprived of a mother or a father. There is no generally applicable, generally accepted social science evidence that children raised by a same-sex couple do as well as children raised by their own biological parents. At most the research suggests directions for further research. (Rekers Decl., ¶¶ 26-27.) Such research cannot constitute a scientific basis for this Court to reformulate public policy.

Indeed, even if this Court were to venture into the legislative role, there is no research – none – comparing children raised from birth by male couples or by female couples with children raised by their own biological parents. The fact that the state permits same-sex couples, non-biological adoptive parents, or single parents to raise children does not mean the state must ignore the evidence demonstrating that the *optimal* environment for raising children is in a stable household comprised of their own biological, married parents.[24] The

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[24]Such an arrangement being the optimal one for society, "[i]t is therefore entitled to a presumption in its favor over any other form of lifestyle, whether it be polygamy, communal living, homosexual relationships, celibate utopian communities or a myriad of other forms tried throughout the ages, none of which succeeded in supplanting the traditional family. . . . A primary function of government and law is to preserve and perpetuate society, in this

social science evidence is very clear: children generally do best when raised by their own married, biological parents. (Carlson Decl., ¶ 9, CT:371.; Rekers Decl., ¶¶ 5-11; Maggie Gallagher, *Does Sex Make Babies? Marriage, Same-Sex Marriage and legal Justifications for the Regulation of Intimacy in a Post-Lawrence World*, 23 QLR 447, 466-68 [2004].)

Because they have failed to counter this social science evidence by a preponderance of the evidence, Petitioners cannot meet the threshold for an equal protection challenge. Accordingly, this Court should not even consider what standard of review would be appropriate for the alleged equal protection claims.

C. The Marriage Laws Do Not Discriminate on the Basis of Sex.

1. Laws that treat men and women equally are not discriminatory.

California's marriage laws do not discriminate on the basis of sex – they treat men and women equally. Neither men nor women may marry a person of his or her same sex. Petitioners have not cited a single California case that has found sex discrimination – or applied strict scrutiny – where both sexes are treated equally. Instead, they attempt to push California law well beyond all established parameters to where the very use of the terms "male" and "female" in a statute are presumably unconstitutional sex discrimination and "sex-stereotyping." The novelty of Petitioners' arguments is highlighted by the dearth of support for their claim in California or any other jurisdiction, despite an abundance of cases analyzing sex discrimination.

Instead of rejecting all distinctions between men and women, California's strong public policy against sex-discrimination ensures that one sex cannot be given *preferential* treatment over the other. It is well-established

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instance, the family." (*Constant A. v. Paul C.A.* (1985) 344 Pa.Super 49, 59 n.6 [496 A.2d 1].)

that equal protection is satisfied "so long as persons similarly situated with respect to the legitimate purpose of the law *receive like treatment*." (*Connerly v. State Personnel Board* (2001) 92 Cal.App.4th 16, 32 [112 Cal.Rptr.2d 5] [emphasis added]; *see also Koire v. Metro Car Wash* (1985) 40 Cal.3d 240 [219 Cal.Rptr. 420]) ["public policy in California mandates the *equal* treatment of men and women"] [emphasis in original]; *cf.* Cal. Const. Art. 1, § 31 [requiring a showing that either males or females were subject to discrimination or preferential treatment, as discussed in *Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th 537, 559 [101 Cal.Rptr.2d 653]].) As this Court has held in the context of sex discrimination, "[d]iscriminate means to make distinctions in treatment; show partiality (in favor of) or prejudice (against)." (*Hi-Voltage Wire Works, supra,* 24 Cal.4th at p. 559.) This Court's discussion of sex discrimination in *Hi-Voltage Wire Works* flatly precludes the sex discrimination claim in this case.

The Court of Appeal in this case rightly recognized that absent disparate treatment of either men or women, their can be no "discrimination" as that term is universally understood. (*Marriage Cases, supra*, 49 Cal.Rptr.3d at p. 707.) Here, both males and females are equal under the law; neither is given preferential treatment.[25]

Laws do not implicate equal protection concerns merely by recognizing the distinction between "male" and "female." As Justice Ginsberg has noted, although recognizing "inherent differences" between the races is never a

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[25]Petitioners also try to bolster their sex discrimination argument by analogizing the marriage laws to a hypothetical statute that requires courts to give custody of male children to fathers and female children to mothers. (*See* City Open Br. at p. 73.) The City mistakes sex discrimination with the fundamental right to parent. While the hypothetical statute would not likely be sex discrimination without giving preference to men or women, it would infringe the liberty interest in parenting one's children.

legitimate purpose of the law and is easily recognized as a product of invidious racial discrimination, recognizing inherent differences between the sexes is a much different matter:

> Supposed "inherent differences" are no longer accepted as a ground for race or national origin classifications. Physical differences between men and women, however, are enduring: "The two sexes are not fungible; a community made up exclusively of one sex is different from a community composed of both." "Inherent differences" between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraint on an individual's opportunity.

(*U.S. v. Virginia* (1996) 518 U.S. 515, 533 (quoting *Ballard v. United States* (1946) 329 U.S. 187, 193.)) There is no credible argument that the marriage laws are meant to denigrate one sex or the other.

The state recognizes sex in contexts that respect sexual differences without denigrating either sex. For example, the state often requires separate restroom accommodations for males and females. (*See* CCP § 216(a) [requiring male and female restrooms for jurors]; Cal. Bus. & Prof. Code § 13651 [requiring all services stations to provide separate male and female restrooms].) There is no doubt that when the government required separate public facilities for blacks and whites, it was a mark of racial prejudice and exemplified invidious racial discrimination. But Petitioners cannot seriously contend that requiring separate bathrooms for males and females is rooted in invidious sex discrimination. Like the marriage laws, these laws do not denigrate men or women, but merely recognize that the sexes are not fungible. (*Virginia, supra,* 518 U.S. at p. 533.)

It is nonsensical to assert that defining marriage as the union of a man and a woman discriminates against both men and women simultaneously on the basis of sex. In fact, no majority appellate decision in the United States has ever held that a state's marriage laws discriminate on the basis of sex. As the

Vermont Supreme Court held: "[h]ere, there is no discrete class subject to differential treatment solely on the basis of sex; each sex is equally prohibited from precisely the same conduct. *Indeed, most appellate courts that have addressed the issue have rejected the claim that defining marriage as the union of one man and one woman discriminates on the basis of sex*." (*Baker v. State, supra,* 170 Vt. at p. 215 n.13 [citing cases; emphasis added]; *see also see also Anderson*, *supra*, 158 Wash.2d at p. 48; *Wilson, supra,* 354 F. Supp. 2d at pp. 1308-09; *Baker v. Nelson*, *supra*, 291 Minn. at p. 315 [the limitation of marriage to a man and a woman is "based upon the fundamental difference in sex"]; *cf. Jones, supra,* 501 S.W.2d at p. 590 [recognizing and adopting *Baker v. Nelson's* binding conclusion that no federal constitutional claims arise from marriage laws].)

Only one appellate court in America has ever found that the definition of marriage *might* constitute sex-based discrimination – a plurality of the Hawaii Supreme Court in *Baehr, supra,*74 Haw. at p. 572 (overruled by constitutional amendment). Noted constitutional scholar Bernard Schwartz has described the logic used in *Baehr* as "an affront to both law and language that well deserves its place on the list of worst decisions." (BERNARD SCHWARTZ, A BOOK OF LEGAL LISTS 182 (1997).) "The *Baehr* decision is so contrary to both established law and common sense that one is almost speechless before this patent reductio ad absurdum of equal protection jurisprudence." (*Id.* at p. 183.)

2. Acknowledging differences between men and women is not "sex stereotyping."

Petitioners' argument that the marriage laws are unconstitutional because they constitute "sex-stereotyping" is equally unavailing. The case law recognizing sex-stereotyping requires that in order to succeed on such a claim the challenger must, like a normal sex discrimination claim, prove that there

is unequal treatment of men or women. Sex stereotyping was first recognized by the Supreme Court in *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 251. The Court explained the connection between sex stereotyping and sex discrimination: "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." (*Id.* at p. 250.)[26] The chorus of cases following *Price Waterhouse* are unanimous in holding that for there to be sex-stereotyping, there must be unequal treatment of either men or women.

For example, the Ninth Circuit, sitting en banc, recently affirmed a panel decision that found that a corporate sex-specific grooming policy was not sex-stereotyping because the policy did not place an unequal burden on men or women. (*Jespersen v. Harrah's Operating Company, Inc.* (9th Cir. 2006) 44 F.3d 1104 [en banc].) In *Jespersen*, a female bartender challenged the sex-specific grooming policy at Harrah's casino. (*Id.* at p. 1107.) The policy required females to wear stockings and colored nail polish, and to wear their hair "teased, curled, or styled." (*Ibid.*) Men were prohibited from wearing makeup or nail polish and had to maintain short haircuts. (*Ibid.*) The plaintiff refused to comply with the female grooming policy, so she was fired. (*Ibid.*) She later sued, claiming that the policy was sex-stereotyping under the Supreme Courts' decision in *Price Waterhouse*. The Ninth Circuit rejected the claim, recognizing that "[w]hile those individual requirements differ according to gender, none on its face places a greater burden on one gender than the other. Grooming standards that appropriately differentiate between the genders are not facially discriminatory." (*Id.* at p. 1110 [emphasis added]

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[26]Sex-stereotyping has traditionally been applied to sex-discrimination claims under Title VII. As the City notes, however, some courts have also applied the theory to equal protection claims. (*See* City Open Br. at p. 80 and n. 32.)

[citing unanimity among circuits that sex-stereotyping claim is not cognizable absent disparate treatment of either males or females].) Because there was no unequal treatment of men or women, the policy did not constitute sex-stereotyping. (*Id.* at p. 1112.)

In short, far from supporting Petitioners position, the cases discussing sex-stereotyping unanimously recognize that, just as with sex discrimination, one sex must be treated less favorably than the other. Because California's marriage statutes treat men and women exactly the same, and indeed impose no sex-based expectation whatsoever, the laws do not implicate sex-stereotyping.

But even if Petitioners had some legal foundation for establishing a claim of sex-stereotyping where neither sex is subject to unequal treatment, they have no evidence that the marriage laws assume particular roles that individuals are to play within marriage. As the Court of Appeal recognized:

> "It is one thing to show that long-repealed marriage statutes subordinated women to men within the marital relation. It is quite another to demonstrate that the authors of the marriage laws excluded same-sex couples because of incorrect and discriminatory assumptions about gender roles or anxiety about gender-role confusion. That evidence is not before us."

(*Marriage Cases, supra*, 49 Cal.Rptr.3d at p. 709 [*quoting Baker v. State, supra*, 170 Vt. at p. 215 n.13].)

Indeed, the context of the legislative history cited by Petitioners (Rymer at 41; City at 79), reveals the origins of marriage regulation as being designed primarily to benefit children, not couples. (City Request for Judicial Notice ("CRJN"), Ex. 2, Ex. E at p. 2 [Bill digest, Assembly Committee on Judiciary, Bill No. 607 (1977-1978 Reg. Sess)] ["the status of marriage and its benefits are not really designed to benefit the married couple. Its real purpose is to protect the children"].) Neither the Bill Digest nor § 300 itself suggests, much less requires, that individuals must assume certain roles in the marriage.

Although the Assembly Bill Digest noted that "typically" it is women who stay home to raise children, it did not deny that it can also be men, or say that couples where the man stays home with the children would need marriage less. Moreover, the Bill Digest did not imply an intent to make any incident of marriage dependent upon whether a man or a woman might be a stay-home parent. The author's point, as is obvious from the context, was that children will normatively result from an opposite-sex union and benefit from marriage. Thus, the state has a strong interest in encouraging those couples to stay together and raise the children together. (*Ibid*.)

More importantly, selective legislative history does not establish the intent of the Legislature in enacting the marriage law:

> We rely on the legislative history of an ambiguous statute as dispositive only when that history is itself unambiguous. (Citation) The members of the Legislature have no opportunity to disapprove legislative history, and the Governor has no chance to veto it. Legislative history directly represents only the views of the few actors in the legislative process, including lobbyists and committee staff people, who are intimately involved with particular legislation . . . . Only a clear statement of intent allows a court to reasonably indulge the inference that the individual members of the Legislature may have given at least a little thought to that statement before voting on the bill."

(*Medical Board of California v. Superior Court* (2003) 111 Cal.App.4th 163, 179 [4 Cal.Rptr.3d 403] [quoting *J.A. Jones Construction Co. v. Superior Court* (1994) 27 Cal.App.4th 1568, 1578 [33 Cal.Rptr.2d 206] [noting that "reading the tea leaves of legislative history is often no easy matter"].) Here, the short passage of legislative history by one sponsor of the bill cited by Petitioners is sorely insufficient to establish the intent of the Legislature in codifying the marriage law. There simply is no credible evidence that sex-stereotyping is the basis for the marriage laws.

3. The miscegenation cases do not support the sex discrimination argument.

There are at least three profound fallacies in Petitioners' argument that opposite-sex marriage laws are sex discrimination by analogy to *Loving* and *Perez*. First, interracial marriage is nothing new – those decisions did not require a change in marriage as it has existed since the dawn of history. In fact, the criminal prosecution at issue in *Loving* was *because* the couple was married. Second, the statutes were designed to denigrate African Americans and promote white supremacy. (*See Loving*, *supra*, 388 U.S. at pp. 7, 11; *Perez*, *supra*, 32 Cal.2d at pp. 719-20, 722, 724.) Third, the very purpose of the anti-miscegenation laws was to maintain discrimination against African-Americans by attempting to limit interracial procreation, which cuts against a core purpose of marriage. (*See Perez, supra*, 32 Cal.2d at p. 727.)

It is indisputable that the miscegenation laws in America were legislatively enacted rather than inherited from the common law. While there have been times in American history when the majority of the states prohibited interracial marriage, there has never been a time when the entire nation (or the entire world) did so.[27] Only sixteen states prohibited interracial marriage at the time of the Supreme Court's decision invalidating such laws in 1967 – thirty-three states had either never prohibited interracial marriage or had legislatively repealed the laws. (*Cf. Loving*, *supra*, 388 U.S. at p. 6 & n.5 [Maryland repealed its prohibition in 1967, prior to the Court's decision].)

Both the U.S. Supreme Court in *Loving* and this Court in *Perez* discussed and relied upon the fact that the miscegenation statutes at issue were premised on an unconstitutional promotion of white supremacy. This violated

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[27] *See* www.lovingday.org/map.htm, where an interactive map shows, by year, the number of states with laws against interracial marriage, from the first law in 1662 to the Supreme Court's invalidation of the remaining miscegenation laws in 1967 (last visited June 13, 2007).

the federal Constitution specifically because the Fourteenth Amendment was passed to promote racial equality – to require that racial minorities be afforded equal protection of the laws. (*See Loving, supra*, 388 U.S. at pp. 7, 11; *Perez*, *supra*, 32 Cal. 2d at pp. 719-20, 722, 724.) As the U.S. Supreme Court held in *Loving*, "[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." (*Loving*, *supra*, 388 U.S. at p. 10; *see also McLaughlin v. Florida* (1964) 379 U.S. 184, 191-92 ["central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States"].) Because the Virginia law was "designed to maintain White Supremacy," it violated "the central meaning of the Equal Protection Clause" and could not be justified by any overriding public interest. (*Loving, supra*, 388 U.S. at pp. 11-12.)

As the Minnesota Supreme Court held in *Baker v. Nelson*, "in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental differences in sex." (*Baker v. Nelson*, 291 Minn. at p. 315.) And as noted by numerous courts, the Supreme Court's dismissal of *Baker* for want of a substantial federal question was a decision on the merits that is binding on all other courts in regard to federal law.[28] "Thus, the Supreme Court, five years after it decided *Loving*, determined that that [sic] case did not support an argument by same-sex couples that precluding them from marrying violated the Fourteenth Amendment." (*Morrison*, *supra*, 821 N.E.2d at p. 20.) That summary disposition rejected a claim based upon sex discrimination. (Fund Request for Judicial Notice (FRJN), Ex. 1 at p. 16 ["The discrimination in this case is one of gender"] [Baker Jurisdictional Statement at 16].)

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[28] *See* note 14, *supra*.

In contrast to the racial prejudice motivating the miscegenation laws, the historical meaning of marriage as the union of a man and a woman developed as a universal principle without any concept that it could be anything else. (*See Hernandez, supra*, 7 N.Y.3d at pp. 360-61 [distinguishing history of marriage definition from miscegenation laws].) California's opposite-sex marriage laws are not secretly designed to denigrate men or women, despite their facial neutrality. Therefore, California and federal case law striking down anti-miscegenation restrictions on marriage is inapposite.

D. The Marriage Laws Do Not Discriminate on the Basis of Sexual Orientation.

If the marriage laws precluded homosexual persons from entering a union between a man and a woman, Petitioners would have a legitimate claim that the laws discriminate on the basis of sexual orientation. They do not.

1. The marriage laws do not implicate sexual orientation either facially or through disparate impact.

The City sensibly makes no attempt to argue that the marriage laws discriminate facially on the basis of sexual orientation. (*See* City Open Br. at 60.) The marriage laws are facially neutral with regard to sexual orientation, and sexual orientation has nothing to do with whether a person can obtain a marriage license. If sexual orientation were a relevant consideration for obtaining a marriage license, the application would require applicants to declare their sexual orientation. Indeed, if the marriage laws were based on sexual orientation, a change in a person's sexual orientation could change his or her ability to marry. But a same-sex couple cannot marry whether one or both is heterosexual, homosexual, or bisexual. Accordingly, any disparate impact on homosexual persons is not *because of* their sexual orientation. Thus, the criteria for marriage has nothing to do with sexual orientation, and *cannot* constitute sexual orientation discrimination. The court below *assumed* that the marriage laws discriminate on the basis of sexual orientation. But

there can be no discrimination based on sexual orientation when a change in sexual orientation would not change the result.[29] Marriage laws do not preclude homosexual persons from marrying; the laws merely limit the options to entering a union of a man and a woman because that is what the institution of marriage *is*.

The cases Petitioners cite in support of their sexual orientation discrimination claim are inapposite because they involve only express discrimination. (*See* City Open Br. at pp. 60-64; Rymer Open Br. at pp. 28-29 [*citing Gay Law Students Ass'n v. Pacific Tel & Tel Co* (1979) 24 Cal.3d 458, 464 [156 Cal.Rptr. 14](express sexual orientation discrimination in employment policies); *People v. Garcia* (2000) 77 Cal.App.4th 1269 [92 Cal.Rptr.2d 339](express sexual orientation discrimination in striking jurors)].) In *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 85 [115 P.3d 1212], this Court found that a country club's policy of using marriage to allocate certain benefits did not constitute express sexual orientation discrimination because the policy "did not on its face constitute . . . sexual orientation discrimination . . . ."

Without express sexual orientation discrimination, Petitioners' claim is essentially that the marriage laws have a disparate impact on homosexuals (even though the impact has nothing to do with their sexual orientation). In *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142 [278 Cal.Rptr. 614], this Court ruled that a sex discrimination claim under the Unruh Act was

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[29]The essence of disparate impact discrimination is that a person is being discriminated against because of a specific characteristic or class membership. The underlying assumption that justifies disparate impact analysis is that if a person did not have that characteristic or was not a member of the class, the outcome would be different. No court in any other context has found discrimination through a disparate impact analysis when changing the characteristic or class would not change the result.

not cognizable under the traditional disparate impact theory. It noted that disparate impact had not been applied outside of employment discrimination cases under Title VII and Title VIII of the Civil Rights Act, and California's equivalent, the Fair Employment and Housing Act. (*Id.* at p. 1174.) The Court held that disparate impact claims were colorable in employment discrimination cases because "[t]hey represent areas of special concern to Congress and the Legislature," but that disparate impact claims were not colorable under general antidiscrimination laws like Unruh. (*Ibid.*) The Court also noted that "the United States Supreme Court has declined to extend disparate impact analysis to the general antidiscrimination provisions in the Fifth and Fourteenth Amendments to the United States Constitution" and that "the Unruh Act is more in the tradition of these constitutional amendments than the extensive and detailed regulatory provisions of titles VII and VIII . . . ." (*Ibid.* n. 20, citing *Washington v. Davis* (1976) 426 U.S. 229, 246-248.)

The California Constitution's guarantee of equal protection is obviously a general anti-discrimination law like the Unruh Act, and is applied in a similar fashion to its federal counterpart. (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 571-72 [117 Cal.Rptr.2d 168].) Thus, a traditional disparate impact theory is not cognizable here.

Absent the availability of the traditional disparate impact theory, Petitioners must establish that the marriage laws have a disparate impact on homosexual persons because of their sexual orientation. To make out a prima facie case of equal protection discrimination, after establishing the threshold elements noted above, they must also establish that the marriage laws were enacted with a purpose or intent to invidiously discriminate against a protected class *because of membership in that class*. (*Arlington Heights v. Metropolitan Housing Corp.* (1977) 429 U.S. 252, 265; *Personnel Administrator of*

Massachusetts v. Feeney (1976) 442 U.S. 256, 274.) Petitioners cannot come close to meeting this test.

2. California did not adopt the universal definition of marriage in an effort to harm homosexual persons.

California's earliest statutes regulating marriage, which incorporated its common law meaning, were enacted before the concept of "homosexual" even existed.[30] Section 55 of the 1872 Civil Code provided that "[m]arriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary." (CT:250.) Section 56 provided that an "unmarried male" eighteen years or older and an "unmarried female" fifteen years or older "[were] capable of consenting to and consummating marriage." (*Ibid*.) Other passages in the same Article I ("Validity of Marriage") and the following Article II ("Authentication of Marriage") confirm the original Civil Code's assumption that marriage is an opposite-sex union. (CT:250-251; *see*, *e.g.*, Section 59 [prohibiting marriage between "brothers and sisters ..., and between uncles and nieces or aunts and nephews"]; Section 69 [clerk's duty to ascertain that "the male" and "the female" are of age or have parental consent before issuing license]; Section 71 (parties must declare that "they take each other as husband and wife"].) This Court construed the marriage laws accordingly:

> The section of the Code defines "marriage," which, as distinguished from a present contract to marry, or the act of becoming married, is "the civil *status* of one man and one woman united in law for life, for the discharge to each other and to the community of the duties legally incumbent on those whose association is founded on the distinction of sex."

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[30]The term "homosexual" did not even exist until 1892, long after marriage was understood as the union of one man and one woman. (*See* MERRIAM WEBSTER'S COLLEGIATE DICTIONARY–TENTH EDITION 556 [definition of "homosexual" as adjective in 1892, and as a noun in 1902].)

(*Sharon v. Sharon* (1888) 75 Cal. 1, 9 [16 P. 345] [citation omitted].)

The language in the marriage provision of the original § 55 of the Civil Code was carried forward with little change into former § 4100 of the Family Code, the immediate predecessor of current Family Code § 300. The prelude to the revision now reflected in § 300 was an amendment to the language from former § 56 in § 4101 of the Family Code in 1971. The amendment changed the age of consent for marriage to eighteen for both men and women. The revised statute accordingly removed specific references to male and female, (CT:293), causing some to claim that the marriage laws had somehow changed to enable same-sex couples to "marry." (CT:312.) Thus, § 4100 was revised to clarify that the earlier revision of § 4101 did not change the meaning of marriage. (*Id.*)

The history of the meaning of "marriage" and the specific language in other marriage laws referring to husbands and wives makes it evident that the laws regulating the formation of marriage had not become gender neutral. For instance, California Family Code § 420(a), previously codified as Cal. Civ. Code § 4206 and virtually unchanged from the 1872 Cal. Civ. Code § 71 (CT:251), states:

> No particular form for the ceremony of *marriage* is required for solemnization of the *marriage*, but the parties shall declare, in the presence of the person solemnizing the *marriage* and necessary witnesses, that they take each other as *husband* and *wife*.

(West's Ann. Cal. Civ. Code § 420(a) [emphases added].) Same-sex couples obviously could not satisfy this requirement for solemnizing a marriage at any time in California's history.

Petitioners offer no evidence to support the proposition that the state's recognition of the common law definition of marriage from the inception of the state somehow had the purpose of invidiously discriminating against

homosexual persons. Nor does the Legislature's re-codification of the common law definition in 1977, and the people's in 2000, convert the common law definition of marriage into a form of discrimination. First, reliance upon legislative history that has not been specifically adopted by the Legislature is a disfavored method of establishing legislative intent unless that history "is itself unambiguous." (*Medical Board of California*, *supra*, 111 Cal.App.4th at p. 179.) Second, by codifying the definition of marriage, in both AB 607 in 1977 and Proposition 22 in 2000, proponents were unambiguous that they were simply trying to ensure that marriage would not be redefined from what it had always meant in California. (*See, e.g., Id*., Ex. F [noting that the "bill simply codifies case law dating back to English Common Law"]; Ex. B [Argument in Favor of Prop 22] [arguing that marriage is not "just a word anyone can re-define again and again until it no longer has any meaning" and that "marriage should stay the way it is"]; *id.* [Rebuttal to Argument Against Proposition 22] ["we respect EVERYONE'S freedom to make lifestyle choices, but draw the line at re-defining marriage for the rest of society"].) As Justice Kennard observed in *Lockyer*, the statutory measures codifying the definition of marriage "did not change existing law. Since the earliest days of statehood, California has recognized only opposite-sex marriages." (*Lockyer*, *supra*, 33 Cal.4th at p. 1126 [conc. & dis. opn. of Kennard, J.].)

Moreover, if the legislative history is to be considered, it indicates that the reason California recognizes marriage is to support children who are the result of the normative, natural procreation between men and women. For example, the rationale for the 1977 law (AB 607) was that:

> the legal institution of marriage was designed for purposes of procreation, and for protecting the interests of offspring born to the marriage. Thus special benefits, such as tax breaks, inheritance rights and government pensions, are accorded married persons, in order to encourage the establishment and maintenance of the state-sanctioned relationship of marriage.

("FRJN", Ex. 2 at p. 2 [Senate Analysis of AB 607].) The statement in the Senate analysis that the purpose of the law was to prohibit same-sex couples from marrying must be understood within this overall context. (*See id*. at p. 1 [Purpose].) Same-sex couples simply do not implicate the natural procreative interest being pursued by the Legislature. (*Id*. at p. 2.)

That California's interest in fostering responsible procreation through its marriage laws is anchored in the reality that men and women, normatively, will produce offspring and that same-sex couples do not is also seen in the Assembly Bill Digest for the 1977 law, which notes that the state recognizes marriage to provide support for children. (CRJN Ex. 2, Ex. E at p. 2.) To be sure, opposite-sex couples that do not have children are theoretically given a windfall by the state's marriage laws. (*Ibid.*) The Comments, however, also noted that redefining marriage to include same-sex couples would in most cases give them the same windfall, "except in those rare situations (perhaps not so rare among females) where they function as parents with at least one of the partners devoting a significant period of his or her life to staying home and raising children." (*Ibid.*)

Thus, the marriage laws represent just the sort of legislative line-drawing that is necessary and appropriate when determining how to best effectuate the state's interest. Such considerations are consistent with well-established equal protection jurisprudence and are certainly not evidence of invidious discrimination. (*Warden v. State Bar* (1999) 21 Cal.4th 628, 649 n.13 [88 Cal.Rptr.2d 283] ["a court may not strike down a classification simply because the classification may be imperfect or because it may be to some extent both underinclusive and overinclusive"] [citation omitted].) The evidence shows that the state's concern was how to effectuate the state interest in marriage related to procreation and child rearing. There is absolutely no

evidence that its purpose was to harm homosexual persons because of their sexual orientation.

Even if Petitioners could somehow show from the legislative history that §§ 300 and 308.5 were enacted to exclude homosexual persons from marriage *because of* their sexual orientation, they still could not succeed on a disparate impact claim. One significant factor for determining whether an action was taken for a discriminatory purpose is whether there is evidence of a substantive change in a law or practice that indicates an improper purpose. (*Arlington Heights, supra,* 429 U.S. at p. 267.) There has been no such change in the marriage laws. Absent a change, the legislative history of recent statutes is not germane to whether the codification of the common law definition of marriage in California law was intended to discriminate against homosexual persons. (*Ibid*.) Historically, it is undisputable that the marriage laws were not enacted for the purpose of harming homosexual persons, since the concept of a homosexual person did not exist.

3. Sexual orientation is not a suspect class.

Absent an intent to discriminate against homosexual persons because of their sexual orientation, it is not relevant whether sexual orientation constitutes a suspect class. In any event, California courts have declined to consider homosexual persons a suspect class. (*See Gay Law Students Association, supra,* 24 Cal.3d 458; *Hinman v. Department of Personnel Administration* (1985) 167 Cal.App.3d 516, 526, n.8 [213 Cal.Rptr. 410].) Indeed, in a recent decision, Justice Werdegar cited *Gay Law Students* and *Romer* as support for applying rational basis review for sexual orientation discrimination claims. (*See K.M. v. E.G.*(2005) 37 Cal.4th 130, 151-152 [117 P.3d 673] [dis. opn. of Werdegar, J.].)

A group of individuals deserves special protection as a "suspect class" only when the political process has failed to adequately protect their interests.

(Purdy, supra, 71 Cal.2d at p. 580 [alienage recognized as suspect class because aliens were politically powerless and were denied the right to vote]; *United States v. Carolene Products Co.* (1938) 304 U.S. 144, 152-53 [political powerlessness reason for extending protection to suspect class]; *San Antonio Indep. Sch. Dist. v. Rodriquez* (1973) 411 U.S. 1, 28.) Declaring a group "suspect" is an extraordinary act of circumventing the political process. Thus, political powerlessness is a crucial factor in determining whether a class is suspect. (*Purdy*, *supra*, 71 Cal.2d at p. 580; *see also Bowens v. Superior Court* (1991) 1 Cal.4th 36, 42 [2 Cal.Rptr.2d 376].) Homosexual persons in California cannot reasonably claim that they have been unprotected by the political process. As the Court of Appeal recognized (and as Petitioners concede), California has afforded homosexual persons more rights, privileges and benefits than any other state in the country. California's Family Code § 297 now grants same-sex couples essentially the same rights, benefits, and privileges as married couples. And significantly, California was the first state to enact a statute granting same-sex couples the right to obtain marriage licenses. (*See* A.B. 849, § 3(f).)[31] Given the proliferation of benefits and protections for homosexual persons in California, it appears rather absurd for Petitioners to claim a lack of political power.

The U.S. Supreme Court's decision in *City of Cleburne v. Cleburne Living Center* (1985) 473 U.S. 432, 445 is particularly instructive. In *City of Cleburne* the Court found that the mentally handicapped were not a suspect class in large part because their problems were being addressed by the

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[31]As the City notes, this bill was vetoed by the Governor. On June 5, 2007, the California Assembly again passed a bill granting same-sex couples the ability to receive marriage licenses. It is expected that the bill will also pass the Senate and again be vetoed by the Governor. If the bill were to become law, the Fund submits that it would be unconstitutional because it is contrary to Proposition 22.

legislature. As the Court noted, this "negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of lawmakers. Any minority can be said to be powerless to assert direct control over the legislature, but if that were a criterion for higher level scrutiny by the courts, much economic and social legislation would now be suspect."[32] The Court made this determination despite the fact that mental retardation is an immutable trait. (*Ibid.)*

The Washington Supreme Court recently made a similar finding about sexual orientation in a challenge to that state's marriage laws. "The enactment of provisions providing increased protections to gay and lesbian individuals in Washington shows that as a class gay and lesbian persons are not powerless but, instead, exercise increasing political power." (*Andersen*, *supra*, 158 Wash.2d at p. 21.) Likewise, every state appellate court but one that has considered whether sexual orientation is "suspect" has concluded that it is not. (*See Baker v. State*, *supra*, 170 Vt. at p. 231 n.10 [listing cases].)[33] In just the last year, two state supreme courts and the Eighth Circuit Court of Appeals have made the same determination. (*Citizens for Equal Protection*, *supra*, 455 F.3d at pp. 865-67; *Andersen*, *supra*, 158 Wash.2d at pp. 19-20; *Hernandez*, *supra*, 805 N.Y.S.2d at pp. 360-361.) Even two state courts that decided that same-sex couples have a right to a civil union or marriage did not find that

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[32]The City argues that only two criteria should define a suspect class: (1) history of discrimination or stigmatization; and (2) the discrimination is based on characteristics that have no bearing on the group's ability to perform in society. (City Br. at 60.) The City's bare-bones criteria would exclude few groups from qualifying as a suspect class, which is likely why the City is unable to cite any case to support the use of only those two criteria.

[33]The single exception is *Tanner v. Oregon Health Sciences Univ.* (Or. App. 2003) 157 Or.App. 502 [971 P.2d 435]. *Tanner* scarcely helps suspect class analysis, as its holding is poorly analyzed and relies upon a unique Oregon constitutional provision. (*Id.* at p. 523.)

sexual orientation is a suspect class. (*Baker v. State*, *supra*, 170 Vt. 194; *Goodridge*, *supra*, 440 Mass. 309.)

Federal courts of appeals have unanimously found that sexual orientation is not a suspect class. (*See Thomasson v. Perry* (4th Cir. 1996) 80 F.3d 915, 928; *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati* (6th Cir. 1997) 128 F.3d 289, 292-93; *Ben-Shalom v. Marsh* (7th Cir. 1989) 881 F.2d 454, 464; *Richenberg v. Perry* (8th Cir. 1996) 97 F.3d 256, 260, *cert. denied sub nom. Richenberg v. Cohen* (1997) 522 U.S. 807; *Holmes v. California Army Nat'l Guard* (9th Cir. 1997) 124 F.3d 1126, 1132, *cert. denied* (1998) 525 U.S. 1067; *High Tech Gays v. Def. Indus. Sec. Clearance Office* (9th Cir. 1990) 895 F.2d 563;[34] *Rich v. Secretary of the Army* (10th Cir. 1984) 735 F.2d 1220, 1229; *Steffan v. Perry* (D.C. Cir. 1994) 41 F.3d 677, 684 n.3; *Woodward v. United States* (Fed. Cir. 1989) 871 F.2d 1068, 1076.)

Contrary to Petitioners' argument, the Supreme Court's decision in *Lawrence v. Texas* does not undermine these cases. Indeed, *Lawrence* supports the conclusion that sexual orientation is not a suspect class. In that case, the Court applied only rational basis review to a law that explicitly discriminated against homosexuals. (*See Lawrence, supra,* 539 U.S. at p. 578; *id*. at p. 599 [Scalia, J., dissenting].) Almost every court that has analyzed *Lawrence* has agreed that it does not require heightened scrutiny for sexual orientation discrimination. (*See, e.g., Muth v. Frank* (7th Cir. 2005) 412 F.3d 808, 817-18; *Lofton*, *supra,* 358 F.3d at pp. 815-17; *United States v. Marcum* (2004) 60 M.J. 198, 204-05; *Cook v. Rumsfeld* (D. Mass. 2006) 429 F. Supp.2d

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[34]The City's argument that *High Tech Gays* is no longer good law after *Lawrence* is unfounded. Subsequent to *Lawrence*, the Ninth Circuit cited *High Tech Gays* for its holding that homosexuals do not constitute a suspect or quasi-suspect class. (*Flores v. Morgan Hill Unified Sch. Dist.* (2003) 324 F.3d 1130, 1137.)

385; *Loomis v. United States* (2005) 68 Fed. Cl. 503, 517-18; *Kansas v. Limon* (2005) 280 Kan. 275.)

As the Court of Appeal found, Petitioners have not proved a second criterion for suspect classification – that sexual orientation is immutable. (*Marriage Cases, supra,* 49 Cal.Rptr.3d at p. 713.) The assumption of immutability is contradicted by substantial social science evidence, not least of which is the fact that people frequently change their sexual orientation. (*See* LAUMANN, ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES 283 [referring to "assumptions that are patently false: that homosexuality is a uniform attribute across individuals, that it is stable over time, and that it can be easily measured"]; 296 ["42 percent of the total number of men who report ever having a same-sender experience" had "sex with another male before turning eighteen but not after"].) Most courts, like the Court of Appeal in this case, have rightly resisted declaring that homosexuality is an immutable trait, when there is such vast disagreement on that issue among social scientists. (*See Marriage Cases, supra*, 49 Cal.Rptr.3d at pp. 713-714.)

The Court of Appeal's determination that the marriage laws do not constitute sexual orientation discrimination is consistent with the great number of cases analyzing the same question and should be upheld. Nevertheless, should this Court determine that the question of whether sexual orientation is immutable is outcome determinative, it must remand that question to the trial court for findings of fact. Although evidence was submitted by both sides on this question, the trial court did not determine whether the marriage laws discriminated on the basis of sexual orientation. Thus, it did not consider the evidence.

VI. THE INSTITUTION OF "MARRIAGE" IS NOT A PUBLIC FORUM FOR FREE EXPRESSION.

Marriage is an institution recognized and regulated by the State for the primary purpose of promoting natural procreation and optimal child rearing. (*See supra*, Section V.A.) Marriage is not a public forum for speech. Thus, the state's formulation of the marriage laws in no way reflects a policy that interferes with same-sex couples' ability to engage in free expression. Accordingly, the state's regulation and preservation of marriage cannot violate the Free Expression Clause of the California Constitution.

Rymer claims that marriage is primarily speech which conveys one "distinct message that is understood across all borders." (Rymer Open Br. at p. 65.) Specifically, Rymer argues that people marry to express the "unique permanence and depth of their relationship to their spouse and to others." (*Id*. at p. 66.) It is this purported universal message that the Rymer Petitioners contend they cannot express. (*Ibid*.) Consequently, they argue that because same-sex couples may not marry, the state has interfered with their desired freedom of expression in violation of the California Constitution.

This argument is flawed at its foundation. Marriage is not a message but an institution which men and women enter, and it is this "state of matrimony" in which they hopefully abide. Rymer argues, however, that free speech principles provide the legal leverage needed to *transform* marriage into a forum in which same-sex couples can communicate their commitment to themselves and the world. Obviously, the Rymer Petitioners are free to espouse their views on marriage and commitment to anyone they desire. What they are not free to do is alter the meaning of marriage to transform the institution into a public forum for free expression purposes.

The state of matrimony is not a public forum akin to a public street or park reserved for the purpose of facilitating communication. (*See Hague v.*

CIO (1939) 307 U.S. 496, 515.) Neither has the state designated marriage as a forum for speech. (*See Perry Educ. Ass'n v. Perry Local Educators' Ass'n* (1983) 460 U.S. 37.) Marriage is not a government created forum for speech in any respect, and therefore the Rymer Petitioners have no right to redefine it as such to facilitate their subjective message.[35]

No court has ever suggested that the marriage institution is a constitutionally protected mechanism for individual messages. Marriage is no more a speech forum than the residential chambers of the White House or the halls of the Supreme Court of the United States. In these places, the government is free to limit use to the intended purpose of the facilities. The fact that one may desire to enter such places to espouse a particular message is irrelevant. Similarly, marriage regulations have been established for the *state's* intended purposes. Rymer has clearly confused the issue of why people marry with why the state regulates marriage. The multifarious reasons that people choose to marry has no bearing on the constitutionality of the state's reasons for regulating marriage.

Rymer cites *Turner, supra,* 482 U.S. 78, for the proposition that marriage's purpose is primarily expressive, and therefore protected "speech" under the California Constitution. *Turner,* however, only considered whether the fundamental right to marry could be exercised during incarceration. The Court did not hold that the First Amendment provides any legal basis for

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[35]Rymer argues that the California Constitution provides more protection than the First Amendment because it "explicitly embraces [the] people's right to express themselves on 'all subjects."' (Rymer Open Br. at p. 65.) Rymer cites *Gerawan Farming, Inc. v. Kawamura* (2004) 33 Cal.4th 1, 15 [14 Cal.Rptr.3d 14] for this proposition. *Gerawan Farming, Inc.*, however, did not involve a forum analysis, but rather addressed a law that *required* plumb growers to fund generic advertising of plums. No California court has held that the California Free Expression clause dispenses with public forum analysis.

inmates to marry. Instead, the Court simply stated, *in dicta,* that marriage is important to individuals for a variety of reasons which are not inconsistent with incarceration. Specifically, the Court stated:

> The right to marry, like many other rights, is subject to substantial restrictions as a result of incarceration. Many important attributes of marriage remain, however, after taking into account the limitations imposed by prison life. First, inmate marriages, like others, are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship. In addition, many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication. Third, most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated. Finally, marital status often is a precondition to the receipt of government benefits (*e.g.,* Social Security benefits), property rights (*e.g.,* tenancy by the entirety, inheritance rights), and other, less tangible benefits (*e.g.,* legitimation of children born out of wedlock). These *incidents* of marriage, like the religious and personal aspects of the marriage commitment, are unaffected by the fact of confinement or the pursuit of legitimate corrections goals.

(*Id.* at pp. 95-96; emphasis added].) The Court held that unless the prison sentence was intended to deprive inmates of the right to marry while incarcerated as punishment for the crime, the state was not justified in interfering with the fundamental right to marry – to enter the union of a man and a woman. (*Id*. at p. 96.)

The *Turner* case has no bearing on free speech jurisprudence. The Court's description of certain "incidents" of marriage simply illustrates *why* inmates may *want* to marry while incarcerated and *how* those subjective reasons are not at odds with the State's penological objectives. One could list many other reasons people marry. For instance, some marry for reasons which

are purely economic, or as a result of an arranged marriage, or to preserve royal bloodlines, for mere companionship, or for the sake of convenience.

The state's interests in regulating, promoting and preserving marriage exists apart from one's subjective intent for entering it – expressive or otherwise. One has no more right to redefine marriage under the rubric of free expression than the polygamists, who challenged the institution on free exercise grounds. (*See Reynolds, supra,* 98 U.S. at p. 166 [rejecting argument that the free exercise of religion justified polygamy].) Therefore, Rymer's free expression arguments are without merit and should be soundly rejected.

VII. PROPOSITION 22 APPLIES TO MARRIAGES LICENSED IN CALIFORNIA AND TO FOREIGN MARRIAGES.

The Clinton petitioners concede that Proposition 22 (§ 308.5) limits marriage within California to only a man and a woman. (Clinton Open Br., p. 3.) So do the Tyler petitioners. (Tyler Open Br., pp. 1, 5, 12 and 24.) The City briefly mentions, in a footnote, that Proposition 22 "was adopted . . . to prevent California from recognizing same-sex marriages performed out of state," but does not take the position or argue that Proposition 22's limit of marriage to a man and a woman applies exclusively to foreign marriages. (City Open Br., p. 27, fn. 12.) Only the Rymer petitioners assert the untenable theory that Proposition 22's broad and unqualified language limiting all marriage in California to a man and a woman somehow applies narrowly to only foreign marriages, and does not prevent same-sex marriages from being licensed in California. (Rymer Open Br., pp. 79-85.) None of the arguments set forth by the Rymer petitioners supports their suggested interpretation.

A. The Court Should Not Re-write Proposition 22's Simple, Clear, and Unambiguous Language to Apply Only to Foreign Marriages.

In its entirety, the plain and unambiguous language of Proposition 22 simply states: "Only marriage between a man and a woman is valid or

recognized in California." (§ 308.5.) It does *not* read: "Only marriage *contracted outside this state* between a man and a woman is valid or recognized in California." But that is exactly how the Rymer petitioners ask this Court to re-write Proposition 22.

The statutory construction of Proposition 22 begins with examining the language of the initiative statute, giving the words their usual and ordinary meaning, viewed in the context of the statute as a whole and the overall statutory scheme. When the terms of a statute are unambiguous, it is presumed that the lawmakers (in this case, the voters) meant what they said, and the plain meaning of the language governs. If the language is ambiguous, the court may look for evidence of the legislative intent, such as the analyses and arguments contained in the official ballot pamphlet. However, if the language is not ambiguous, not even the most reliable document of legislative history can change the legal meaning of the measure. "A court cannot insert or omit words to cause the meaning of a statute to conform to a presumed intent that is not expressed." (Code Civ. Proc., § 1858; *Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 23 [26 Cal.Rptr.3d 687].) The court's role is to interpret the laws as they are written. (Ibid.)

As discussed below, none of the Rymer petitioners' arguments show that Proposition 22 is truly ambiguous. "Since the language of [Proposition 22] is unambiguous, [the court] need not look to other indicia of the voters' intent." (*Knight, supra*, 128 Cal.App.4th at p. 25 [construing Proposition 22].) Rather, this Court should simply hold that Proposition 22 governs the validity and recognition of all marriages in California, regardless of the jurisdiction in which they are originally performed.

B. The Ballot Materials Did Not Tell Voters that Proposition 22 Would Apply Only to Foreign Marriages.

The Rymer petitioners argue that Proposition 22 is ambiguous because the ballot arguments in support of Proposition 22 and other ballot materials somehow informed voters that the measure was intended to apply exclusively to foreign marriages. (Rymer Open Br., pp. 82 - 84.) While the ballot arguments did correctly inform voters that the measure would prohibit recognition of foreign same-sex marriages, nowhere was it stated that Proposition 22 would apply *only* to foreign marriages. And by no means could a voter who reviewed the materials come away with the understanding that he or she was actually voting to *allow* same-sex marriages to be licensed in California, as the Rymer petitioners argue. The voters knew they were limiting all marriage "in California".

The Official Title and Summary prepared for Proposition 22 by then-Attorney General Bill Lockyer did not tell voters that Proposition 22 would apply only to foreign marriages. (Respondents' Appendix, Vol. I, Case No. A110652, page 96 ("RA 0096").) Nor did the Analysis by the Legislative Analyst in the ballot materials tell voters that the proposed limit on marriage would apply only to foreign marriages. (RA 0097.) In addition to speaking of the need to prohibit recognition of same-sex marriages from out-of-state, the ballot Argument in Favor of Proposition 22 *also* spoke broadly of the need to define and limit marriage generally, without distinguishing between foreign and local marriages:

> Proposition 22 is exactly 14 words long: "Only marriage between a man and a woman is valid or recognized in California." That's it! No legal doubletalk, no hidden agenda. Just common sense: Marriage should be between a man and a woman.
>
> […]

> California is not alone in trying to keep marriage between a man and a woman… So far, 30 states have passed laws defining marriage as between a man and a woman.
>
> […]
>
> But some people… say I have to accept that marriage can mean whatever anyone says it means, and if I don't agree then I'm out of touch…
>
> […]
>
> I believe that marriage should stay the way it is.

(RA 0099.)

The Rebuttal to Argument Against Proposition 22 similarly set forth language referring to marriage in California generally, not just foreign marriages:

> THE TRUTH IS, we respect EVERYONE'S freedom to make lifestyle choices, but draw the line at re-defining marriage for the rest of society.
>
> […]
>
> THE TRUTH IS, "YES" on 22 sends a clear, positive message to children that marriage between a man and a woman is a valuable and respected institution, now and forever.

(RA 0098.)

The above statements in the ballot materials (especially the closing appeal asking voters to keep "marriage between a man and a woman… now and forever") make it impossible to accept the Rymer petitioners' argument that the proponents and the majority of voters who approved Proposition 22 actually intended to prohibit only foreign same-sex marriages, while still allowing same-sex marriage to be legally licensed within California. Both the plain language of Proposition 22 and the ballot materials show it was intended

as an "absolute refusal to recognize marriages between persons of the same sex." (*Knight, supra*, 128 Cal.App. at pp. 14, 23-24.)

C. The Holding in *Knight v. Superior Court* Regarding the Scope of Proposition 22 Is Not *Dicta*, and Should Be Reaffirmed by This Court.

The Rymer petitioners state that Proposition 22 is ambiguous because two appellate courts have indicated in *dicta* that they would reach different conclusions on the scope of Proposition 22. (Rymer Open Br., p. 79-80.) Rymer correctly notes that the language in *Armijo v. Miles* (2005) 127 Cal.App.4th 1405 [26 Cal.Rptr.3d 623] was *dictum* because it did not embody the resolution of that case. But the Third District Court of Appeal's holding in *Knight, supra*, 128 Cal.App.4th 14, that Proposition 22 applies to both foreign and California marriages, cannot be viewed as *dictum* because it was central to the court's determination of the case.

In *Knight*, the parties disagreed over whether A.B. 205 (which extended virtually all the legal incidents of marriage under state law to registered domestic partners in California) constituted an unlawful amendment of Proposition 22 without the voter approval required under Article II, Section 10(c) of the State Constitution. (*Knight, supra*, 128 Cal.App.4th at p. 22.) The court observed that "the answer to this question turns on an interpretation of the two statutes, it is an issue of law…" (*Ibid*.) Thus, interpreting the scope of Proposition 22 was central to the resolution of the case. Analyzing what the court described as the "plain and unambiguous" language of Proposition, as well as the ballot arguments, the court held that the legal effect of Proposition 22:

> . . . ensures that California will not legitimize or recognize same-sex marriages from other jurisdictions . . . , *and that California will not permit same-sex partners to validly marry within the state*.

> Without submitting the matter to the voters, the Legislature cannot change this absolute refusal to recognize marriages between persons of the same sex. (Cal. Const., art. II, § 10, subd. (c).)

(*Knight, supra*, 128 Cal.App.4th at pp. 23-24 [emphasis added].)[36]

This Court should adopt the Third District's reasoned construction of Proposition 22 as applying to all marriages, both foreign marriages and those licensed in California.

D. The Legislative Counsel of California Agrees that Proposition 22 Applies to Marriages Licensed in California.

Opinions of the Legislative Counsel of California are cognizable evidence of legislative history. (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc*. (2005) 133 Cal.App.4th 26, 35 [34 Cal.Rptr.3d 520].) This Court has extended to the Legislative Counsel Opinions the same "great weight" that courts had previously given only to Opinions of the California Attorney General. (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 17 [270 Cal.Rptr. 796].)

In issuing an Opinion on the question whether A.B. 205, if adopted, would constitute an amendment of Proposition 22 requiring voter approval, the Legislative Counsel acknowledged that "to determine whether the proposed act would amend [Proposition 22], we must first determine the scope and effect of that initiative statute." (Opinion of the Legislative Counsel of California, Mar. 24, 2003, entitled "DOMESTIC PARTNERS: INITIATIVE AMENDMENT - #1144"; *See* FRJN, Exhibit 3, page 4.) In analyzing the

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[36]Having established the legal scope of Proposition 22, the court then went on to hold further that granting marriage-like status to domestic partners under A.B. 205 did not amend Proposition 22 as construed "because the plain, unambiguous language of section 308.5 does not state an intent to repeal existing domestic partnership laws or to limit the Legislature's authority to regulate such unions." (*Knight, supra*, 128 Cal.App.4th at p. 24.)

scope and effect of Proposition 22, the Legislative Counsel confronted and rejected any interpretation that Proposition 22 applies only to foreign marriages:

> However, if this narrow view of the intent and effect of Section 308.5 is accepted, it would have to follow that, while the voters intended to prohibit recognition of same-sex marriages if entered into outside the state, they intended to retain the Legislature's authority to later amend the definition of marriage contained in Section 300 to permit recognition of those marriages entered into within California, even though that later amendment would be in direct conflict with the plain language of Section 308.5. It is well established that where a statutory provision is susceptible of two constructions, one of which, in application, will render it reasonable, fair, and in harmony with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted. [Citation.]

(*Id*., FRJN, Exhibit 3, page 5.)

In light of the foregoing analysis, and noting that Proposition 22's "plain language . . . does not limit its application to out-of-state marriages," the Legislative Counsel concluded that Proposition 22 "prohibits recognition in California of out-of-state same-sex marriages *and also* assures that the Legislature may not, without voter approval, change the definition of marriage, as contained in Section 300, to include same-sex relationships." (*Id*., FRJN, Exhibit 3, page 5 (emphasis added).) This Court should give great weight to the Opinion of the Legislative Counsel in construing the scope and effect of Proposition 22.[37]

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[37]Recently, the Legislative Counsel's Digest for Assembly Bill 43 of the current session of the Legislature (which bill purports to allow licensing of same-sex marriages in California notwithstanding Proposition 22), shows that the Legislative Counsel continues to advise that Proposition 22 applies to all marriages, not just foreign marriages as the Rymer petitioners argue. The Digest states, in part: "Existing law, enacted by initiative measure, further provides that only marriage between a man and a woman is valid or recognized

E. Marriage "Validity" Is Not a Term of Art Applicable Only to Recognition of Foreign Marriages.

The Rymer petitioners also assert that Proposition 22 is ambiguous because it contains the term "valid," which they argue is a "legal term of art" used primarily in the context of determining whether, or to what extent, foreign marriages will be recognized in California. (Rymer Open Br., pp. 80-81.) This inventive argument is meritless. The term "valid" appears throughout the Family Code in the context of marriages licensed *in* California. (*See, e.g.*, Fam. Code § 306 [nonparty's failure to solemnize, authenticate, and return the certificate of registry of marriage "does not *invalidate* the marriage"]; Fam. Code § 309 [setting forth right of party to a marriage to bring a legal action "to have the *validity* of the marriage determined and declared"]; Fam. Code § 352 ["No marriage license shall be granted if either of the applicants lacks the capacity to enter into a *valid* marriage"]; Fam. Code § 420(c) ["No contract of marriage, if otherwise duly made, shall be *invalidated* for want of conformity to the requirements of any religious sect"]; Fam. Code § 2201 [If a former spouse is absent for five years or believed dead, "the subsequent marriage is *valid* until its nullity is adjudged"]; Fam. Code § 2251(a) [Court may declare status of putative spouses if "either party or both parties believed in good faith that the marriage was *valid*"].)

In fact, contrary to the Rymer petitioners' position, the use of the term "valid" in both Proposition 22 as well as the many other statutes relative to marriages licensed in California tends to show that Proposition 22 does apply to California-licensed marriages, not just foreign marriages.

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in this state." (Legislative Counsel Digest of Assembly Bill No. 43 (2007-2008 Reg. Sess.), as amended Apr. 9, 2007; FRJN, Exhibit 9.) The Legislative Counsel's Digest does *not* state that only marriages "contracted outside this state" are so limited.

F. The Differences Between Proposition 22 and Prior Legislative Proposals by Proposition 22's Author Show that Proposition 22 Applies to Marriages Licensed in California.

The Rymer petitioners compare Proposition 22 to two pieces of prior legislation also authored by Proposition 22's official proponent, State Senator Wm. J. "Pete" Knight. (Rymer Open Br., pp. 84-85.) The comparison is misleading and incomplete. For example, referring to a portion of a bill that proposed only social policy findings and declarations of the Legislature in support of existing law, the Rymer petitioners' brief falsely states that the bill "would have *provided* that California's marriage laws 'apply only to male-female couples, not same-gender couples,'" even though the bill in actuality did not alter the existing licensing laws in any way. (Id. at p. 84 [emphasis added].)[38]

However, a review of all Senator Knight's proposed marriage legislation prior to Proposition 22 actually shows that he knew exactly how to limit the scope of legislation to apply only to marriages "contracted outside this state," when that was the intent.

In 1996, then-Assemblyman Knight authored A.B. 1982. As it passed the Assembly (and before hostile amendments in the Senate), A.B. 1982 expressly applied only to foreign marriages. It provided: "Any marriage *contracted outside this state* between individuals of the same gender is not valid in this state." (Assem. Bill No. 1982 (1995-1996 Reg. Sess.) § 2, as amended Jan. 29, 1996 [emphasis added]; *see* FRJN, Exhibit 4.)

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[38]The Knight legislation mentioned by the Rymer petitioners, A.B. 3227, only proposed legislative findings and declarations of the Legislature with regard to social policy interests served by the existing marriage laws – it did not purport to change any existing law with regard to validity of marriage, so it is not useful in this case. (Assem. Bill No. 3227 (1995-1996 Reg. Sess.) § 1, as amended May 2, 1996; FRJN, Exhibit 6.)

When A.B. 1982 stalled in the Senate, Knight's colleague Senator Ray Haynes employed a "gut and amend" procedure at Knight's request to make another attempt at obtaining approval in the Senate. Though it did not pass, S.B. 2075 again clearly limited its application to only foreign marriages "contracted outside this state":

> It is the public policy of this state that a marriage *contracted outside this state* that conforms to the requirement in Section 300 that a marriage is a personal relation arising out of a civil contract between a man and a woman and that would be valid by the laws of the jurisdiction in which the marriage was contracted is valid in this state."

(Sen. Bill No. 2075 (1995-1996 Reg. Sess.) § 1, as amended Aug. 5, 1996 [emphasis added]; FRJN, Exhibit 5.)

The following year, as a new State Senator, Knight again authored legislation dealing with marriage, S.B. 911. The bill proposed to amend Section 308 of the Family Code to recognize only marriage between a man and a woman, speaking expressly in terms of marriage "contracted . . . outside this state":

> It is declared to be the strong public policy of this state that only a marriage contracted between one man and one woman *outside this state* that would be valid by the laws of the jurisdiction in which the marriage was contracted is valid in this state. . . .

(Sen. Bill No. 911 (1997-1998 Reg. Sess.) § 4, as introduced Feb. 27, 1997 [emphasis added]; FRJN, Exhibit 7.)[39]

Thus, all of Senator Knight's legislation that preceded Proposition 22, as discussed above, contained an express provision that the limit on marriage proposed for enactment would apply only to marriages "contracted outside this state." The subsequent omission of that phrase from Proposition 22 is highly

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[39]Senator Knight also co-authored an identical bill in the State Assembly (Assem. Bill No. 800 (1997-1998 Reg. Sess.), as introduced Feb. 26, 1997; FRJN, Exhibit 8.)

probative to show that Proposition 22 was *not* intended to apply only to such foreign marriages, as was the predecessor legislation. Where legislation omits a particular provision, the inclusion of such a provision in other legislation concerning a related matter indicates an intent that the provision is not applicable to the legislation from which it was omitted. (*Marsh v. Edwards Theatres Circuit, Inc*. (1976) 64 Cal.App.3d 881, 891 [260 Cal.Rptr. 49].) The fact that Senator Knight knew how to (and did) write legislative provisions that limited its scope exclusively to marriages "contracted outside this state," and yet omitted such language from Proposition 22, is "compelling evidence" against construing Proposition 22 to impliedly include the omitted language. (*Shaw v. McMahon* (1987) 197 Cal.App.3d 417, 425 [243 Cal.Rptr. 26]; *see also County of San Diego v. State of California* (1997) 15 Cal.4th 68, 94-95 [61 Cal.Rptr.2d 134] [express limitation appearing in prior legislation shows legislature "knew how to include words of limitation", and does not apply to subsequent legislation that "contains no such limiting language"]; *Sherwin Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 904 [16 Cal.Rptr.2d 215] [express preemption declaration in prior legislation cannot be implied in subsequent legislation where the express declaration is omitted].)

G. The Scope of Proposition 22 Is Not Affected by Whether the Ballot Materials Told Voters that the Legislature Could Not Amend It without Voter Approval.

Finally, the Rymer petitioners argue that Proposition 22 should not be read to prevent the licensing of same-sex marriages within California because "[t]here is no indication in any of the ballot materials . . . that Proposition 22 had any such purpose of limiting the California Legislature's authority over marriage eligibility." (Rymer Open Br., p. 84.) The ballot materials, they point out, "were completely silent with regard to any need to limit the power of the Legislature." (*Ibid*.)

The argument is meritless because the state constitutional protection against the Legislature amending a voter-passed initiative statute without voter approval applies to *all* initiatives, except where the initiative itself authorizes such amendment. (Cal. Const., art. II, § 10(c).) It is a fundamental feature of the initiative process in California. A judicial decision adopting the Rymer petitioners' theory would open up virtually every voter-passed initiative statute to possible amendment by the Legislature without voter approval, on the basis that voters were not told in ballot materials of the automatic, constitutional limit on the Legislature's authority to amend statutes adopted by initiative. The proponents of Proposition 22 should not be held to such a double-standard.[40] As an initiative statute, Proposition 22 is protected against legislative amendment by operation of state constitutional law, not because the ballot materials did or did not say so.

VIII. THE MARRIAGE LAWS PASS CONSTITUTIONAL MUSTER.

A. Petitioners Bear the Burden Under Rational Basis Review.

No level of scrutiny is appropriate because there is no fundamental right at issue, the Petitioners have failed to show that the marriage laws discriminate, and they have failed to meet the threshold for an equal protection claim. Nevertheless, the Petitioners argue for a *heightened* standard under rational basis review that essentially shifts the burden to the defenders of the laws rather than the challengers. (*Cf.* City Open Br. at 32; Rymer Open Br. at p. 71.) Petitioners would shift the burden of proof by requiring the defenders of the law to justify excluding same-sex couples from marriage rather than

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[40]It should also be noted that the Attorney General presumably agrees that the automatic constitutional protection of voter-passed initiatives from amendment by the Legislature is so well established that it is never necessary to mention that feature among the "chief purposes and points" of a proposed initiative measure in preparing its official Title and Summary. (Elec. Code § 9002.)

requiring the challengers to show that it is irrational to retain the definition of marriage that has always existed.

The Court of Appeal majority properly held that the challengers of the marriage laws "bear the burden of demonstrating their constitutional invalidity under the rational basis test." (*Marriage Cases, supra*, 49 Cal.Rptr.3d at p. 718.) The issue is not whether the Fund or the State has established a realistically conceivable basis for a "marriage ban" or an "exclusion" of same-sex couples from "marriage." Instead, the issue is whether *Petitioners* have demonstrated that there is no realistically conceivable basis for statutes defining marriage as the union of a man and a woman. The burden is on the challengers to a statutory benefit to demonstrate that there is no rational basis for extending a right to the benefitted class that is not granted to the challengers. (*Warden, supra,* 21 Cal.4th at p. 641; *In re York* (1995) 9 Cal.4th 1133, 1152 [40 Cal.Rptr.2d 308].)

In *Warden* this Court rejected any notion of a "heightened" standard of review or the placing of the burden of proof on the defenders of a law. (*Id*. at p. 648 and n.12.) "[T]he rational relationship test remains a restrained, deferential standard, albeit one that continues to provide protection against classifications that do not bear a rational relationship to a reasonably conceivable, legitimate purpose." (*Warden*, 21 Cal.4th at p. 648 n.12.)

The fact that a classification could have been drawn more broadly or more narrowly is immaterial under rational basis review:

> "Defining the class of persons subject to a regulatory requirement . . . 'inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial consideration.'"

(*Warden*, *supra*, 21 Cal.4th at p. 645 [internal changes by Court; citation omitted].) Therefore, Petitioners' arguments about allowing prisoners, bad

parents, infertile opposite-sex couples, and opposite-sex couples who do not want children to marry, and not allowing same-sex couples with children to "marry," are not germane to rational basis analysis. (*Ibid*.; *see also Standhardt*, *supra*, 206 Ariz. at pp. 287-88 [inquiring into ability, intent or desire to have children would violate right to privacy, be impossible to police, and would violate fundamental right to marry].) The only question is whether it is rational to retain the institution of marriage with the same meaning it has had in virtually every civilization throughout history, in light of the legitimate state interests discussed herein.

Courts in other states have rejected efforts to switch the burden of proof on marriage laws from the equal protection challengers to the State: "There is no requirement in rational basis equal protection analysis that the government interest be furthered by both those included in the statutory classification *and by those excluded from it*." (*Hernandez*, *supra*, 805 N.Y.S.2d at p. 361 [emphasis added]; *see also Morrison*, *supra*, 821 N.E.2d at p. 23 ["The key question . . . is whether the recognition of same-sex marriage would promote all of the same state interests that opposite-sex marriage does, including the interest in marital procreation"].) This Court likewise should reject Petitioners' implicit invitation to shift the burden of proof under equal protection.

B. The Marriage Laws Easily Pass Rational Basis Review.

It cannot be irrational to define marriage the way it has been defined since the beginning of the English language, indeed, the way it has been understood in virtually every civilization throughout history. That is what is behind the State's "tradition" argument as well as the Court of Appeal's ruling regarding tradition. (*See Marriage Laws, supra*, 49 Cal.Rptr.3d at p. 723; *see also Lawrence, supra*, 539 U.S. at p. 585 [O'Connor, J., concurring] ["preserving the traditional institution of marriage" is a legitimate state

interest].) As New York's high court implied in *Hernandez*, to rule that such a venerable tradition is irrational would be to "conclude that everyone who held [the view that marriage is the union of a man and a woman throughout history] was irrational, ignorant or bigoted." (*Hernandez, supra*, 7 N.Y.3d at p. 361.) To take such a view in itself is irrational.

Nearly every appellate court that has addressed the issue has concluded that the government has a rational basis for defining marriage as the union of a man and a woman because of its interest in responsible procreation. (*See* Section V.A., *supra*.) Courts have also recognized that the state's interest in marriage relates to providing the optimal environment for raising the offspring that opposite-sex couples naturally produce. (*Ibid*.)

Where reasonable minds may differ about the wisdom of legislation, it cannot be said to be irrational. This is a well-settled perspective in the analogous context of deference to administrative actions. As in the rational basis review of legislation, "'[i]f there appears to be some reasonable basis for the board's classification a court will not substitute its judgment for that of the administrative body.'" (*Richard Boyd Industries, Inc. v. State Bd. of Equalization* (Ct. App. 2001) 89 Cal.App.4th 706, 715 [107 Cal.Rptr.2d 520] [citation omitted].) The court in *Richard Boyd Industries* discussed a case where expert testimony had "'established that reasonable minds might have reached a different result . . . .'" (*Ibid*. [citation omitted].) The follow-up to that statement is incisive: "'But evidence that reasonable minds might reasonably differ on the matter . . . falls far short of establishing that the classification adopted by the Board was arbitrary, capricious or had no reasonable or rational basis.'" (*Ibid*.) Other courts have likewise held that there is a rational basis for a decision where reasonable minds may differ. (*See, e.g., Gannon v. Metropolitan Life Ins. Co.* (1st Cir. 2004) 360 F.3d 211, 213 ["recognizing that reasonable minds could differ about this analysis, we

conclude that MetLife's reliance on the FCE was rational"]; *State v. Henry* (Ohio Ct. App. 2002) 151 Ohio App.3d 128, 141 [783 N.E.2d 609] ["If reasonable minds could reach different conclusions, then the evidence is sufficient" to find that a "rational fact-finder could have found the elements of the offense proven beyond a reasonable doubt"]; *Medical Society v. New York State Dept. of Social Serv.* (N.Y. App. Div. 1989) 148 A.D.2d 144, 148 [544 N.Y.S.2d 58] ["petitioners' arguments establish, at best, that reasonable minds might differ as to the conclusions to be drawn, which is not sufficient to establish the irrationality necessary to warrant annulment of the amended regulation"].)

Petitioners' attacks on the rational basis of the marriage laws is simply a disagreement with the Fund's rationale, which has been adopted by the overwhelming majority of American appellate courts to have considered the issue. That disagreement, even if reasonable minds may differ on it, falls far short of meeting the burden of proving that the statutory classification adopted by the people is "arbitrary, capricious or had no reasonable or rational basis." (*Richard Boyd Industries*, *supra*, 89 Cal.App.4th at p. 715.)

C. Strict Scrutiny May Not Be Used to Invalidate the Marriage Laws Without Resolving Disputed Facts.

The Fund expressly objected to the trial court applying strict scrutiny without the Fund having an opportunity to present evidence to carry its burden of proof under that standard. (CT:700-02.) It is a violation of due process to render a judgment against a party without affording the party an opportunity to present evidence on the issues resolved. (*Motores de Mexicalli, S.A. v. Superior Ct.* (1958) 51 Cal.2d 172, 176 [331 P.2d 1] [due process includes "the opportunity to be heard and to present . . . defenses"]; *Bricker v. Superior Ct.* (Ct. App. 2005) 133 Cal.App.4th 634, 638 [35 Cal.Rptr.3d 7] [same].) Although the Court of Appeal did not address this error, in view of its holding

that the proper standard was rational basis, the Fund raised the issue as error on appeal. (Fund Opening Br. in Court of Appeal at pp. 32-33.)

Given the impropriety of the trial court applying strict scrutiny without considering evidence, this Court should remand for an evidentiary hearing if it concludes that strict scrutiny is appropriate, and that the marriage laws do not pass strict scrutiny as a matter of law.

However, if this Court believes strict scrutiny is appropriate, the marriage laws properly satisfy that standard. Even under the strict scrutiny test, a law may be constitutional when it is "the least restrictive means of achieving a compelling interest or, in other words, . . . narrowly tailored." (*Catholic Charities of Sacramento, Inc. v. Superior Ct.* (2004) 32 Cal.4th 527, 562 [10 Cal.Rptr.3d 283].)

The state has a compelling interest in determining paternity. (Cal. Fam. Code § 7570(a).) The marriage laws achieve that compelling interest by encouraging responsible procreation by opposite-sex couples within the bounds of marriage. Defining marriage as the union of a man and woman is the least restrictive means of achieving that interest. The laws could not legitimately narrow the definition to couples who are fertile or who wish to bear children. Any investigation into fertility or a desire or intent to have children would violate the right to privacy. (*Griswold, supra,* 381 U.S. 479 [right to privacy in regard to reproductive decisions]; *Standhardt*, *supra*, 206 Ariz. at p. 287, citing *Griswold*; *Adams, supra*, 486 F. Supp. at pp. 1124-25, citing *Griswold*.) In addition, attempting to exclude infertile couples would be impossible to police, and would violate the fundamental right to marry, as historically understood. (*Standhardt*, *supra*, 206 Ariz. at pp. 287-88.) Thus, the laws could not be more narrowly tailored. They are the least restrictive

means of achieving the state's compelling interest in determining paternity for the vast majority of children. (*Adams*, *supra*, 486 F. Supp. at p. 1125.)[41]

CONCLUSION

For the foregoing reasons, the Fund respectfully requests that this Court uphold the decision of the Court of Appeal on the merits, and order the entry of summary judgment on behalf of the Fund.

Dated: June 14, 2007

Respectfully submitted,

ALLIANCE DEFENSE FUND
Benjamin W. Bull, AZ SBN 009940*
Glen Lavy, AZ SBN 022922*
Christopher R. Stovall, GA SBN 621780*
Dale Schowengerdt, AZ SBN 022684*

*Admitted *Pro Hac Vice*

ADVOCATES FOR FAITH AND FREEDOM
Robert H. Tyler, CA SBN 179572

LAW OFFICES OF TERRY L. THOMPSON
Terry L. Thompson, CA SBN 199870

LAW OFFICES OF ANDREW P. PUGNO
Andrew P. Pugno, CA SBN 206587

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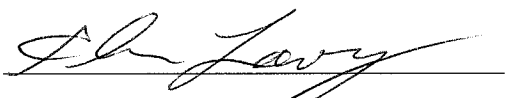
[41]Writing the laws more broadly to include same-sex couples would not further the state's compelling interest in determining paternity. No same-sex *couple* can procreate, as has been noted by any court that has thought to mention it. (*Hernandez*, *supra*, 805 N.Y.S.2d at p. 374 [Catterson, J., concurring]; *Morrison*, *supra*, 821 N.E.2d at p. 25; *Standhardt*, *supra*, 206 Ariz. at p. 288.) Accordingly, rewriting the marriage laws to include same-sex couples would eliminate the procreation justification for regulating marriage. Absent that rationale, the state might be hard pressed to justify withholding the right to marry from groups or incestuous couples.

CERTIFICATE OF COMPLIANCE PURSUANT TO RULE OF COURT 14

I hereby certify that this brief was prepared in Times New Roman 13 font. According to the "Word Count" feature in my Word Perfect for Windows software, this brief, including footnotes but excluding the Table of Contents, Table of Authorities, this Certificate, and any attachments, is 28,492, up to and including the signature lines that follow the brief's conclusion.

Dated: June 14, 2007



Glen Lavy
Attorney for Appellant Proposition 22
Legal Defense and Education Fund