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

RESPONDENTS' CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS

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INTRODUCTION

Given the importance of the constitutional issues presented by the Marriage Cases, it is not surprising that the Court has heard from what may be an unprecedented number of amici, including many who have a direct interest in maintaining the integrity and strength of our state Constitution's central guarantees of equality, due process, privacy, and expression. Respondents here answer the briefs of amici who urge the Court to reverse the decision of the trial court and to permit the State to continue to bar same-sex couples from civil marriage.[1]

The questions to be decided here are issues of constitutional law and require the application of legal principles. At the same time, however, the Marriage Cases are before this Court against a backdrop of significant public engagement and discourse. This context is not unique to this case, or to this Court. This Court has long demonstrated a commitment to embracing principles of full equality even at times when such basic application of the law eluded other courts. Unlike the U.S. Supreme Court, which came to recognize and profoundly regret the ignominy that was *Plessy v. Ferguson* (1896) 163 U.S. 537, this Court charted a path that history has entirely vindicated. In *Perez v. Sharp* (1948) 32 Cal.2d 711, this Court held that the promise of equality in the California Constitution must extend to all her citizens, regardless of private or public prejudice.

Respondents respectfully suggest that this history is instructive here. There is a growing recognition and appreciation that the equal dignity and citizenship of lesbian and gay couples in California must include their right

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[1] For the Court's convenience, Respondents have attached an Appendix listing all of the amici and their counsel, and indicating which parties they support. (See Appendix filed herewith at pp. 1-10.)

to participate equally in the institution of civil marriage. It remains only for this Court, in the discharge of its role as guardian of the state's Constitution, to give formal voice to that reality.

The range of amici who have chosen to add their names and their voices in support of Respondents' legal arguments further attests that the time to recognize the right of same sex couples to marry in California is at hand.

Amicus briefs urging the Court to end the exclusion of same-sex couples from marriage have been filed by nineteen California cities and counties, including the five most populated cities in California (the cities of Los Angeles, San Diego, San Jose, Long Beach, and Oakland), as well as by sixteen state legislators. By contrast, there were no amicus briefs supporting the marriage restriction submitted by any local governments or public officials (other than those who are Appellants in this action and their counsel).

Amicus briefs opposing the marriage ban in order to end the harms inflicted on children of lesbian and gay parents and on lesbian and gay (as well as non-gay) adults and youth have been filed by the American Psychological Association, the California Psychological Association, the American Psychiatric Association, the National Association of Social Workers and its California chapter, the California District of the American Academy of Pediatrics, the American Psychoanalytic Association, and the American Anthropological Association. By contrast, no national, regional or local associations of child welfare experts, social scientists, or psychologists have defended the marriage ban.

Amicus briefs supporting the constitutional rights of same-sex couples to marry also were submitted by the American Academy of Matrimonial Lawyers and its Northern California Chapter, as well as by the

Los Angeles County Bar Association, the Santa Clara County Bar Association, the Bar Association of San Francisco, the Beverly Hills Bar Association, California Women Lawyers, the Women Lawyers Association of Los Angeles, the San Francisco Trial Lawyers Association, the National Asian Pacific American Bar Association, the Asian American Bar Association of the Greater Bay Area, the Asian Pacific American Bar Association of Los Angeles County, the Korean American Bar Association of Southern California, the Japanese American Bar Association of Greater Los Angeles, the Philippine American Bar Association, the South Asian Bar Association of Northern California, the Southern California Chinese Lawyers Association, Bay Area Lawyers for Individual Freedom, the Lesbian and Gay Lawyers Association of Los Angeles, the National Lesbian and Gay Law Association, Sacramento Lawyers for the Equality of Gays and Lesbians, and the Tom Homann Law Association. By contrast, no briefs in favor of the current marriage ban have been submitted by any bar or legal associations.

Further, while some amici argue that the decisions in *Perez v. Sharp*, *supra*, 32 Cal.2d 711 and *Loving v. Virginia* (1967) 388 U.S. 1 have no relevance to the Marriage Cases, that view is not shared by the California State Conference of the NAACP, the NAACP Legal Defense and Educational Fund, Inc., the Civil Rights Clinic of Howard University School of Law, and myriad other leading civil rights organizations that have filed amicus briefs urging this Court to apply the principles in those historic decisions to strike the restriction challenged here.

Similarly, while some amici claim that sexual orientation does not merit heightened scrutiny and that comparisons to discrimination based on race, national origin, and alienage are inappropriate, the leading national and state organizations with expertise regarding proper application of

heightened scrutiny disagree. These include, among others: the Mexican American Legal Defense and Education Fund, La Raza Centro Legal, more than sixty Asian Pacific American organizations, the Anti-Defamation League, the Southern Poverty Law Center, and the Equal Justice Society.

Likewise, although some amici argue that the marriage restriction does not discriminate based on sex, leading national and state legal organizations that specialize in sex discrimination law – the California Women's Law Center, Equal Rights Advocates, and Legal Momentum (formerly known as NOW Legal Defense and Education Fund) – have submitted briefs urging the Court to hold that the ban impermissibly discriminates based on sex and perpetuates inaccurate and harmful gender stereotypes.

And while some amici who support the marriage ban claim that religious sentiment is overwhelmingly opposed to Respondents' claims, religious groups and leaders have weighed in on both sides, with more than 400 religious organizations and leaders supporting the right of same-sex couples to marry.

Finally, some of the country's most respected legal scholars filed amicus briefs supporting equal marriage rights, including, among others, Professor and former California Supreme Court Associate Justice Joseph R. Grodin, Associate Dean Scott Altman, and constitutional and family law Professors Dean Paul Brest, Grace Ganz Blumberg, Jesse Choper, William N. Eskridge, Jr., Susan R. Estrich, Kenneth L. Karst, Herma Hill Kay, Joan H. Hollinger, Pamela S. Karlan, Lawrence Levine, Kathleen M. Sullivan, Jonathan D. Varat, and Michael S. Wald.

Since California's inception as a State, this Court has played an instrumental role in ensuring that the guarantees of the California Constitution are applied equally to all. Judicial vindication of

constitutional principles in these cases has yielded some of the most defining and respected moments in our state's history. (See, e.g., *Perez v. Sharp, supra*, 32 Ca.2d 711 [striking laws barring interracial marriage]; *Sei Fujii v. State of California* (1952) 38 Cal.2d 718 [striking California's alien land law]; *Mulkey v. Reitman* (1966) 64 Cal.2d 529 [striking voter initiative amending California Constitution to permit private race discrimination in the sale of housing]; *Sail'er Inn, Inc. v Kirby* (1971) 5 Cal.3d 1 [striking law restricting women's choice of occupations].)

This has been true for lesbian and gay Californians as well. This Court repeatedly has ensured that laws and legal principles are applied equally to lesbian and gay people, including in the area of family law. (See, e.g., *Stoumen v. Reilly* (1951) 37 Cal.2d 713 [holding that the State could not close a bar simply because gay people associated there]; *Morrison v. State Bd. of Education* (1969) 1 Cal.3d 214 [holding that the State could not discharge a teacher for private same-sex conduct]; *Gay Law Students Assn. v. Pacific Telephone & Telegraph Co.* (1979) 24 Cal.3d 458 [holding that public utility could not discriminate against employees based on sexual orientation]; *Pryor v. Municipal Court* (1979) 25 Cal.3d 238 [holding that the State could not discriminate against gay men in the enforcement of a criminal statute]; *Sharon S. v. Superior Court* (2003) 31 Cal.4th 417 [permitting second-parent adoptions by same-sex couples]; *Elisa B. v. Superior Court* (2005) 37 Cal.4th 108 [holding that parentage statutes must be construed gender neutrally to protect children of same-sex parents]; *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824 [holding that state law prohibits discrimination against domestic partners]). Our state has responded favorably to these decisions, because they are consistent with settled policies favoring inclusion and a deeply shared value of respecting diversity. The same is true of the question now before the

Court. Respondents wish to participate and share in the institution of civil marriage on equal terms; they do not wish to abolish or alter it, and their participation will not diminish the existing rights of others in any way.

As this Court has long recognized, the freedom to marry the person of one's choice is an essential aspect of human dignity. For most people, being able to exercise that freedom and to join with one's chosen partner in marriage is one of the most meaningful and cherished decisions in a person's life. To be denied that freedom is to suffer a unique – and uniquely personal and demeaning – harm.

To deny same-sex couples the same legal right to marry that heterosexual couples celebrate, and to permit the State to limit same-sex couples to the separate and lesser status of registered domestic partnerships, would suggest that they are not valued as equal members of our diverse community, and that it is legitimate for their government to treat them differently, and in an intentionally inferior way, from how it treats their neighbors, coworkers, family members, and friends. Such a message cannot be reconciled with California's constitutional principles, and would be an unworthy legacy for our state. With that in mind, Respondents respond below to the amici who oppose relief in the Marriage Cases.

ARGUMENT

I. INVALIDATING THE MARRIAGE EXCLUSION IS CONSISTENT WITH THIS COURT'S ROLE AS NEUTRAL ARBITER OF CONSTITUTIONAL ISSUES.

In prior cases, this Court repeatedly has affirmed the inherent equality and dignity of lesbian and gay people. Indeed, as Professor William N. Eskridge, Jr. has explained, "at *every* stage of California's evolving policy toward sexual minorities, this Court has played an active

and critical role, repeatedly ameliorating or trumping antigay legislation supported by popular prejudice and stereotyping and pressing state policy toward more equal treatment." (Br. of Prof. William N. Eskridge, Jr. at p. 5 (hereafter Prof. Eskridge), italics added.) As a result of this Court's rulings, as well as the enactment of laws and executive policies prohibiting official discrimination based on sexual orientation, California has increasingly embraced lesbian and gay people as equal members of society. Respondents now seek removal of the last barrier to their inclusion as fully equal citizens of this state by asking the Court to hold that their exclusion from civil marriage violates their rights to equal protection, privacy, due process, and freedom of association and expression under the California Constitution.

In opposition to this claim, some of the amici supporting Appellants argue not merely that Respondents are wrong on the constitutional merits, but that it would be *improper* for this Court to subject the marriage restriction to meaningful judicial review. Specifically, these amici argue: (1) that marriage is a matter of "public policy" and should be entrusted exclusively to "the democratic process" (Br. of Church of Jesus Christ of Latter-Day Saints, et al. at p. 25 (hereafter LDS, et al. or LDS Amici); see also Br. of Judicial Watch, Inc. at pp. 4-7, 17); and (2) that this Court should refrain from invalidating the marriage ban because it enjoys widespread popular support. (Br. of LDS, et al. at pp. 14-18; Br. of United Families International, et al. at pp. 33-37.) Neither of those arguments has merit.

First, there is no authority for the proposition that laws concerning marriage are, or should be, insulated from judicial review. That is the same argument raised by the State of California in *Perez v. Sharp* (1948) 32 Cal.2d 711 (hereafter *Perez*), and by the Commonwealth of Virginia in

Loving v. Virginia (1967) 388 U.S. 1 (hereafter *Loving*). But as those and other cases make clear,[2] the Legislature's authority over marriage must be exercised within constitutional bounds. (See *Beeler v. Beeler* (1954) 124 Cal.App.2d 679, 682 ["The regulation of marriage and divorce is solely within the province of the Legislature, *except as the same may be restricted by the Constitution.*" (italics added)].)

Second, judicial review is particularly appropriate in this case because the political process has reached an impasse. Twice in the past three years, the Legislature has voted to permit same-sex couples to marry, and the Governor has vetoed both measures based on the pendency of this litigation. In his most recent message Governor Schwarzenegger stated that the constitutionality of the marriage ban is "pending before the California Supreme Court" and reiterated his "position that the appropriate resolution to this issue is to allow the Court to rule." (Governor's veto message to Assem. on Assem. Bill. No. 43 (Oct. 12, 2007) Recess J. No. 9 (2007-2008 Reg. Sess.) pp. 3497-3498.)[3] Thus, without resolution by this Court,

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[2] See, e.g., *Zablocki v. Redhail* (1978) 434 U.S. 374 (striking law restricting marriage by persons who had failed to pay child support); *Turner v. Safley* (1987) 482 U.S. 78 (striking policy barring most prisoners from marriage); *Boddie v. Connecticut* (1971) 401 U.S. 371 (striking state policy of refusing to waive otherwise applicable court fees for indigents who wished to file for divorce).

[3] See Respondents' Request for Judicial Notice of Governor's veto message to Assembly Bill No. 43, filed concurrently herewith; Governor's veto message to Assembly on Assembly Bill. No. 849 (Sept. 29, 2005) Recess Journal No. 4 (2005-2006 Reg. Sess.) pp. 3737-3738; Court of Appeal Opinion at p. 21 (hereafter Opn.) ("because the constitutionality of the marriage laws was pending before this appellate court at the time, the Governor believed Assembly Bill No. 849 would add 'confusion' to the constitutional issues under review.").

California's lesbian and gay couples face a stalemate between the legislative and executive branches.[4]

Third, there likewise is no authority for the proposition that this Court should defer to supposed popular opinion in determining whether a challenged law violates the California Constitution.. Rather, the role of the courts is "to protect the rights of individuals and minorities . . . *against* the power of numbers." (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 141, italics added [citing *Hurtado v. California* (1884) 110 U.S. 516, 536]; see also *Parr v. Municipal Court* (1971) 3 Cal.3d 861, 870 ["Constitutional questions are not determined by a consensus of current public opinion."].) Contrary to the arguments of some amici, the courts' exercise of this protective role is an integral part of the democratic process and ensures its integrity. "The separation of powers doctrine articulates a basic philosophy of our constitutional system of government . . . . [T]he most fundamental [protection] lies in the power of the courts . . . to preserve constitutional rights, whether of individual or minority, from obliteration by the majority." (*Ross v. City of Yorba Linda* (1991) 1 Cal.App.4th 954, 964, fn. 3.)

Finally, the arguments of these amici miss the mark in another important respect. Contrary to their representations, there is no longer overwhelming public support for the marriage exclusion in California. As noted above, the California Legislature has *twice* voted to eliminate the

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[4] As Professor Eskridge notes, "California's judiciary has traditionally played a key role, *reversing the burden of inertia* when the political process is unable (for reasons of gridlock or lingering prejudice) to deliver full equality to a traditionally disadvantaged minority that has earned its rightful place in civil society." (Br. of Prof. Eskridge at p. 3, italics in original.) Both factors cited by Professor Eskridge are present here.

marriage ban. In recent polling only 46% of likely California voters oppose allowing same-sex couples to marry.[5]

Nationwide, every state legislator who has voted for legislation to permit same-sex couples to marry and who has run for reelection has won.[6] And as demonstrated by the amici in this case, those who support the right of lesbian and gay couples to marry include municipalities, bar associations, professional associations, child welfare experts, constitutional and family law scholars, civil rights advocates, and hundreds of religious leaders and organizations. Unmistakably, these trends point to growing public recognition that lesbian and gay couples "share the values of their parents and their neighbors" and are qualified to take on the responsibilities of marriage. (Br. of Prof. Eskridge at p. 36.)

As this Court has noted, "courts have been instrumental . . . in the quest for equality." (*Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000)

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[5] See Baldassare, Public Policy Institute of California (Sept. 2006) Californians and the Future: PPIC Statewide Survey, p. 29 (47% favor allowing same-sex couples to marry, 46% oppose, and 7% are undecided); Binder (Final Results Sept. 6 2007) California Voter Survey, p. 1 (42% favor allowing same-sex couples to marry, 40% oppose, and 18% are undecided). This data shows a significant increase in support for permitting same-sex couples to marry in a relatively short period of time. In 2000, 61.4% of those who voted cast ballots in favor of. Proposition 22. (Prop. 22, Gen. Elec. (Mar. 7, 2000); Cal. Sec. of State, State Ballot Measures Statewide Return (June 2, 2000) <http://primary2000.sos.ca.gov/returns/prop/00.htm> [last visited Nov. 10, 2007].) Many of those voters may have been concerned primarily about whether another state's decision to permit same-sex couples to marry could be determinative of whether California would recognize such marriages. (See Respondents' Consolidated Opening Br. at pp. 79-85.)

[6] (See Freedom to Marry (Oct. 2007) Pro-Marriage Incumbents and Candidates Win Elections <http://www.freedomtomarry.org/images/pdfs/promarriage_incumbents_and_candidates_win_elections.pdf> [last visited Nov. 10, 2007].)

24 Cal.4th 537, 545.) Conversely, as history has shown, when courts place their imprimatur upon official discrimination, the damaging consequences – both for society and for the affected group – can be profound and often lasting. (See, e.g., *Bradwell v. State* (1872) 83 U.S. 130 [upholding denial of law licenses to women]; *Plessy v. Ferguson* (1896) 163 U.S. 537 [upholding racial segregation in railroad cars]; *Buck v. Bell* (1927) 274 U.S. 200 [upholding law mandating forced sterilization of people with disabilities]; *Bowers v. Hardwick* (1986) 478 U.S. 186 [upholding law criminalizing same-sex intimacy]; *People v. Hall* (1854) 4 Cal. 399 [construing statute to preclude Chinese persons from testifying against "white" persons on the ground that ruling otherwise "would admit them to all the equal rights of citizenship"].)

II. THE MARRIAGE RESTRICTION DISCRIMINATES BASED ON SEXUAL ORIENTATION AND MUST BE SUBJECTED TO HEIGHTENED SCRUTINY FOR THAT REASON.

A. The Marriage Restriction Discriminates Based On Sexual Orientation.

Some amici erroneously argue that the marriage restriction does not discriminate based on sexual orientation because a gay man is free to marry a woman and a lesbian is free to marry a man.[7] That argument ignores that the meaning of sexual orientation is defined in terms of a person's attraction to, and desire for intimacy with, a person of a particular sex. A statute limiting one's choice of partner for intimate relations to a particular sex discriminates based on sexual orientation even without using the terms

[7] See Brief of Professor Douglas W. Kmiec, et al. at p. 8 (hereafter Prof. Kmiec, et al.); Br. of Knights of Columbus at pp. 14-16; Brief of Professor James Q. Wilson, et al. at p. 49 (hereafter Prof. Wilson, et al.).

sexual orientation, gay, lesbian, homosexual, or heterosexual. (*Lawrence v. Texas* (2003) 539 U.S. 558 (hereafter *Lawrence*).)[8]

As California courts have made clear, a law targeting a characteristic that is obviously a proxy for a protected category discriminates on the basis of that protected category. For example, in *Johnson Controls, Inc. v. Fair Employment & Housing Com.* (1990) 218 Cal.App.3d 517, 533 (hereafter *Johnson Controls*), the Court of Appeal held that an employer discriminated on the basis of sex by excluding only employees capable of becoming pregnant from certain jobs. The Court explained that such a policy did not merely have a disparate impact on women, but also facially discriminated based on sex:

> at issue is not a rule, standard, or criterion which might disproportionately exclude members of a protected class, but rather a determinative, if conceptually "neutral," trait or condition . . . which, if it excludes anyone, can only exclude members of a protected class. In such a case, it is pure

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[8] As Amici American Psychological Association, et al. explain:

> [S]exual orientation is always defined in relational terms and necessarily involves relationships with other individuals. Sexual acts and romantic attractions are categorized as homosexual or heterosexual according to the biological sex of the individuals involved in them, relative to each other. Indeed, it is by acting – or desiring to act – with another person that individuals express their heterosexuality, homosexuality, or bisexuality. . . . Thus, sexual orientation is integrally linked to the intimate personal relationships that human beings form with others to meet their deeply felt needs for love, attachment, and intimacy. . . .
>
> Consequently, sexual orientation is not merely a personal characteristic that can be defined in isolation. Rather, one's sexual orientation defines the universe of persons with whom one is likely to find the satisfying and fulfilling relationships that, for many individuals, comprise an essential component of personal identity.

(Br. of American Psychological Assn., et al. at pp. 7-8.)

> sophistry to argue there is any distinction between an "adverse impact" on the class . . . and "disparate treatment" of that class. The neutral trait or condition is but a proxy for membership in the protected class itself.

(*Johnson Controls*, *supra*, at p. 541, fn. 7.) Similarly, barring same-sex couples from marriage "does not merely have a 'greater impact' on lesbian and gay couples; it excludes 100 percent of them from entering marriage." (Opn. p. 39, fn. 23.) By any reasonable measure, the statutory exclusion of same-sex couples from marriage is a facial classification based on sexual orientation.[9]

Some amici deny even that the marriage restriction has a legally cognizable disparate impact on lesbians and gay men because, they claim, the marriage law was not enacted with a discriminatory purpose. (Br. of Knights of Columbus at pp. 16-20; see also Br. of Prof. Kmiec, et al. at pp. 7-8 [arguing that "any claimed impact or disparity flows from gays and lesbians themselves"].) Respondents have shown in prior briefing that the Legislature's purpose in amending Family Code section 300 in 1977 was to exclude lesbian and gay couples from marriage, and that the purpose of Proposition 22, as expressed in the measure's ballot materials, was to prevent recognition of marriages of lesbian and gay couples entered in other

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[9] In addition to violating equal protection, requiring lesbians and gay men either to marry a person of the other sex or to forego marriage imposes an unconstitutional condition that also violates the fundamental right to autonomy recognized in *Lawrence*, *supra*, 539 U.S. at p. 574 (explaining that "persons in a homosexual relationship" are entitled to seek "autonomy . . . just as heterosexual persons do" in "intimate and personal choices" central to "personal dignity," such as those relating to sexual intimacy, procreation, family relationships and child-rearing). (See also Br. of Equal Justice Society at pp. 22-23 (hereafter Equal Justice Society); Br. of American Psychological Assn., et al. at pp. 6-7, 14-18; Br. of Anti-Defamation League, et al. at pp. 4-6 (hereafter Anti-Defamation League, et al.).)

states. (Respondents' Consolidated Opening Br. at pp. 26-28; Respondents' Consolidated Reply Br. at p. 22.) Thus, contrary to the argument of the Knights of Columbus (Br. of Knights of Columbus at pp. 19-20), the restriction challenged in this case is not like that in *Personnel Administrator of Mass. v. Feeney* (1979) 442 U.S. 256. In *Feeney*, the state legislature sought to accomplish an independent legislative goal – providing a benefit to veterans – that was completely unrelated to the incidental and unintended effect on women, who were disadvantaged by the statute due to discriminatory federal policies preventing women from serving on equal terms in the armed forces. (*Id.* at pp. 269-270.) In contrast here, there is no difference between the purpose of the challenged legislation and its adverse impact on lesbian and gay people; rather, the Legislature amended Family Code section 300, and the people enacted Family Code section 308.5, precisely in order to ensure the exclusion of lesbian and gay couples from marriage and to prevent recognition of such couples' marriages entered in other jurisdictions.[10]

B. Laws That Discriminate Based On Sexual Orientation Should Be Subject To Strict Scrutiny Under The California Constitution.

Some amici contend that laws that classify based on sexual orientation should be subject only to rational basis review (Br. of Knights of Columbus at pp. 20-32); however, this contention disregards the primary

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[10] In *Koebke*, this Court expressly acknowledged that "discrimination based on marital status implicates discrimination against homosexuals." (*Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 849 (hereafter *Koebke*).) Contrary to the Knights of Columbus' claim (Br. of Knights of Columbus at pp. 18-19.), *Koebke* did not hold that the marriage restriction has no disparate impact on lesbians and gay men; rather, the Court simply affirmed that the Unruh Act does not permit disparate impact claims. (*Koebke*, *supra*, at pp. 853-854.)

purpose of strict scrutiny and the suspect classification doctrine: to "smoke out" government actions that are likely to reflect bias. (See *Johnson v. California* (2005) 543 U.S. 499, 499.) When a group has been subject to a longstanding history of discrimination based on a characteristic with no bearing on ability to perform or contribute to society, the courts should be suspicious of laws that discriminate based on that characteristic.[11] (*Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 18 (hereafter *Sail'er Inn*); Respondents' Consolidated Opening Br. at pp. 29-30; Respondents' Consolidated Reply Br. at pp. 25-26; Br. of Mexican American Legal Defense and Education Fund, et al. at pp. 14-15 (hereafter MALDEF, et al.); Br. of Equal Justice Society, et al. at pp. 22-23; Br. of American Psychological Assn., et al. at pp. 6-7, 14-18; Br. of Anti-Defamation League, et al. at pp. 4-6; Br. of Prof. Eskridge at p. 55.)

In arguing otherwise, some amici suggest that immutability and political powerlessness are invariably litmus tests of suspect classification. (Br. of Knights of Columbus at pp. 21-23, 27-31; Br. of LDS, et al. at pp. 31-33; Br. of Jews Offering New Alternatives to Homosexuality, et al. at pp. 5, 7-11 (hereafter JONAH, et al.).) This Court, however, has not held that either of these factors is essential in order for a classification to be subjected to heightened scrutiny.[12] (Respondents' Consolidated Opening

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[11] California's history of discrimination against lesbian and gay persons is chronicled in the brief of Professor Eskridge at pages 5-12, in the brief of City of Los Angeles, et al., at pages 14-20, and in the brief of Mexican American Legal Defense and Education Fund, et al. at pages 14-22. As Professor Eskridge explains, California law "demonized [lesbian and gay couples] for most of the twentieth century, then denigrated [them], and now denies full marriage rights." (Br. of Prof. Eskridge at p. 4.)

[12] There is no merit to the assertion of Amicus Knights of Columbus that this Court relied "solely" on immutability to deny suspect classification to prisoners in *Meredith v. Workers' Compensation Appeals Board* (1977)

Br. at pp. 33-34, 36-39; Respondents' Consolidated Reply Br. at pp. 24-33.) Rather, in *Sail'er Inn*, *Meredith*, and other cases, this Court has emphasized that "[w]hat differentiates sex from nonsuspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classifications is that the characteristic frequently bears no relation to ability to perform or contribute to society." (*Meredith v. Workers' Compensation Appeals Bd.* (1977) 19 Cal.3d 777, 780-781 [quoting *Sail'er Inn*, *supra*, 5 Cal.3d at p. 18]; *Bobb v. Municipal Court* (1983) 143 Cal.App.3d 860, 866; *Molar v. Gates* (1979) 98 Cal.App.3d 1, 17; cf. *Tanner v. Or. Health Sciences Univ.* (Or. Ct. App. 1998) 157 Or.App. 502, 523 ["[T]he focus of suspect class definition is not necessarily the immutability of the common, class-defining characteristics, but instead the fact that such characteristics are historically regarded as defining distinct, socially-recognized groups that have been the subject of adverse social or political stereotyping or prejudice."].)

Indeed, alienage and religion are suspect classifications even though neither is immutable, given that a person's citizenship can change and one can change one's religion. Amicus Knights of Columbus attempts to discount religion as an example of a suspect classification that is not immutable by erroneously claiming that classifications based on religion are subject to strict scrutiny only because freedom of religion is protected as a fundamental right. (See Br. of Knights of Columbus at p. 22.) It is well settled, however, that laws that discriminate based on religion meet the

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19 Cal.3d 777. (See Br. of Knights of Columbus at p. 21 [citing *Meredith*, *supra*, at p. 781].) While this Court mentioned immutability in *Meredith*, the Court placed equal emphasis on the fact that being convicted of a crime generally "bears 'a relationship to ability to perform or contribute to society.'" (*Meredith*, *supra*, at 781 [citing *In re Harrell* (1970) 2 Cal.3d 675, 693].)

criteria for heightened scrutiny under the equal protection clause independent of the express protections for religious exercise in the state and federal Constitutions. (See, e.g., *City of New Orleans v. Dukes* (1976) 427 U.S. 297, 303 [explaining that rational basis review is insufficient if "a classification trammels fundamental personal rights *or* is drawn upon inherently suspect distinctions such as race, *religion*, or alienage" (italics added)]; *Burlington Northern Railroad Co. v. Ford* (1992) 504 U.S. 648, 651 [applying rational basis review to rules that "neither deprive [the petitioner] of a fundamental right nor classify along suspect lines like race or religion"]; *Christian Science Reading Room Jointly Maintained v. City and County of San Francisco* (9th Cir.1986) 784 F.2d 1010, 1012 & fn. 1 [explaining that "an individual religion meets the requirements for treatment as a suspect class" and noting plaintiff's additional argument "that the Free Exercise Clause of the First Amendment provides an *alternative basis* for applying strict scrutiny" under the federal Equal Protection Clause (italics added)]; *Owens v. City of Signal Hill* (1984) 154 Cal.App.3d 123, 128 ["Some classifications are 'suspect,' because they are rarely relevant to a legitimate governmental interest. Examples of such classifications are race, religion and alienage."].)[13]

Moreover, even if immutability were a prerequisite for strict scrutiny, sexual orientation is immutable, as that term is used in suspect classification analysis. The overwhelming weight of current scientific knowledge and mental health practice recognizes that, for the great majority

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[13] In any event, to the extent that religion's status as a suspect classification is based on the protection of religious exercise as a fundamental right, sexual orientation is comparable in that, under the California Constitution's privacy and due process guarantees, each person has a fundamental right to form a consensual intimate relationship with the person of his or her choice.

of people – gay and straight alike – sexual orientation is not subject to voluntary change or control. (See Br. of American Psychological Assn., et al. at pp. 11-12, fn. 14; see also Respondents' Consolidated Opening Br. at pp. 36-39; see also (*Reyes-Reyes v. Ashcroft* (9th Cir. 2004) 384 F.3d 782, 785, fn. 1 ["[I]t is well accepted among social scientists that '[s]exual identity is inherent to one's very identity as a person. . . . Sexual orientation and sexual identity are immutable." (quoting *Hernandez-Montiel v. Immigration and Naturalization Service* (9th Cir. 2000) 225 F.3d 1084, 1093 (hereafter *Hernandez-Montiel*).)[14]

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[14] In a recent decision affirming the validity of Maryland's marriage ban, the Maryland high court erroneously stated that the Ninth Circuit held that classifications based on sexual orientation are not suspect in *Flores v. Morgan Hill Unified School District* (9th Cir. 2003) 324 F.3d 1130 (hereafter *Flores*). (*Conaway v. Deane* (2007) 932 A.2d 571, 614-615.) In fact, the legal issue in *Flores* was whether the defendant school officials were on notice that discrimination based on sexual orientation was unconstitutional during the time period at issue. (*Flores*, *supra*, at p. 1136 ["The defendants contend that the law [on this point] was not clearly established . . . during the relevant years, 1991-1998 . . . ."].) The Ninth Circuit cited its prior decision in *High Tech Gays* solely in order to make the point that, "[a]s early as 1990, we established . . . that such conduct violates constitutional rights: state employees who treat individuals differently on the basis of their sexual orientation violate the constitutional guarantee of equal protection. See *High Tech Gays* [*v. Defense Industrial Security Clearance Office* (9th Cir. 1990) 895 F.2d 563] at 573-74 (finding that homosexuals are not a suspect or quasi-suspect class, but are a definable group entitled to rational basis scrutiny for equal protection purposes)." (*Flores*, *supra*, at p. 1137.) The *Flores* Court did not consider, much less decide, whether government discrimination based on sexual orientation should be subjected to strict scrutiny in light of the reversal of *Bowers v. Hardwick*, *supra*, 478 U.S. 186 and in light of the Ninth Circuit's determination that sexual orientation is immutable. (See also *Hensala v. Dept. of the Air Force* (9th Cir. 2003) 343 F.3d 951, 956, 959 [declining to decide whether *Lawrence*, *supra*, 539 U.S. 558 overruled prior Ninth Circuit cases that had applied rational basis review to sexual orientation discrimination and remanding to district court for its possible consideration

Contrary to arguments by some amici (Br. of JONAH, et al. at pp. 5, 7-15; Br. of Knights of Columbus at p. 27-29), an "immutable" trait for purposes of equal protection analysis need not be genetically or biologically determined.[15] Rather, in this context, "immutability" means traits that are beyond an individual's ability to control or that "are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them." (*Watkins v. United States Army* (1989) 875 F.2d 699, 726 (conc. opn. of Norris, J.), cert. den., 498 U.S. 957.) Accordingly, the fact that scientists have not conclusively established whether sexual orientation is genetically determined is not determinative of whether sexual orientation is immutable for purposes of equal protection analysis. Whatever the cause of sexual orientation, the legally salient points are that "[h]omosexuality is as deeply ingrained as heterosexuality" and is "a basic component of a person's core identity" (*Hernandez-Montiel, supra*, 225

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of that issue, since *Lawrence* was decided after district court decision on review].) Accordingly, the Maryland high court's reliance on *Flores* for this proposition was erroneous.

[15] For example, alienage and legitimacy are based on legal categories, not on genetics or biology. Moreover, even race is now widely recognized both by scientists and by courts to be a socially and legal constructed status that lacks coherent genetic or biological underpinnings. (See, e.g., *Saint Francis College v. Al-Khazraji* (1987) 481 U.S. 604, 610, fn. 4.) ["It has been found that differences between individuals of the same race are often greater than the differences between the "average" individuals of different races. These observations and others have led some, but not all, scientists to conclude that racial classifications are for the most part sociopolitical, rather than biological, in nature."].) Indeed, as early as 1948, this Court recognized that racial classifications are premised not on scientific "truths" but on inherently arbitrary and unreliable criteria. (*Perez, supra*, 32 Cal.2d at pp. 728-732 [holding that racial classifications are inherently subjective, arbitrary, and unconstitutionally vague].) In addition, alienage and illegitimacy are based on legal categories, not on genetics or biology.

F.3d at pp. 1093-1094 [quoting *Gay Rights Coalition of Georgetown Univ. Law Center v. Georgetown Univ.* (D.C. Ct. App. 1987) 536 A.2d 1, 34-35]), and that sexual orientation is not within the control of most people (see Br. of American Psychological Assn., et al. at pp. 11-12, fn. 14).

Some amici in support of Appellants contend that "at least a few strongly motivated individuals can change their sexual orientation." (See, e.g., Br. of JONAH, et al. at p. 13.) The existence of such persons does not change the fact that, for the overwhelming majority of people (both heterosexual and gay), sexual orientation is a deeply-rooted aspect of one's identity that cannot be changed. The leading national and state psychological, psychiatric, and social workers' associations who have joined as amici in support of Respondents explain:

> Sexual orientation has proved to be generally impervious to interventions intended to change it, which are sometimes referred to as "reparative therapy." No scientifically adequate research has shown that such interventions are effective or safe. Moreover, because homosexuality is a normal variant of human sexuality, national mental health organizations do not encourage individuals to try to change their sexual orientation from homosexual to heterosexual. Therefore, all major national mental health organizations have adopted policy statements cautioning the profession and the public about treatments that purport to change sexual orientation.

(Br. of American Psychological Assn., et al. at pp. 11-12, fn. 14.)

The State has no legitimate interest in seeking to pressure or coerce individuals to alter their sexual orientation, any more than it would have such an interest in pressuring or coercing individuals to change their religion or ethnic or racial identification. Indeed, as Respondents have previously argued and as amici Anti-Defamation League, et al. have further explained, conditioning access to marriage on surrender of the right to

choose a life partner consistently with one's sexual orientation violates the privacy and due process guarantees of the California Constitution. (Respondents' Consolidated Opening Br. at pp. 51-64; Respondents' Consolidated Reply Br. at pp. 7-16; Br. of Anti-Defamation League, et al.)

Also contrary to the claims of some amici, this Court has never held that political powerlessness is a controlling criterion for suspect status, nor has the United States Supreme Court.[16] (See Respondents' Consolidated Opening Br. at p. 30; Respondents' Consolidated Reply Br. at pp. 24-28; Br. of MALDEF, et al. at pp. 5-11; Br. of Equal Justice Society at pp. 19-20; Br. of Prof. Eskridge at p. 55.) In *Sail'er Inn*, *supra*, 5 Cal.3d 1, this Court did not mention political powerlessness as even a relevant factor, much less a controlling one. One amicus in support of Appellants erroneously asserts that this Court reversed *Sail'er Inn* on this point in *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1. (Br. of Knights of Columbus at p. 29.) In fact, however, *D'Amico* did not discuss

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[16] As one federal district court has noted:

> [I]n most cases the Supreme Court has no more than made passing reference to the 'political power' factor without ever analyzing it. See, e.g., *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). Thus, while these Court have given the test differing degrees of attention, one thing is apparent . . . the significance of the test pales in comparison to the question of whether or not the characteristic bears any relationship to the individuals ability to function in society, whether the group has suffered a history of discrimination based on misconceptions of that factor and whether that factor is the product of the group's own volition.

(*Equality Foundation of Greater Cincinnati v. City of Cincinnati* (S.D. Ohio 1994) 860 F. Supp. 417, 438, fn. 17, revd. on other grounds, (6th Cir. 1997) 128 F.3d 289.)

or even mention political powerlessness; indeed, neither the term nor the concept appears in the decision.

In addition to overstating the significance of this factor, some amici also err by construing "political powerlessness" literally to mean that a group must be completely unable to win any legal protections. (Br. of LDS, et al. at pp. 31-33; Br. of JONAH, et al. at pp. 15-19; Br. of Knights of Columbus at pp. 29-31.) If that were the case, however, few if any currently recognized suspect classifications would exist. (See Respondents' Consolidated Reply Br. at pp. 26-27; Br. of MALDEF, et al. at pp. 7-11; Br. of Equal Justice Society, et al. at pp. 14-15; Br. of Prof. Eskridge at pp. 55-56.) For example, men do not lack political power; to the contrary, they represent a majority of office-holders in all branches of this state's government. Nonetheless, sex-based laws that disadvantage men must be subjected to heightened scrutiny under the federal Constitution and to strict scrutiny under the California Constitution. (See, e.g., *Miss. Univ. for Women v. Hogan* (1982) 458 U.S. 718; *Craig v. Boren* (1976) 429 U.S. 190; *Arp v. Workers' Compensation Appeals Bd.* (1977) 19 Cal.3d 395, 400.) Similarly, if a targeted group's ability to gain equal protection through legislation precluded a discriminatory classification from being suspect, legislative gains by women and racial minorities would long ago have ended the constitutional presumption that laws disadvantaging those groups warrant a closer look. But the opposite is true; both this Court and the United States Supreme Court continue to treat classifications based on sex and race as inherently suspect. (*Nevada Dept. of Human Resources v. Hibbs* (2003) 538 U.S. 721, 728 [sex]: ; *Grutter v.*

Bollinger (2003) 539 U.S. 306, 328 [race]; *Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 564 [sex].)[17]

Moreover, contrary to the arguments of some amici, the Supreme Court's decision in *Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432 (hereafter *Cleburne*) does not support a literal interpretation of "political powerlessness." (Br. of LDS, et al. at pp. 31-33.) In *Cleburne*, *supra*, 473 U.S. 432, the Supreme Court explained that it would not be appropriate to presume that laws expressly addressing persons with developmental disabilities are likely to be invidious (and thus properly subject to strict scrutiny) for two reasons: (1) the "vast majority" of such laws do not merely prohibit discrimination but also provide persons with developmental disabilities with special accommodations and benefits; (2) in many cases, whether a person has a developmental disability may be relevant to the individual's ability to perform and thus, at least in some circumstances, may be a legitimate subject of legislation. (*Cleburne*, *supra*, 473 U.S. at pp. 443-445; see also Br. of Equal Justice Society at pp. 20-22.) Neither of those considerations is applicable here. While the Legislature has passed many laws prohibiting discrimination based on sexual orientation, the premise of those measures is not that lesbian and gay people require special consideration or assistance, but rather that sexual orientation is completely irrelevant to a person's ability to contribute or function in society. (See, e.g., Assem. Bill No. 1001 (1999-2000 Reg.

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[17] Amici's arguments resemble those made in Justice Scalia's dissent in *United States v. Virginia*, which were rejected by the United States Supreme Court's majority. (See *United States v. Virginia* (1996) 518 U.S. 515, 575 (dis. opn. of Scalia, J.) (hereafter *VMI*) [arguing that discrimination based on sex should only receive rational basis review because, in Justice Scalia's view, women (1) are not a "discrete and insular minority," (2) possess political power, and (3) have "a long list of legislation" protecting them].)

Sess.) [employment discrimination]; Assem. Bill No. 537 (1999-2000 Reg. Sess.) [discrimination and harassment in schools].) Moreover, in light of the irrelevance of sexual orientation to ability to contribute to society, the Legislature's enactment of a domestic partnership status for same-sex couples separate and apart from marriage is not comparable to legislative enactments to assist disabled persons. Rather, the Legislature's exclusion of same-sex couples from marriage – while simultaneously acknowledging that same-sex couples are similarly situated to and entitled to the same treatment as spouses (Assem. Bill No. 205 (2003-2004 Reg. Sess.), § 1, subd. (a)-(b); Fam. Code, § 297.5, subd. (a)-(f)) – confirms that, even today in California, as around the country, statutory distinctions between persons or families based on sexual orientation are most likely motivated by bias, rather than legitimate government interests.

Strict scrutiny is warranted as well because lesbian and gay people have been – and continue to be – subject to extraordinary, majoritarian efforts to deprive them of basic civil rights and protections. (*Romer v. Evans* (1996) 517 U.S. 620; *Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal.App.4th 1013.) Thus, even if political vulnerability were a prerequisite for treatment as a suspect classification, laws that discriminate against lesbian and gay people would meet this requirement. (Br. of MALDEF, et al. at pp. 14-22, 24-26; Br. of Equal Justice Society at pp. 26-29; Br. of Prof. Eskridge at pp.55-57.).

III. THE MARRIAGE RESTRICTION DISCRIMINATES BASED ON SEX AND IS NOT JUSTIFIED BY ACTUAL OR SUPPOSED DIFFERENCES BETWEEN MEN AND WOMEN.

In their prior briefing, Respondents have shown that California's current marriage law violates equal protection because it expressly discriminates based on sex and perpetuates impermissible sex stereotypes.

(Respondents' Consolidated Opening Br. at pp. 39-45; Respondents' Consolidated Reply Br. at pp. 33-40; see also Br. of Cal. Women's Law Center, et al.; Br. of Prof. Eskridge at pp. 47-52.) Some amici argue, however, that this Court should not deem the marriage restriction's sex-based classification to be impermissible sex discrimination (1) because the reasoning in *Perez*, *supra*, 32 Cal.2d 711 and *Loving*, *supra*, 388 U.S. 1 purportedly applies only to race, not to sex; and (2) because the marriage restriction supposedly is based on and justified by differences between men and women. Neither argument has merit.

A. The Reasoning In *Perez* And *Loving* Is Applicable To The Marriage Restriction's Sex-Based Classification.

In arguing that the marriage exclusion does not impermissibly discriminate on the basis of sex, some amici contend that the reasoning in cases such as *Perez* and *Loving* – including the rejection of the "equal application" argument[18] – was limited to race and has no relevance with

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[18] For more detailed responses to the arguments of certain amici in support of Appellants that the marriage statutes do not discriminate based on sex because they apply "equally" to men and women (Br. of Prof. Kmiec et al. at pp. 14, 20-22) and that discrimination against *same-sex couples* is not sex discrimination (Br. of Prof. Kmiec, et al. at p. 7), see Respondents' Consolidated Opening Brief at pages 45 through 50; Respondents' Consolidated Reply Brief at pages 33 through 40; Brief of California Women's Law Center, et al. at pages 9 through 14; and Brief of Prof. Eskridge at pages 47 through 52. In addition, Knights of Columbus cites to *People v. Silva* (1994) 27 Cal.App.4th 1160, 1168-1171, as purportedly holding that classifications distinguishing between same-sex couples and different-sex couples are reviewable under the rational basis standard. (Br. of Knights of Columbus, p. 15.) In *Silva*, the defendant challenged a statutory classification that treated violence occurring within nonmarital different-sex relationships differently than violence occurring within same-sex relationships. There is no indication, however, that the defendant in *Silva* argued that the classification should be subject to

respect to sex. (Br. of Knights of Columbus at pp. 6-8; Br. of Prof. Kmiec, et al. at pp. 9-11; Br. of LDS, et al. at pp. 19-20.) Simply because race and sex are not completely "fungible" for equal protection purposes, however, does not mean that reasoning used by the courts in striking down race-based classifications is inapplicable in other equal protection contexts. Amicus NAACP Legal Defense and Educational Fund, Inc. and amicus California State Conference of the NAACP have filed briefs expressly urging this Court to apply the reasoning in *Perez* and *Loving* to strike down California's exclusion of same-sex couples from marriage as impermissible sex discrimination. (See Br. of NAACP Legal Defense and Educational Fund, Inc. at p. 4 ["The basic constitutional principles addressed in *Perez* and *Loving* are not and should not be limited to race . . . ."]; Br. of Cal. State Conference of the NAACP at p. 4; see also Br. of Howard Univ. School of Law Civil Rights Clinic at pp. 1-4 [explaining that the arguments of Appellants and their supporters in opposition to marriage by same-sex couples are the same arguments formerly marshaled against interracial marriage and that this Court should reject such arguments].)

The amici who contend that *Perez* and *Loving* have no relevance to this case attempt to bolster their argument by pointing to the existence of sex-segregated public bathrooms, schools, and athletic programs, while noting that segregation based on race in such contexts would be unconstitutional. (Br. of Knights of Columbus at pp. 6-7 & fn. 8; Br. of Prof. Kmiec, et al. at p. 11, fn. 7.) The permissibility of sex-based legal

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heightened scrutiny as discriminatory based on sex or sexual orientation. Rather, the defendant's "equal protection challenge in th[at] case [was] based on an alleged sentencing disparity," and the Court of Appeal analyzed the case by reference to precedents stating that the courts should subject to rational basis review the Legislature's "determin[ations of] which class of crimes deserves certain punishments and which crimes should be distinguished from others." (*People v. Silva*, *supra*, at p. 1168.)

classifications in certain limited contexts, however, does not suggest that the marriage exclusion is not a sex-based classification or provide any reason that the marriage exclusion could survive strict scrutiny.

Under the California Constitution, sex-segregated public facilities and programs are subject to strict scrutiny, but some such facilities and programs may survive heightened judicial review. As this Court noted in *Koire*, "some sex-segregated facilities, such as public restrooms, may be justified by the constitutional right to personal privacy." (*Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 38 (hereafter *Koire*).) The state's compelling interest in educating children who reside in the state, including with respect to physical fitness and athletics, likewise may in certain limited contexts provide justification for separate educational and sports programs for females and males.[19]

The justifications for those sex-segregated facilities or programs are inapplicable to the marriage exclusion. For example, in contrast to the privacy interests that may be served by separate bathrooms for males and females, there are no privacy interests that in any way would be negatively

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[19] Some public sex-segregated educational facilities, of course, cannot withstand equal protection scrutiny. (See, e.g., *VMI*, *supra*, 518 U.S. 515 [holding that the exclusion of women from the Virginia Military Institute violated equal protection even where the Commonwealth of Virginia offered an alternative military school for women]; see also *Miss. Univ. for Women v. Hogan*, *supra*, 458 U.S. 718 [holding that state-run nursing school violated equal protection by excluding men].) The same holds true for some, but not all, public athletic programs. (See Br. of Knights of Columbus at p. 7, fn. 7 [citing cases upholding and cases invalidating separate athletic programs and teams for boys and girls]; *Brenden v. Independent School Dist. 742* (8th Cir. 1973) 477 F.2d 1292 [rule barring girls from high school cross-country skiing team violated equal protection]; *Attorney Gen. v. Mass. Interscholastic Athletic Assn.* (1979) 393 N.E.2d 284 [rule excluding all boys from girls' teams, while permitting girls to play on boys' teams if sport was not offered for girls, violated the Massachusetts Equal Rights Amendment].)

implicated by permitting same-sex couples to marry. To the contrary, the relevant privacy interests support permitting same-sex couples to marry. (Respondents' Consolidated Opening Br. at pp. 51-64; Br. of Anti-Defamation League, et al. at pp. 13-19.)

Some amici also seek to distinguish *Perez* and *Loving* by arguing that laws barring marriages of interracial couples were designed to segregate persons of different races while "the sex classification employed by marriage laws plays an integrative function with regard to gender." (Br. of Prof. Kmiec, et al. at p. 24; see also Br. of Knights of Columbus at pp. 8-9; Br. of United Families International, et al. at pp. 13, 30; Br. of LDS, et al. at pp. 40-41.) That argument ignores a central reason *why* laws restricting marriage based on race or sex are unconstitutional. The gravamen of "anti-miscegenation" laws was not simply that they were designed to separate persons of different races (which indeed independently would be fatal to such laws), but also that they impermissibly treated race as though it were a relevant characteristic. (*Perez*, *supra*, 32 Cal.2d at 718 ["By restricting the individual's right to marry on the basis of race alone, they violate the equal protection of the laws clause of the United States Constitution."]; see also *Loving*, *supra*, 388 U.S. at p. 12 ["the freedom to marry or not marry, a person of another race, resides with the individual"].) Thus, a law *requiring* individuals to marry a person of a different race (even if the asserted purpose was to encourage racial integration) would violate equal protection just as certainly as would a law *barring* such marriages; in either case, the law erroneously would presume that a person's race has some bearing on his or her qualifications for marriage.[20]

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[20] As the United States Supreme Court has recently reiterated, even in the context of public education, laws designed to integrate, rather than segregate, based on suspect classifications can fail to pass muster under

The argument that the marriage restriction is justified because it "integrates" women and men violates equal protection for an analogous reason – i.e., because it presupposes, incorrectly, that the sexes of partners are relevant to their abilities to form lasting, caring relationships with each other or to be parents together. As Respondents previously have explained (Respondents' Consolidated Opening Br. at pp. 40-45; Respondents' Consolidated Reply Br. at pp. 38-40), the Legislature has determined that sex is not relevant to such matters, and this Court has expressed concurrence.[21]

Moreover, as discussed further below, just as some of the arguments made by those attempting to justify race-based marriage laws were premised on racial stereotypes, the notion that the State may restrict the right to marry based on sex in order to "integrate" the sexes is premised on inaccurate and harmful stereotypes about the roles of women and men in family life.

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strict scrutiny. (See, e.g., *Parents Involved in Community Schools v. Seattle School Dist. No. 1* (2007) 127 S.Ct. 2738, 2760.)

[21] See, e.g., Assembly Bill No. 205 (2003-2004 Reg. Sess.) section 1, subdivision (b) ("[M]any lesbian, gay, and bisexual Californians have formed lasting, committed, and caring relationships with persons of the same sex . . . ."); Family Code section 297.5, subdivisions (a) ("Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law . . . as are granted to and imposed upon spouses") and (d) ("The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses."); *Elisa B. v. Superior Court* (2005) 37 Cal.4th 108, 119 (hereafter *Elisa B.*) ["We perceive no reason why both parents of a child cannot be women."].

B. The Marriage Restriction Is Not Justified By Any Legally Relevant Differences Between Women And Men.

Several amici who support the marriage ban erroneously argue that it is justified by purported differences between women and men. Specifically, these amici claim: that women are inherently more bonded with their children and more inclined to be caring and responsible parents than men;[22] that women are inherently more vulnerable and dependent than men because it is women who give birth;[23] that the purpose of marriage is to encourage men to provide for their wives and children;[24] and that women

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[22] See, e.g., Brief of Professor Kmiec pp. 25-26 ("Women are naturally and uniquely connected to their children by the process of gestation and birth. Fathers by contrast . . . are . . . less likely to bond with their children."); Brief of American Center for Law and Justice at pp. 2-3 (marriage "is crucial for heterosexual males who have no physical connection to their offspring after conception"); Brief of LDS, et al. at p. 39 (arguing that whereas women are naturally tied to their children, men require marriage in order to encourage them to bond with and care for their children).

[23] Brief of Professor Kmiec, et al. at pp. 25-26 (arguing that "nature itself discriminates" against women and that the purpose of marriage is to "mitigat[e] against the effects of this biological inequity"); Brief of American Center for Law & Justice at p. 2; Br. of United Families International at p. 21 (purpose of marriage is to protect "the child and the often vulnerable mother"); *id.* at pp. 2-3 (arguing that marriage is "crucial for heterosexual males" in order to convey to them the "seriousness" of sexual relationships because men have no physical connection to their offspring after conception).

[24] Brief of Professor Wilson et al., at pp. 31-32 (stating that purpose of marriage is to prevent children from being in "fatherless households"); Brief of American Center for Law & Justice, at p. 2 (arguing that without marriage, the natural "default position" is "too many men abandoning the mothers of their children, and too many women left alone to care for their offspring"); Brief of Professor Kmiec et al., at p. 25 (arguing that marriage

and men parent differently.[25] Such contentions invoke the same stereotypes that underlay the now discredited coverture doctrine, which defined the husband as the breadwinner and head of household and the wife as dependent and responsible for the domestic sphere. (See McClain, *Intimate Affiliation and Democracy: Beyond Marriage?* (2003) 32 Hofstra L. Rev. 379, 387-388 ["Well into the twentieth century, notions of the complementary roles of husband and wife, and women's special responsibilities for domestic life, rationalized limitations on married women's participation in economic, civic, and political life."].)

In 2007, the impermissibility of such official sex stereotyping is so well settled as to be axiomatic. More than thirty years ago, in *Stanley v. Illinois* (1972) 405 U.S. 645, the United States Supreme Court struck down, on equal protection and due process grounds, an Illinois statute that presumed all unmarried fathers to be unfit custodians. In doing so, it characterized as overbroad and impermissible the state's claim that "physiological and other studies . . . . [show] that men are not naturally inclined to childrearing" and that unmarried fathers in particular "are unsuitable and neglectful parents." (*Id.* at pp. 653-654 [holding that a

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is about "bringing together men and women . . . so that children have the mothers and fathers for which they long.").

[25] Brief of Professor Kmiec, et al. at p. 23, fn. 14 (asserting that "men and women, and fathers and mothers, in particular, bring unique assets to their marriage and to their children"); Brief of American Center for Law & Justice at pp. 12-14 (asserting that there are "innate differences between men and women" that result in "unique contribution each sex makes in child-rearing"); Brief of Professor Wilson, et al. at pp. 41-42 (arguing that only male-female couples can provide optimal parenting); Brief of LDS et al., at p. 40 ("Men and women are not fungible in relation to child rearing. They have distinct contributions to make. [Citation.]"); see also *ibid* ("Traditional marriage also provides children with male and female role models and vital training in bridging the gender divide.").

categorical presumption of unfitness is unconstitutional because some unmarried fathers "are wholly suited to have custody of their children"]; see also *VMI*, *supra*, 518 U.S. at pp. 533, 541-542 ["overbroad generalizations about the different talents, capacities, or preferences of males and females" do not justify discrimination based on sex even if they are true of most women and men].)

More recently, in *Nevada Dept. of Human Resources v. Hibbs*, *supra*, 538 U.S. 721 at pp. 729-730, the Supreme Court reiterated that government action based on stereotypes about women's purportedly greater suitability or inclination to assume primary responsibility for childcare is blatantly unconstitutional. In sustaining the gender-neutral provisions of the Family Medical Leave Act against a sovereign immunity challenge, the Court found that Congress had acted to correct a nationwide pattern of violations of equal protection based on the unconstitutional stereotype that women are the primary caregivers in families. (*Id.* at pp. 729-734.) The Court noted the prevalence of this stereotype in state laws, employer policies, and "until relatively recently . . . [even in the] Court's own opinions." (*Id.* at p. 729 [citing *Muller v. Oregon* (1908) 208 U.S. 412 (upholding a state law limiting the hours that women could work based on stereotyped views about women's "maternal functions")].)

Contemporary California family law likewise has rejected the notion that either women or men are inherently more suited or inclined to care for children, or that either sex has a monopoly on responsible or irresponsible parenting. California law provides that all parents, regardless of their sex, are equally legally responsible for their children.[26] The rights and

[26] In particular, it is well settled that the state's interest in protecting economically vulnerable children and parents extends equally to same-sex couples and their children. In *Sharon S. v. Superior Court* (2003) 31

obligations of parentage are the same, regardless of whether a parent is male or female. (See, e.g., *Elisa B.*, *supra*, 37 Cal.4th 108.) Similarly, our statutes – and case law – recognize that women as well as men may fail to bond with their children or to provide adequate care for their children. (See, e.g., *In re Nicholas H.* (2002) 28 Cal.4th 56, 61 [while child had a "strong emotional bond" with his non-biological father, the child's biological mother "has been a frail reed"].)

Further, the argument that the marriage restriction is justified by differences between mothers and father cannot withstand this Court's analysis in *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, which invalidated, on equal protection and due process grounds, a state law that provided unmarried mothers with greater protections when consenting to the adoption of a child than unmarried fathers. (*Id.* at pp. 824-825.) This Court expressly rejected as unfounded any assumption that women "are more likely to remain with their children. [Citation.]" (*id.* at 835), or that there is any "difference between the affection and concern of mothers and fathers for their children." (*Ibid.* [citing *Caban v. Mohammed* (1979) 441 U.S. 380, 391-392.)

Similarly, in *Johnson*, *supra*, 218 Cal.App.3d 517, the California Court of Appeal held that a workplace policy that excluded women (but not men) from certain hazardous jobs, purportedly in order to protect their potential offspring, was unlawful sex discrimination. The Court rejected the employer's argument that the policy was not discriminatory because it was based upon "real physical differences between men and women." (*Id.*

Cal.4th 417, 437-438 (hereafter *Sharon S.*) and *Elisa B.*, *supra*, 37 Cal.4th at pp. 124-125, this Court emphasized the state's interest in requiring both members of same-sex couples who raise children together to assume responsibility for those children, regardless of the sex or sexual orientation of the members of the couple.

at p. 546.) Noting that women's reproductive capacity often has been used as a justification for laws that discriminate based on sex, the Court held that – even assuming that exposure to hazardous substances posed a greater risk to pregnant women than to procreating men – the employer's reliance on sex was not justified:

> By excluding all women solely on the basis of fertility, the Company makes at least the following unfounded assumptions about women – *none of which* has anything whatsoever to do with "objective differences" between men and women: (1) that all unmarried fertile women are either presently actively involved in sexual relationships with men, or will definitely become so involved; (2) that fertile women who are actively involved in sexual relationships with men or who may become so involved, are or will be involved with a fertile man (a woman's partner, for example, might have had a vasectomy); (3) that fertile women who are actively involved in sexual relationships with a fertile man, or will become so, cannot be trusted to employ reasonably adequate prophylactic measures against an unexpected pregnancy; and (4) that fertile women, even when possessed of sufficient information about the worksite hazard, are incapable of properly weighing the chances of unexpected pregnancy, notwithstanding use of prophylactic measures, against the possibility of fetal hazard should she become pregnant.

(*Id.* at pp. 550-551.) The Court concluded that: "this is not discrimination based on 'objective differences' between men and women, it is discrimination based on categorical, long ago discarded assumptions about the ability of women to govern their sexuality and about the comparative ability of women to make reasoned, informed choices." (*Id.* at p. 551.)[27]

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[27] The United States Supreme Court adopted the reasoning in *Johnson Controls* in *Internat. Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc.* (1991) 499 U.S. 187, 197.

The amici who seek to justify the marriage ban rely upon equally stereotypical assumptions. But just as in *Adoption of Kelsey S.* and *Johnson Controls*, the mere fact that women (and only women) are capable of becoming pregnant and giving birth cannot support a sex-based exclusion that is premised on far more sweeping and patently erroneous assumptions – in this case, assumptions that all women who bear children have male partners, that all women who bear children are financially dependent on men, that all women assume more responsibility for children than men, and that same-sex couples do not have children. Those assumptions have no basis in reality or in California law, and they cannot justify a broad, sex-based restriction on marriage.

California's Legislature and this Court also have made clear that the State may not presume that women and men play different roles as parents. This Court expressly ruled, in *Marriage of Carney*, that "conventional sex-stereotypical thinking" is presumptively unconstitutional in family law, just as it is in other settings. (*In re Marriage of Carney* (1979) 24 Cal.3d 725, 735-737.) For example, at one time, the California Civil Code provided that "other things being equal, if the child is of tender years, it should be given to the mother; if it is of an age to require education and preparation for labor and business, then to the father." (See *White v. White* (1952) 109 Cal.App.2d 522, 523 [quoting former Civ. Code, § 138, subd. (2)].) But "since it was amended in 1972, the code no longer requires or permits the trial courts to favor the mother in determining . . . custody of a child. . . . Regardless of the age of the minor, therefore, fathers now have equal custody rights with mothers; the sole concern, as it should be, is 'the best interests of the child.'" (*In re Marriage of Carney*, *supra*, at pp. 729-730; see also Fam. Code, § 3040, subd. (a)(1) ["In making an order granting custody to either parent, the court . . . shall not prefer a parent as custodian

because of that parent's sex."].) By rejecting custody determinations based on stereotypical expectations about "proper gender roles" (*In re Marriage of Carney*, *supra*, at p. 737), this Court has precluded amici's asserted state interest in barring same-sex couples from marriage based on generalizations about "the [purportedly] innate differences between men and women and the unique contributions each sex makes in child-rearing." (Br. of American Center for Law & Justice at p. 13.)

IV. THE STATE'S INTERESTS INVOLVING CHILDREN SUPPORT PERMITTING SAME-SEX COUPLES TO MARRY, RATHER THAN JUSTIFY EXCLUDING SAME-SEX COUPLES FROM MARRIAGE.

The State and the Governor have expressly disavowed any asserted state interests based on any argument that barring same-sex couples from marriage benefits children. (See Answer Br. of Governor at p. 30, fn. 22 [noting that the assertion that same-sex marriage would harm children is clearly "inconsistent with California's determination to extend to registered domestic partners the 'same rights, protections, and benefits' as spouses"]; see also Opn. pp. 59-60, fn. 33 [noting the Attorney General's position that any argument that the state has an interest in promoting different-sex parents over other parents is contrary to California public policy].) The trial court and the Court of Appeal also expressly rejected any such asserted state interests. (See Opn. p. 62; Trial Court Opn., Appellants' Appendix, Case No. A110451, p. 118-119, 122.)

There are currently more than 70,000 children in California who are being raised by same-sex couples. (Br. of Prof. M.V. Lee Badgett & Gary J. Gates at p. 14.) As Respondents have previously argued, and as the American Psychological Association and the American Psychoanalytic Association and the amici who joined their briefs have explained, the

children of same-sex couples would benefit if their parents were permitted to marry. (See Br. of American Psychological Assn., et al. at pp. 45-48; Br. of American Psychoanalytic Assn, et al. at pp. 32-33; Br. of American Academy of Matrimonial Lawyers, et al. pp. 2-12, 20-24.)

Nevertheless, in arguments that essentially ignore the existence and needs of the tens of thousands of children being raised by same-sex couples in California, some amici supporting Appellants contend that excluding those couples from marriage is valid because that exclusion purportedly benefits children. Those amici's arguments do not supply even a rational basis for excluding same-sex couples from marriage – much less the compelling state interest that is required in this case. Even under rational basis review, the governmental interests advanced in support of the statute must be not only "legitimate," but also "plausible" and "realistically conceivable legislative purposes" rather than "fictitious purposes that could not have been within the contemplation of the Legislature." (*Warden v. State Bar* (1999) 21 Cal.4th 628, 648-649.) In addition, there must be a rational connection between the legitimate state interest and the measure at issue. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1203) Under this inquiry, the arguments of these amici fail because their asserted state interests either patently contravene established California policy and law or are not rationally related in any way to the exclusion of same-sex couples from marriage.

Specifically, amici supporting Appellants argue that California may exclude same-sex couples from marriage because: (1) children purportedly are better off being raised by heterosexual parents; (2) heterosexual couples purportedly have a greater need for the stability provided by marriage because they can procreate unintentionally; (3) children purportedly are better off being raised by biological parents; and (4) permitting same-sex

couples to marry purportedly would undermine the connection between marriage and children. As explained below, none of those arguments has merit.

A. Enforcing Stereotypes About Lesbian And Gay Parents Is Not A Legitimate State Interest And Does Not Justify Barring Same-Sex Couples From Marriage.

The argument of some amici that the State may constitutionally bar same-sex couples from marriage based on a presumption that heterosexual parents are superior to lesbian and gay parents is repugnant to California law. (See, e.g., Br. of American Center for Law & Justice at pp. 12-14; Br. of Prof. Wilson, et al. at pp. 41-45.) In *Perez*, the State of California cited research purporting to show that children of interracial parents suffered from a variety of psychological, social, and even physical problems. (See *Perez*, *supra*, 32 Cal.2d at pp. 722-725.) In addition to rejecting those arguments as utterly lacking in any scientific credibility, this Court held that the government cannot limit marriage based on unfounded generalizations about any group. (*Id.* at p. 718 [holding that, where there is as much variation within groups as between groups, the State may not make legal distinctions in marriage eligibility requirements based upon such arbitrary classifications].) Accordingly, while the State may prohibit marriage between two persons based on "matters of legitimate concern to the state," "[s]uch legislation . . . must be based on tests of the individual, not on arbitrary classifications of groups." (*Ibid.*)

The same principle applies to the unfounded generalizations about lesbian and gay parents advanced by some amici in this case. These claims are similarly based on an arbitrary classification of groups based on a characteristic – sexual orientation – that has no bearing on parental fitness and are equally lacking in scientific credibility. Indeed:

> [T]he scientific research that has directly compared outcomes for children with gay and lesbian parents with outcomes for children with heterosexual parents has been remarkably consistent in showing that lesbian and gay parents are every bit as fit and capable as heterosexual parents, and their children are as psychologically healthy and well-adjusted as children reared by heterosexual parents.

(Br. of American Psychological Assn., et al. at p. 28.)[28]

In *Perez*, this Court further held that, "even if we were to assume that interracial marriage results in inferior progeny, we are unable to find any clear policy in the statute against marriages on that ground." (*Perez*, *supra*, 32 Cal.2d at pp. 720-722 [noting that the law permitted many types of interracial marriages and did not prohibit "illicit sexual relations between Caucasians and members of the proscribed races"].) Similarly, in this case, California law supports lesbian and gay couples in becoming parents through adoption and assisted reproduction, as well as through the protections of the domestic partnership laws. (See Fam. Code, § 297.5, subd. (d).) In light of this established law, the State and the Governor understandably have declined to argue that the State's exclusion of same-sex couples from marriage advances a purported state interest in preferring heterosexual parents.

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[28] Amici supporting Appellants nevertheless cite research concerning children raised by single parents, divorced parents, and step-parents that shows that children in such situations may suffer some disadvantages related to the stresses of divorce, remarriage and single parenting. *That research does not concern parenting by same-sex couples*, and it has no bearing on the well-being of children raised by same-sex parents.

B. Barring Same-Sex Couples From Marriage Does Not Rationally Further Any State Interest In Encouraging Parental Responsibility In The Event Of Unplanned Pregnancy.

In addition to arguing that heterosexual relationships provide the most stable and secure setting for children, amici supporting Appellants also argue the opposite – that heterosexual couples are uniquely prone to engage in irresponsible procreation, due to the possibility of unplanned pregnancy, and therefore purportedly require the stability provided by marriage to a greater degree than same-sex couples. (See, e.g., Br. of American Center for Law & Justice at p. 2; Br. of Prof. Kmiec, et al. at p. 8, fn. 4; Br. of Prof. Wilson, et al. at pp. 32, 40-41, 45.)

California law and policy, however, do not embrace in any respect the view that the State may penalize or draw legal distinctions between families based on the circumstances of children's birth or the way in which children come into a family. California statutes and case law expressly acknowledge and protect families who conceive with medical assistance, ensuring that their rights are equal to – not greater or less than – the rights of families who have children through sexual intercourse.[29] More broadly,

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[29] Indeed, unlike some other states, where the legislature and the courts have not kept pace with the increasing use of assisted reproduction, California has led the nation on this issue. (See, e.g., *Clevenger v. Clevenger* (1961) 189 Cal.App.2d 658 [holding that man who consented to birth of a child through artificial insemination of his wife was legally responsible as a parent]; *Elisa B.*, *supra*, 37 Cal.4th 108 [holding that woman who consented to the birth of a child through artificial insemination of her female partner was legally responsible as a parent]; *Johnson v. Calvert* (1993) 5 Cal.4th 84 [holding that married couple who procreated a child by means of a surrogacy agreement were both legally responsible as parents]; Fam. Code, § 7613 [providing for parentage of children born through artificial insemination]; Fam. Code, § 7648.9 [prohibiting challenges to a child's parentage based on the absence of a biological tie

California law requires equal treatment of all children – regardless of whether pregnancy is planned or unplanned; whether children are conceived through intercourse or assisted reproduction; whether they are born to their legal parents or adopted by them; whether their parents are married or unmarried; or whether their parents are heterosexual or lesbian or gay. (See, e.g., *Elisa B.*, *supra*, 37 Cal.4th 108 [protecting child born to lesbian couple through assisted reproduction]; *Id.* at p. 119 ["We perceive no reason why both parents of a child cannot be women."]; Fam. Code, § 8616 ["After adoption, the adopted child and the adoptive parents shall sustain towards each other the legal relationship of parent and child and have all the rights and are subject to all the duties of that relationship."]; Fam. Code, § 7602 ["The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents."].)[30]

Finally, even if the State were to have a special or unique interest in protecting children born through unplanned heterosexual intercourse, excluding same-sex couples from marriage does not rationally advance that purported interest in any way. See *People v. Hofsheier*, *supra*, 37 Cal.4th at p. 1206, fn. 8 [even "when the legislative body proposes to address an area of concern in less than comprehensive fashion . . . its decision about

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"with regard to a child conceived by artificial insemination pursuant to Section 7613 or a child conceived pursuant to a surrogacy agreement"].) In contrast, for example, the New York Legislature has not expressly addressed how to determine the legal parentage of children born through artificial insemination, even to married couples.

[30] In addition, as explained in Section III above, the argument that heterosexual couples are uniquely unstable is based in large part on unfounded and impermissible sex stereotypes claiming that men are naturally disinclined to care for their children and must be coerced or encouraged to do so through marriage.

where to [draw a line] must have a rational basis in light of the legislative objectives. [Citation.]"].) The marriage restriction fails this test. Heterosexual couples are not more likely to marry, or to be responsible parents, because the law prevents same-sex couples (many of whom have children) from marrying.

C. The Exclusion Of Same-Sex Couples From Marriage Is Not Justified By A Purported Preference For Children To Be Raised By Two Biological Parents.

The claim by some amici that barring same-sex couples from marriage advances a purported state interest in children being raised by their biological parents also runs afoul of settled California policy and law. (See Br. of American Center for Law & Justice at pp. 11-14; Br. of Prof. Wilson, et al. at p. 38, 41-43.) California law certainly encourages (and frequently requires) parents who procreate children through sexual intercourse to assume responsibility for their children. (See, e.g., Fam. Code, § 7573 [permitting man who biologically fathers a child to establish legal paternity by filing a voluntary acknowledgment of paternity].) But this Court and other California courts also repeatedly have made clear that the State's interest in the parent-child relationship lies not in biology per se, but in preserving established parent-child bonds. (See, e.g., *In re Nicholas H.*, *supra*, 28 Cal.4th 56 [citing *Susan H. v. Jack S.* (1994) 30 Cal.App.4th 1435, 1442].) In applying the parentage presumptions, our courts have repeatedly held that preserving an existing parent-child relationship may take precedence over biological ties. (See, e.g., *Michelle W. v. Ronald W.* (1985) 39 Cal.3d 354, 363 [alleged biological father's abstract interest in establishing paternity not as weighty as state's interest in familial stability and the welfare of the child]; *Comino v. Kelley* (1994) 25 Cal.App.4th 678, 684 [court refused to apply conclusive presumption of Evidence Code

section 621 to deny the child the only father she had ever known]; *Susan H. v. Jack S.*, *supra*, 30 Cal.App.4th at p. 1443 ["A man who has lived with a child, treating it as his son or daughter, has developed a relationship with the child that should not be lightly dissolved . . . . This social relationship is much more important, to the child at least, than a biological relationship of actual paternity."].)

Moreover, our statutes recognize that persons of either sex may create loving parent-child relationships with children to whom they are not biologically related. (See, e.g., *Sharon S.*, *supra*, 31 Cal.4th at pp. 424-426 [describing adoption statutes and noting that they are to be liberally construed]; *In re Nicholas H.*, *supra*, 28 Cal.4th 56 [construing Family Code Section 7611(d) to protect relationship between child and non-biological father]; *In re Karen C.* (2002) 101 Cal.App.4th 932 [construing Family Codes section 7611(d) to protect relationship between child and non-biological mother]; see also Fam. Code, § 8600, et seq. [addressing the adoption of children].) Indeed, California case law is replete with examples of both men and women who have adopted or otherwise assumed parental responsibility for children they did not biologically procreate. (See, e.g., *Clevenger v. Clevenger*, *supra*, 189 Cal.App.2d 658; *In re Nicholas H.*, *supra*, 28 Cal.4th 56; *Sharon S.*, *supra*, 31 Cal.4th 417; *In re Karen C.*, *supra*, 101 Cal.App.4th 932. Contrary to the implications of the arguments of amici supporting Appellants, such families are not less than "ideal" under California law. (Cf. *Minister of Home Affairs v. Fourie* (South Africa 2005) CC60/40, at p. 54 ["It is demeaning to adoptive parents to suggest that their family is less a family and any less entitled to respect and concern than a family with [biologically] procreated children."] <http://fl1.findlaw.com/news.findlaw.com/wp/docs/glrts/mhafourie120105.pdf> [as of Nov. 9, 2007].)

Moreover, even if California elevated biology over all other considerations in determining parentage, excluding same-sex couples from marriage would not further any purported state interest in encouraging children to be raised by their biological parents. To the contrary, barring same-sex couples from marriage will not cause more heterosexual couples to have or to raise biological children, or otherwise affect the number of children who are raised by their biological parents in any discernable way. Thus, even under rational basis review, this purported interest could not justify the marriage ban.

D. Permitting Same-Sex Couples To Marry Would Reinforce The Importance Of Marriage As A Social Institution That Promotes The Welfare Of Both Children And Adults.

Some amici also argue that permitting same-sex couples to marry would change the social meaning of marriage by suggesting that marriage is about adult needs rather than the well-being of children. (See Br. of American Center for Law & Justice at pp. 3, 11; Br. of Prof. Wilson, et al. at pp. 46-48; Br. of United Families International, et al. at pp. 15-16, 59-60; Br. of LDS, et al. at pp. 9-13.) That argument is based on invidious stereotypes about lesbians and gay men and has no basis in reality, logic, or law.

California law already recognizes that same-sex couples can and do create families and raise children. Permitting those couples to marry would serve only to reinforce the connection between marriage and children and the importance of marriage to couples, children, and society. Moreover, the children of same-sex couples would benefit from the added stability and security of marriage no less than the children of heterosexual couples. Indeed, by taking the position that the State can exclude an entire category of parents and children from the protections of marriage, it is those who

support the marriage ban, not same-sex couples who wish to marry, who are both harming children and severing the link between children and marriage.

The notion that permitting same-sex couples to marry would undermine the link between marriage and children because those couples cannot procreate without medical assistance cannot withstand even the most cursory examination. As the Vermont Supreme Court has pointed out, there are far more heterosexual parents who have children by means of assisted reproduction than same-sex parents. Yet:

> The State does not suggest that the use of these technologies undermines a married couple's sense of parental responsibility, or fosters the perception that they are "mere surplusage" to the conception and parenting of the child so conceived. Nor does it even remotely suggest that access to such techniques ought to be restricted as a matter of public policy to "send a public message that procreation and child rearing are intertwined."

(*Baker v. State* (1999) 744 A.2d 864, 882.)

Moreover, the choice posited by some amici – between a child-centered model of marriage and a model focused on "personal commitment" and love between adult partners – is a false dichotomy. As this Court has recognized, marriage serves multiple purposes and goals. (See, e.g., *De Burgh v. De Burgh* (1952) 39 Cal.2d 858, 863-864 [describing numerous purposes of marriage]; see also McClain, *"God's Created Order, Gender Complementarity, and the Federal Marriage Amendment* (2006) 20 B.Y.U. J. Pub. L. 313, 336 ["the argument that marriage is not about adult love, but about children, sets up an either/or view of the purposes of marriage that is simply wrong with respect to historical and contemporary understandings of marriage"].) As important

as they are, neither procreation nor childrearing is a *sine qua non* of marriage.

Indeed, it is the marriage statute itself – not Respondents – that defines marriage in terms of the adult participants, as "a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary." (Fam. Code, § 300.) Many of the rights and obligations of marriage concern the relationship between the two spouses, rather than their relationship to any children the couple may have. (E.g., the right not to testify against each a spouse, the right of spouses to seek wrongful death compensation, the right to inherit from a spouse in the absence of a will, and the automatic right to hold property as tenants in common.) In addition, California law has specifically disavowed procreation as a marital requirement. This is demonstrated by marriage eligibility rules, which do not require either an ability or an intent to procreate, and by annulment law, which likewise does not include inability or refusal to procreate as a ground for annulment of a marriage. (Fam. Code, § 2210 [listing causes for annulment]; see also Trial Court Opinion, Appellants' Appendix, Case No. A110451, p. 93.) It is also demonstrated by constitutional and statutory protections for a prisoner's right to marry, regardless of ability to procreate (*Turner v. Safley* (1987) 482 U.S. 78; Pen. Code § 2601, subd. (e)), and by a women's right to terminate a pregnancy without her husband's consent. (*Planned Parenthood v. Casey* (1992) 505 U.S. 833, 894-896.)

Amici's argument belittles the important purposes of marriage that are related to the two spouses irrespective of the existence of children within the marriage. Permitting same-sex couples to marry, in contrast, would further *both* those interests and the state's interests related to children.

V. PERMITTING SAME-SEX COUPLES TO MARRY, CONSISTENT WITH THE CALIFORNIA CONSTITUTION, DOES NOT AFFECT OR UNDERMINE THE STATE'S PROSCRIPTION AGAINST POLYGAMOUS OR INCESTUOUS MARRIAGES.

Some amici supporting Appellants argue that permitting same-sex couples to marry will open the door to incestuous and polygamous marriages. (Br. of LDS, et al. at pp. 35-36; Br. of American Center for Law & Justice at pp. 14-18; Br. of Prof. Wilson, et al. at pp. 48-49.) This Court soundly rejected this red herring in *Perez*, and it should do so here as well. (*Perez*, *supra*, 32 Cal.2d at p. 760, (dis. opn. of Shenk, J.) ["The underlying factors that constitute justification for laws against miscegenation closely parallel those which sustain the validity of prohibitions against incest and incestuous marriages . . . and bigamy."].) Respondents seek to exercise the same freedom to marry the person of their choice that this Court recognized in *Perez*. They do not seek to challenge California's prohibition of incest or polygamy in any way. (Cf. *Goodridge v. Dept. of Public Health* (2003) 798 N.E.2d 941, 965 (hereafter *Goodridge*) ["[T]he plaintiffs seek only to be married, not to undermine the institution of civil marriage. . . . They do not attack the binary nature of marriage, the consanguinity provisions, or any of the other gate-keeping provisions of the marriage licensing law."].)

Laws barring same-sex couples from marriage and laws barring marriages based on incest and polygamy raise distinct legal issues. For example, permitting same-sex couples to marry would not require any substantive alteration in the marriage laws. Except for the very restriction challenged in this case, the rights and obligations of marriage in California are gender-neutral; they are exactly the same for women and men. (Respondents' Consolidated Opening Br. at pp. 43-45; Respondents' Consolidated Reply Br. at pp. 34-35, 40-41; Br. of Cal. Women's Law

Center, et al. at pp. 29-31.) In contrast, permitting more than two persons to marry would require drastic and far-reaching changes because the premise that marriage is a "bilateral loyalty" between two people permeates the entire structure of spousal rights and obligations. (See, e.g., Fam. Code, § 720 [spouses "contract toward each other obligations of mutual respect, fidelity, and support"]; see also Wald, *Same-Sex Couple Marriage: A Family Policy Perspective* (2001) 9 Va. J. Soc. Pol'y & L. 291, 294 [marriage law is designed to facilitate and support the decision of two people to live together in a "shared emotional, economic, and sexual union"].)

Further, in contrast to laws barring same-sex couples from marriage, laws barring marriage to more than one person do not discriminate based on sexual orientation or on sex, or on any other basis that has been recognized by legislatures or courts as a protected characteristic. (See, e.g., Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name* (2004) 117 Harv. L. Rev. 1893, 1944 [contrasting laws barring polygamy, which do not expressly discriminate against any "particular oppressed minority," with laws barring same-sex couples from marriage, which draw "broad lines cutting oppressively across society to rule half the adult population off limits as sexual or marital partners for a distinct and despised minority"].)[31]

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[31] Some opposing amici erroneously claim that Respondents seek to establish the right of bisexual people to marry two persons at once. (Br. of LDS, et al. at pp. 33, 35-36; Br. of American Center for Law & Justice at pp. 16-17.) That claim is based on a serious mischaracterization and misunderstanding of bisexuality. Bisexual people are people who are capable of attraction to persons of either sex and who are capable of having intimate relationships with a person of either sex. A bisexual sexual orientation does not imply that a person wishes to have intimate relationships with a woman and a man at the same time. Rather, the latter

In addition, whereas laws barring same-sex couples from marriage do not serve any legitimate state interest, laws barring incestuous marriage serve compelling government interests in protecting family members and preserving family stability. (See, e.g, *State v. Freeman* (2003) 801 N.E.2d 906, 909 [incest laws serve state interest of protecting the integrity of the family unit]; *Smith v State* (Tenn. Crim. App. 1999) 6 S.W.3d 512, 519-520 [prohibition of incest promotes and protects family harmony and protects children from the abuse of parental authority].) The incest laws protect not merely against the possibility of *procreation* by close family members, but also against the possibility of coercion in sexual relationships. Those interests are not served by the state's exclusion of same-sex couples from marriage, nor would permitting same-sex couples to marry create any sort of "slippery slope" toward incestuous marriage.

VI. RULING THAT CALIFORNIA MUST PERMIT SAME-SEX COUPLES TO MARRY WOULD BE CONSISTENT WITH CONSTITUTIONAL REQUIREMENTS OF RELIGIOUS NEUTRALITY.

Some amici argue that California's Constitution permits the State to bar same-sex couples from marriage because "virtually all faith communities" supposedly support that exclusion. (See, e.g., Br. of LDS, et al. at pp. 43-44.) That argument fails for two reasons. First, it is wrong as

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belief is an invidious stereotype. (Woodhouse & Roberts, Gay, Lesbian, Bisexual, Transgender Student Services, Colorado State University (undated) Bisexuality: Some Questions Answered <http://www.glbtss.colostate.edu/faqs/bisexual-qa.asp> [last visited Nov. 10, 2007]; Bisexual Resource Center (undated) Myths about Bisexuality <http://www.biresource.org/pamphlets/myths.pdf> [last visited Nov. 10, 2007].) As explained in the text, a ruling by this Court permitting same-sex couples to marry would not open the door to polygamy – for bisexual people, heterosexual people, or lesbian or gay people.

a factual matter: many religious communities affirm, both as a matter of doctrine and in practice, the entitlement of same-sex couples to marry. Second, even if *all* faith communities opposed marriage for same-sex couples, the Constitution would preclude reliance on religious belief to justify discrimination in the civil marriage statutes.

Other amici argue that permitting same-sex couples to marry would infringe amici's religious liberty by prohibiting religious entities from discriminating against same-sex couples. (See, e.g., Br. of The Becket Fund for Religious Liberty at pp. 7-26 (hereafter Becket Fund); Br. of Rev. Joshua Beckley, et al. at pp. 20-23.) As explained below, that argument misperceives the constitutional protection afforded to religion, which ensures that clergy will never be required to solemnize a marriage that is inconsistent with their religious beliefs. It also ignores the legal landscape in California, which already prohibits discrimination against same-sex couples and which already provides exemptions from that prohibition to protect religious freedom. Allowing same-sex couples to marry will not restrict anyone else's religious freedom.

A. The Court Should Decide The Marriage Cases Based On Neutral Constitutional Principles Without Establishing Or Preferring Any Particular Religion.

The LDS Amici contend that there is "a powerful agreement among virtually all faith communities on the meaning and importance of marriage." (Br. of LDS, et al. at pp. 43-44.) To the extent the LDS Amici intend to argue that "virtually all faith communities" agree that same-sex couples do not fit within the "meaning . . . of marriage," they are mistaken. Many religious groups, congregations, and their members in California and around the nation believe as a matter of religious doctrine, or otherwise hold the view, that lesbian and gay people should have the same freedom to

marry – both civilly and in their religious traditions – as heterosexual people. (Br. of The Unitarian Universalist Assn. of Congregations, et al. at pp. ix-xxxvi, 1-14 (hereafter Religious Amici in Support of Respondents) [brief of more than 140 national, state, and local religious organizations, including the California Council of Churches, and more than 260 religious leaders urging Court to strike down the marriage exclusion].) There plainly is great diversity of belief – religious and otherwise – about making marriage available to same-sex couples.

There is no basis for the LDS Amici's contention that permitting same-sex couples to marry would "spawn[] deep tensions between civil and religious understandings of that institution." (Br. of LDS, et al. at p. 44.) The diversity of religious traditions and beliefs associated with marriage makes plain that, for many Californians, there would be no "tension" at all "between civil and religious understandings" of marriage if same-sex couples were permitted to marry. More fundamentally, this Court should not give any weight to whether or to what extent, if at all, such "tensions" would exist for members of religious traditions that would continue to prohibit same-sex couples from marrying. To maintain the civil marriage exclusion in order to avoid such tensions impermissibly would privilege those religious traditions over other religious and non-religious traditions. The California Constitution's "no preference" clause (Cal. Const., art. I, § 4) prohibits any such official favor for particular sectarian creeds or purposes.

These Marriage Cases concern civil marriage, not any religion's sacrament or ceremony. Although the history of civil marriage in many countries has been intertwined with religious beliefs and, in some countries, even with government establishments of religion, civil marriage today in California is a religiously neutral, state-conferred status. There are already

great differences between civil and religious understandings of who may marry. For example, some religions do not permit divorce or remarriage; others believe that persons of different faiths should not marry. Such differences between religious understandings and legal rules are abundant in California and the nation.[32]

Religious adherents are free (as amici on both sides have done) to advocate for laws that match their religious beliefs and to be motivated as advocates by their religious faith. But the state cannot enact a law simply because it does or does not conform to the religious beliefs of particular groups. Ensuring that California law is consistent with certain religions is not a legitimate government interest.[33] A century and a half of California jurisprudence regarding the religion clauses of the state and federal constitutions make that point plain. In *Ex Parte Newman*, this court

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[32] Indeed, it frequently has been necessary to distinguish sectarian religious considerations from religiously neutral, legitimate state interests with regard to law and public policy about marriage and family life. For example, religious opposition infused the debates about interracial marriage. (See Br. of Religious Amici in Support of Respondents at p. 13 [citing *Perez*, *supra*, 32 Cal.2d at p. 713; *id.* at p. 740 (conc. opn. of Edmonds, J.)].) Proposals to expand grounds for divorce involved similar dynamics. (See Cott, Public Vows: A History of Marriage and the Nation (2000) pp. 2-3, 106-107 [regarding Christian objections to divorce]; see generally Coontz, Marriage, A History: How Love Conquered Marriage (2005) pp. 86-87, 93-100, 104-108, 124 [regarding historical Christian doctrine concerning marriage, divorce and remarriage].)

[33] Absent a legitimate government interest, the enactment of religious beliefs into law improperly would establish religion and, in some instances, violate religious free exercise rights. (See Br. of Religious Amici in Support of Respondents at pp. 48-52 [arguing that California's exclusion of same-sex couples from marriage infringes upon the religious exercise of same-sex couples who wish to assume the legal duties of matrimony through the rites prescribed by their faith traditions, and also of clergy who wish to solemnize those marriages as their respective faiths call them to do].)

embraced "religious liberty in its largest sense – a complete separation between Church and State, and a perfect equality without distinction between all religious sects." (*Ex Parte Newman* (1858) 9 Cal. 502, 506, overruled in part by *Ex parte Andrews* (1861) 18 Cal. 678 as recognized in *Sands v. Morongo Unified School Dist.* (1991) 53 Cal.3d 863, 908-909 (conc. opn. of Mosk, J.); see also *Ex Parte Newman*, *supra*, at p. 506 [warning against "the danger of applying the powers of government to the furtherance and support of sectarian objects"].) Part of what holds us together as our state becomes ever more religiously diverse is our state's absolute constitutional prohibition against preference for any particular sect, for some traditions rather than others, or for religion generally. (See *Sands v. Morongo*, *supra*, 53 Cal.3d at pp. 883 (plur. opn. of Kennard, J.) ["California courts have interpreted the ['no preference'] clause as being more protective of the principle of separation than the federal guarantee" (citing *Fox v. City of Los Angeles* (1978) 22 Cal.3d 792)].)[34] It is precisely when passions, including religious passions, run strongest that the courts should address legal claims of a minority through fair and consistent application of religiously neutral constitutional principles.

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[34] As Justice Kennard has explained:

> Ours is a religiously diverse nation. Within the vast array of Christian denominations and sects, there is a wide variety of belief and practice. Moreover, substantial segments of our population adhere to non-Christian religions or to no religion. Respect for the differing religious choices of the people of this country requires that government neither place its stamp of approval on any particular religious practice, nor appear to take a stand on any religious question.

(*Sands v. Morongo*, *supra*, 53 Cal.3d at pp. 883-884 (plur. opn. of Kennard, J.), fn. omitted.)

B. Allowing Same-Sex Couples To Marry Would Not Infringe Religious Liberty.

The Becket Fund posits that allowing same-sex couples to marry may "risk pervasive church-state conflict" by putting religious institutions at risk of civil liability if they "refuse to treat legally married same-sex couples as morally equivalent to married men and women," and by depriving such groups of public benefits. (Br. of Becket Fund at p. 5.) As explained below, the scenarios imagined by the Becket Fund do not implicate constitutional rights and largely ignore the basic point that California law already generally requires that lesbian and gay couples be treated equally in commercial transactions and public programs, with exceptions that already accommodate those with contrary religious beliefs.

1. Solemnization of marriages.

Clergy who perform religious marriage ceremonies are free to solemnize only those religious weddings that conform to their religious tenets, and they are protected by ironclad constitutional principles against being forced to do otherwise. (U.S. Const., 1st Amend.; Cal. Const., art. I, § 4.) Thus, clergy members and religious entities may refuse to solemnize a marriage because one person previously has been divorced or because the two people are of different faiths, despite the fact that these individuals are plainly permitted to enter into a civil marriage, and the state cannot require otherwise. The same constitutional protection for clergy and religious entities would apply should this Court rule that same-sex couples are permitted to marry.

Nevertheless, the Becket Fund speculates that religious institutions and clergy would have to choose between performing marriage ceremonies of which they disapprove or foregoing solemnization entirely. (Br. of

Becket Fund at p. 25.) That speculation is baseless. The Becket Fund relies on instances in Vermont and Massachusetts in which *government officials* were prohibited, respectively, from refusing to issuance civil union licenses to and refusing to perform civil marriages for same-sex couples. From those examples, the Becket Fund attempts to manufacture a concern that clergy "soon may be regulated just like civil servants." (*Id.* at p. 25.) The Becket Fund erroneously conflates clergy with government officials. Were same-sex couples permitted to marry, clergy still would be free to refuse to perform any marriage ceremonies that do not conform to their religious beliefs, and government officials still would be required to follow the law in the performance of their public duties.

2. Employment, housing, and public accommodations.

The Becket Fund claims that allowing same-sex couples to marry would infringe the rights of some religious organizations by requiring them to refrain from discriminating against married same-sex couples in employment, housing, and public accommodations. (Br. of Becket Fund at pp. 7-10.) These fears are groundless for two fundamental reasons. *First*, California law *already* exempts religious organizations and religious institutions from non-discriminations laws. Permitting same-sex couples to marry will not lessen the scope of those existing protections for religious liberty in any way. For example, religious institutions retain the ability to hire and fire their clergy and to restrict employment at their educational institutions to those who share their religious views. (*Catholic Charities of Sacramento, Inc. v. Superior Court*, *supra*, 32 Cal.4th at pp. 543-544 [describing ministerial exception to civil rights laws]; *Schmoll v. Chapman Univ.* (1999) 70 Cal.App.4th 1434, 1442-1444 [ministerial exception

precluded chaplain's claims against religious university, including sex discrimination claim pursuant to the Fair Employment and Housing Act (hereafter FEHA)]; see also Gov. Code, §§ 12926, subd. (d) [exempting religious nonprofit corporations from FEHA], 12926.2, subd. (a)-(c) [FEHA does not apply to health care personnel with religious duties], (f) [religiously affiliated educational institutions may restrict employment to persons of that religion].)

Similarly, FEHA *already* exempts housing operated by nonprofit religious organizations and associations that are not generally open to the public. (Gov. Code, § 12955.4.)[35] Likewise, private non-profit associations that do not qualify as "business establishments" under the Unruh Act (Civ. Code, § 51, subd. (b)) *already* are exempt from the Unruh Act. (See *Warfield v. Peninsula Golf & Country Club* (1995) 10 Cal.4th 594 [holding that organizations are covered by the Unruh Act *only* if they generally open their facilities to the public and facilitate business relationships and transactions]; *Curran v. Mount Diablo Council of the Boy Scouts* (1998) 17 Cal.4th 670 [holding that organizations that exist primarily for expressive associational purposes are not covered by the Unruh Act].[36] Permitting same-sex couples to marry will not alter these exemptions.

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[35] The Becket Fund posits that some religious colleges and universities in particular may object to having same-sex couples residing together in student and faculty housing. While it is true that the Education Code prohibits sexual orientation discrimination by educational institutions, that prohibition applies to private religious educational institutions only if such institutions accept public funds. (See Sen. Bill No. 777 (2007-2008 Reg. Sess.) § 1.5; Educ. Code, §§ 200, 220.)

[36] In *North Coast Women's Care Medical Group, Inc. v. Superior Court (Benitez)* (S142892, app. pending), the Court granted review of the

Second, when an employer, landlord, or institution does not qualify for a religious exemption and therefore must comply with an otherwise applicable non-discrimination law,[37] statutory prohibitions against discrimination based on marital status and sexual orientation *already* protect registered domestic partners in the same manner as spouses. For example, Family Code Section 297.5 states: "Registered domestic partners shall have the same rights regarding nondiscrimination as those provided to spouses." In *Koebke*, this Court approved a broad reading of this provision "to mean that there shall be no discrimination in the treatment of registered domestic partners and spouses."[38] Similarly, same-sex couples already are

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question whether an entity that is covered by the Unruh Act may claim an exemption based on religious beliefs.

[37] Under settled law, when an employer, landlord, or institution is not incorporated as a religious entity or does not otherwise qualify for a religious exemption, it must comply with applicable antidiscrimination laws notwithstanding religious objections. (See, e.g., *Catholic Charities of Sacramento v. Superior Court*, *supra*, 32 Cal.4th 527 [social services agency had to comply with law forbidding sex discrimination in employee health benefit plans, despite employer's religious objection to including contraceptives in prescription drug insurance plan]; *Smith v. Fair Employment and Housing Com.* (1996) 12 Cal.4th 1143 [owner of rental property was required to comply with FEHA's prohibition against marital status discrimination despite her religious objection to renting to unmarried heterosexual couples].) Permitting same-sex couples to marry will not alter this settled law.

[38] The Becket Fund acknowledges that California law already prohibits discrimination against domestic partners. (See Br. of Becket Fund at pp. 9, fn. 12, 10, fn. 14.) The Becket Fund erroneously suggests, however, that the status of the statutory prohibition of discrimination against domestic partners is "unclear in light of conflicts with Family Code § 308.5." (*Id.* at p. 10, fn. 14.) In fact, the Court of Appeal already has held that Assembly Bill No. 205 (2003-2004 Reg. Sess.) – which includes the nondiscrimination section codified as Family Code section 297.5, subdivision (f) – did not amend Family Code section 308.5 (see *Knight v.*

entitled to equal treatment by establishments governed by the Unruh Civil Rights Act. (*Koebke*, *supra*, 36 Cal.4th at p. 857; *Rolon v. Kulwitzky* (1984) 153 Cal.App.3d 289; see also *Butler v. Adoption Media, LLC* (N.D. Cal. 2007) 486 F.Supp.2d 1022, 1059-1060 [Unruh Act applied to adoption matching business and required equal treatment of same-sex couples].) In addition, state law already requires health maintenance plans and insurance policies to offer equal coverage for spouses and registered domestic partners. (See Health & Saf. Code, § 1374.58; Ins. Code, §§ 381.5, 10121.7.) In light of these established nondiscrimination protections, permitting same-sex couples to marry will not change the legal situation for employers, landlords, or institutions who already must comply with existing nondiscrimination laws.

3. Liability under hate crimes laws.

The Becket Fund's purported concerns about criminal prosecution of ministers, or civil lawsuits against ministers, for expressing religious condemnation of same-sex relationships also are unfounded. (Br. of Becket Fund at p. 15.) California's hate crimes laws prohibit anti-gay violence, but they do not provide civil or criminal liability for mere speech. (See Civ. Code, § 52.1, subd. (j); Pen. Code, § 422.6, subd. (c).) These standards will not change if same-sex couples are permitted to marry.

The Becket Fund also implausibly argues that "a minister or imam that tells business owners that they have a religious obligation not to patronize pro-same-sex marriage organizations may be liable for unlawful incitement to boycott" under Civil Code section 51.5. (See Br. of Becket

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Superior Court (2005) 128 Cal.App.4th 14, 19; see also *Koebke*, *supra*, 36 Cal.4th at pp. 845-846 [holding that section 297.5 requires equal treatment of domestic partners and spouses].).

Fund at p. 16.) Provision of such religious instruction, however, is constitutionally protected and will continue to be so regardless of whether same-sex couples are permitted to marry. In practice, religious organizations and leaders have occasionally called on their followers not to patronize businesses that have supportive policies regarding lesbian and gay employees or customers. (See, e.g., Johnson, *Southern Baptists End 8-year Disney Boycott* (June 22, 2005) <http://www.msnbc.msn.com/id/8318263/> [as of Nov. 6, 2007] [describing boycott begun by the American Family Association, and joined by the Southern Baptist Convention and Focus on the Family, in protest of the Walt Disney Company's supposed "promotion of a gay agenda"].) Their ability to do so will not be affected by whether same-sex couples are permitted to marry. Even in the unlikely event that Civil Code section 51.5 were interpreted to apply to such boycotts, it would apply whether or not same-sex couples are permitted to marry.

4. Government contracts, grants, and other subsidies.

The Becket Fund also posits that religious institutions may lose publicly-funded benefits if they do not comply with anti-discrimination provisions that the state or a municipal government requires for a government grant or contract. (Br. of Becket Fund at p. 20-23.) Indeed, this Court recently held unanimously that the government may condition receipt of public grants and subsidies on an agreement not to discriminate in the publicly subsidized program. (See *Evans v. City of Berkeley* (2006) 38 Cal.4th 1 [holding that city's refusal to subsidize discriminatory activities of private youth group did not infringe group's exercise of speech

or associational rights].)[39] It is equally clear that such nondiscrimination requirements do not impinge on the free exercise of religion. (See *Locke v. Davey* (2004) 540 U.S. 712, 725 [state scholarship program that excluded devotional theology degree programs did not violate federal or Washington State free exercise guarantees, and also complied with federal and state prohibitions against establishment of religion]; *Catholic Charities of Sacramento, Inc. v. Superior Court*, *supra*, 32 Cal.4th at pp. 550-552 [protections for free exercise of religion do not exempt religiously affiliated agencies engaged in secular social services from neutral, generally applicable nondiscrimination rules].) Permitting same-sex couples to marry will not affect this settled legal framework.

5. Tax-exempt status.

To the extent the Becket Fund argues that religious schools or other religious institutions that are tax-exempt might have their federal tax-exempt status revoked for discriminating against same-sex married couples, this is not a credible concern. The Becket Fund points to the single instance in our nation's history in which a religious university lost its federal tax-exempt status because of a discriminatory policy – in that case,

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[39] Anti-discrimination restrictions on public grant recipients are already common in California law. (See, e.g., Gov. Code, § 11135, subd. (a) [prohibiting discrimination based on sexual orientation, among other characteristics, in "any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state"]; Pub. Contract Code, § 10295.3 [generally prohibiting state agencies from entering into goods or services contracts valued at $100,000 or more with any business that discriminates in its employee benefits plan between employees with spouses and those with domestic partners]; see also *S.D. Myers, Inc. v. City and County of San Francisco* (9th Cir. 2001) 253 F.3d 461, 472 [upholding San Francisco's similar contracting law and noting "the City's legitimate interest in applying the Ordinance to those with whom it contracts."].)

a discriminatory policy based on race. (See Br. of Becket Fund at pp. 19 [citing *Bob Jones Univ. v. United States* (1983) 461 U.S. 574].) The Becket Fund acknowledges, however, that there are no other examples of religious institutions losing their tax-exempt status for any type of discrimination, and that (especially in light of the federal Defense of Marriage Act, which prohibits any federal recognition of marriages of same-sex couples) federal law is unlikely to impose any such penalty on organizations that discriminate against same-sex couples any time soon. (Br. of Becket Fund at p. 18-20.)

VII. CALIFORNIA'S EXCLUSION OF SAME-SEX COUPLES FROM MARRIAGE CANNOT BE JUSTIFIED BY HOW OTHER JURISDICTIONS TREAT SAME-SEX COUPLES OR HOW OTHER JURISDICTIONS MIGHT REACT TO CALIFORNIA PROVIDING SAME-SEX COUPLES THE OPPORTUNITY TO MARRY.

A. The Unequal Treatment Of Same-Sex Couples By Other Governments Does Not Supply A Rational Basis For California To Exclude Same-Sex Couples From Marriage.

A group of six law professors from other states (hereafter Coverdale Amici or Coverdale, et al.) attempt to defend California's exclusion of same-sex couples from marriage on the supposed ground that permitting California's same-sex couples to marry would "mislead same-sex couples regarding the extent to which their unions will be recognized in other states" and cause same-sex couples to forego measures such as wills, health-care proxies, and second-parent adoptions that might provide protection for them in jurisdictions that do not recognize marriages or domestic partnerships of same-sex couples. (See Br. of Coverdale, et al. at pp. 4, 9-10.) The argument of the Coverdale Amici boils down to the assertion that, because a web of discriminatory laws has been erected by the

federal government and by many other states, California also should discriminate against same-sex couples by giving their families a label – domestic partnership – that will clearly communicate to them that their relationships are not recognized by other governments.[40]

Such a purported purpose does not constitute a legitimate government interest that could justify continued discrimination by California against same-sex couples. If the California Constitution would otherwise protect persons from a particular form of discrimination (whether under rational basis review or heightened scrutiny[41]), California cannot find justification for such discrimination in any lesser protection that the federal government or other jurisdictions may provide. (See Cal. Const., art. I,

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[40] The Coverdale Amici's suggestion that California's discrimination against same-sex couples could be justified by other governments' discrimination against same-sex couples echoes reasoning that this Court rejected in *Sei Fujii v. State of California, supra,* 38 Cal.2d at 731-732, in finding California's Alien Land Law unconstitutional:

> One of the most persistent arguments popularly advanced in support of the validity of the restrictive provisions of the Alien Land Law is . . . that the regulations established by federal law, as to who may and may not become citizens, in themselves furnish a reasonable basis for classification. This view has the effect of evading every other legal attack on the statute, for it concedes that the state law is discriminatory and shifts the blame to the federal immigration law . . . . [I]f a state wishes to borrow a federal system of grouping . . . the state's use of the distinction must stand or fall on its own merits.

[41] There is, of course, no evidence in the legislative history of Family Code section 300 – or the ballot materials for Proposition 22, for that matter – that any legislative consideration was given to any purported need to exclude same-sex couples from marriage in order to protect them from mistakenly assuming that they are entitled to legal protections in other jurisdictions or from the federal government. The Coverdale Amici do not contend that the rationale they offer for the marriage exclusion could satisfy heightened scrutiny.

§ 24 ["Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution"].) Nor can the state justify such discrimination on the purported ground that it would be confusing to some people for California law to be more protective than other governments' laws. Accepting such arguments would betray the fundamental precept that California's Constitution has independent force and would improperly make the California rights of same-sex couples depend on inequalities in the laws of other jurisdictions.

Discrimination based on sexual orientation by other jurisdictions or even by the federal government does not justify discrimination by the state of California. In *Holmes v. Cal. National Guard* (2001) 90 Cal.App.4th 297 (maj. opn. of McGuiness, P.J., Corrigan, J. and Parrilli, J., conc.), the Court of Appeal considered the situation faced by a gay member of the California National Guard whose federal recognition as a member of the United States Army National Guard was withdrawn under the federal "Don't Ask, Don't Tell" policy. The Court of Appeal upheld in pertinent part an injunction, issued pursuant to the California Constitution's guarantees of equal protection and free expression, "providing and securing equal access, without regard to sexual orientation, to employment and service in state active duty positions *not requiring federal recognition*." (*Id.* at p. 319, italics in original.) The California Constitution similarly requires that California's marriage laws not discriminate based on sexual orientation, even if the marriages of same-sex couples are not afforded federal recognition or recognition by other jurisdictions.

The argument of the Coverdale Amici is based on an assumption that same-sex couples will be ignorant of relevant law and therefore will need a reminder that "same-sex unions are a legal novelty." (See Br. of Coverdale, et al. at pp. 13-14.) The Coverdale Amici offer no support for the notion

that it is legitimate or rational for such a reminder to take the form of exclusion from a favored legal status and relegation to an inferior status. Even under rational basis review, there must be a connection between the asserted government interest and the classification at issue. (*People v. Hofsheier*, *supra*, 37 Cal.4th at p. 1201 [even under "'the most deferential of standards, [courts must ascertain] the relation between the classification adopted and the objective to be obtained. The search for the link between classification and objective gives substance to the Equal Protection Clause.'" (quoting *Romer v. Evans*, *supra*, 517 U.S. at p. 632) (modification in original)].)

The Coverdale Amici have not established any such connection here. There is no reason to suppose that same-sex couples who are *ignorant* of other jurisdictions' marriage recognition laws will nevertheless be *aware* of those states' laws regarding recognition of domestic partnerships. Moreover, even if the Coverdale Amici are correct that more states will recognize domestic partnerships than will recognize marriages of same-sex couples (see Br. of Coverdale, et al. at p. 17), continuing to deny same-sex couples access to marriage and instead limiting them to domestic partnerships may subject those couples to precisely the same kind of harm about which the Coverdale Amici purport to be concerned: domestic partners could assume incorrectly that they may safely travel to other states that have domestic partnership systems but that may not afford them the protections afforded by a California domestic partnership.

In any event, such speculation cannot be the basis of this Court's ruling in these Marriage Cases. In our federal system – and particularly in family law matters – conflicts-of-law issues routinely arise. This Court should reject the meritless suggestion that the public's purported lack of understanding of "the complex and evolving world of interstate conflicts of

law" can provide a rationale for discriminatory laws. (See Br. of Coverdale, et al. at p. 14.) Although the Coverdale Amici argue that California's relegation of same-sex couples to second-class status is for their own good,[42] the California Constitution cannot tolerate denying same-sex couples equal protection of the laws for a supposed purpose of reminding them that other governments treat them unequally. (Cf. *Perez*, *supra*, 32 Cal.2d at p. 725 ["It is no answer to say that race tension can be eradicated through the perpetuation by law of the prejudices that give rise to the tension."].)

B. The Possibility That Certain Other Jurisdictions Would Recognize Domestic Partnerships But Not Marriages Of Same-Sex Couples Does Not Justify California's Exclusion Of Same-Sex Couples From Marriage.

The Coverdale Amici also contend that more jurisdictions outside California will recognize California domestic partnerships than will recognize California marriages of same-sex couples. That argument is based on speculation that discriminatory laws in other jurisdictions will

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[42] Much of the Coverdale Amici's argument is premised on the incorrect notion that Respondents are challenging California's domestic partnership laws. (See, e.g., Br. of Coverdale, et al. at p. 5 [posing the question: "What rational reason could the state legislature have for creating a distinct legal structure called 'domestic partnership' that conveys the identical legal incidents as marriage within the state of California?"]; *id.* at p. 7 [incorrectly suggesting that Respondents seeking the right to marry have requested that "this [C]ourt . . . find that civil unions represent unconstitutional 'animus'"].) Respondents are not challenging the domestic partnership statutes. Rather, Respondents challenge their exclusion from marriage and contend that California's domestic partnership statutes do not remedy the constitutional harm that exclusion causes. The rationales that underlie this state's remedial domestic partnership statutes do not justify California's separate statutory exclusion of same-sex couples from marriage.

remain static even as positive examples are set by jurisdictions that permit same-sex couples to marry. As noted earlier, our state constitution has independent force, and Californians in same-sex relationships are entitled to its protections. The second-class treatment of same-sex couples by other jurisdictions – including jurisdictions that choose to respect same-sex relationships only if they take a form other than marriage – cannot justify continued discrimination by California.

Rather, it seems likely that, for discrimination against lesbian and gay couples in our federal system to end, individual states must join Massachusetts in fulfilling the promise of equal protection of the laws by permitting same-sex couples to marry. Legal complications for same-sex couples who travel between jurisdictions exist not only because of jurisdictions that refuse to recognize such couples' relationships, but also because jurisdictions that have chosen to recognize same-sex relationships have created multiple statuses without offering same-sex couples access to the one legal status that in *all* jurisdictions is understood to confer the most comprehensive set of legal protections. Notwithstanding how well-intentioned and how important legal statuses such as domestic partnership and civil union are to same-sex couples given the prior denial of any legal status, various states' varied efforts to create separate statuses for same-sex couples, without permitting same-sex couples to marry, can only approach, but never satisfy the requirement that individuals in same-sex relationships be provided equal protection of the laws.

Marriage exists as a respected status throughout the nation and the world, and even jurisdictions that do not permit same-sex couples to marry within their jurisdictions might choose to recognize the marriages of California same-sex couples. For example, as explained in the Brief of Equality Federation & Gay and Lesbian Advocates and Defenders at pages

14-15, New York state officials and the Attorney General of Rhode Island have issued opinions that, under their respective states' laws, marriages of same-sex couples entered in other jurisdictions will be respected notwithstanding that same-sex couples presently cannot marry within those states. In addition, the Supreme Court of Israel ruled in 2006 that, even though same-sex couples may not enter into marriages within Israel, the government must register same-sex couples' marriages entered in other countries just as it must register heterosexual couples' marriages entered in other countries. (See *Ben-Ari v. The Director of the Population Admin. in the Ministry of the Interior* (Israel 2006) HCJ 3045/05.) As these examples illustrate, many jurisdictions will be loathe to disregard the validly entered marriages of same-sex couples in light of the great respect that attaches to marriage. Such respect is possible in the twenty-four states in this country that do not have constitutional provisions prohibiting recognition of marriages of same-sex couples.[43]

In contrast, the term "domestic partner" does not exist in the laws of most states and countries, and same-sex couples can have no confidence that their relationships will be respected, or even understood, by jurisdictions outside of a few states in this country. In speculating to the contrary that more states may choose to recognize California domestic partnerships than would recognize marriages of California same-sex couples, the Coverdale Amici emphasize that many states currently have foreign recognition statutes or constitutional amendments providing that only marriages between a man and a woman will be recognized. (Br. of

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[43] Those states are Massachusetts, which permits same-sex couples to marry, and Arizona, California, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Maine, Maryland, Minnesota, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Pennsylvania, Rhode Island, Vermont, Washington, West Virginia, and Wyoming.

Coverdale, et al. at pp. 8-9.) But the Coverdale Amici have identified only one state – Oregon – that would recognize a California domestic partnership but be obligated under a provision of its state constitution not to recognize the marriage of a same-sex couple entered outside the state (*id.* at p. 17, fn. 14), and they have not identified any foreign nation that would respect a California domestic partnership but refuse to recognize a marriage of a same-sex couple entered in California. As suggested by the examples of Israel, New York, and Rhode Island, there is reason to hope that other states and countries will choose to respect the valid marriages of California same-sex couples even if same-sex couples cannot marry within those jurisdictions. Moreover, there are many same-sex couples who expect to live the remainder of their lives in this state, and they wish to do so as married couples.

In any event, were this Court to permit same-sex couples to marry, any such couple who wished to ensure recognition of their relationship in jurisdictions that might recognize domestic partnerships but not marriages of same-sex couples could register as domestic partners with the Secretary of State. Even today, same-sex couples who have married in other states and move to California may register as domestic partners, and California registered domestic partners can marry each other in other jurisdictions, such as Canada, and many have. (See, e.g., Olson, *Gay Couples Look North,* Riverside Press Enterprise (Aug. 1, 2005) p. B1 <http://www.pe.com/localnews/inland/stories/ PE_News_Local_H_gaymarriage01.90df2f0.html> [as of Nov. 5, 2007].)

As the Massachusetts Supreme Judicial Court recognized in invalidating Massachusetts' former exclusion of same-sex couples from marriage, the state constitutional issues before that court could not be decided on the basis of whether other states would recognize the marriages

of same-sex couples entered in Massachusetts. Rather, same-sex couples living in Massachusetts were entitled to their state constitution's full protection. That Court explained:

> We would not presume to dictate how another State should respond to today's decision. But neither should considerations of comity prevent us from according Massachusetts residents the full measure of protection available under the Massachusetts Constitution. The genius of our Federal system is that each State's Constitution has vitality specific to its own traditions, and that, subject to the minimum requirements of the Fourteenth Amendment, each State is free to address difficult issues of individual liberty in the manner its own Constitution demands.

(*Goodridge*, *supra*, 798 N.E.2d at p. 967.) This Court similarly should ensure that lesbian and gay Californians may enjoy the full protection of the California Constitution's guarantees of equal protection, privacy, due process, and free expression through marrying the person of their choice.

C. This Court Should Give No Weight To Speculative Arguments That A Ruling Invalidating California's Marriage Exclusion Would Deter Other States From Enacting Protections For Same-Sex Couples.

In an unabashed plea for this Court to base its decision on political calculations rather than the law, the Coverdale Amici argue that a ruling by this Court that California must permit same-sex couples to marry would send "a powerful message to sister states: passing substantive new civil unions laws to provide legal benefits to gay couples in itself puts a states' [sic] marriage laws in fresh constitutional jeopardy." (Br. of Coverdale, et al. at p. 21.) It would be improper for this Court to give consideration to such speculations. Furthermore, recent history does not support the argument that the Coverdale Amici advance.

The concern voiced by the Coverdale Amici is the flip side of a tired scare tactic repeatedly trotted out by opponents of measures that would protect lesbian and gay couples. For years, opponents of equality for lesbian and gay people have argued in state legislative debates that enactment of nondiscrimination provisions or domestic partnership or civil unions laws will lead their state courts to permit same-sex couples to marry. Opponents of such legislative measures have noted that, in invalidating Massachusetts' exclusion of same-sex couples from marriage in 2003, the Supreme Judicial Court of Massachusetts supported its holding that the exclusion lacked rational basis by pointing to the Massachusetts Legislature's enactment of prohibitions on discrimination based on sexual orientation in employment, housing, education, public accommodations, and adoption, and foster parenting laws. (See *Goodridge*, *supra*, 798 N.E.2d at p. 967; *id.* at p. 966, fn. 30.)

Notwithstanding the Massachusetts Court's reasoning in 2003, however, laws establishing domestic partnership registries and civil unions have been enacted since then in Connecticut, New Hampshire, New Jersey, Oregon, and Washington;[44] laws expanding domestic partnership protections have been enacted in California,[45] Maine,[46] and the District of

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[44] House Bill No. 963 (2005 Reg. Sess.) (Conn. 2005); House Bill No. 437 (160th Gen. Ct. Reg. Sess.) (N.H. 2007); Assembly Bill No. 3787 (2006-2007 Reg. Sess.) (N.J. 2006); House Bill No. 2007 (74th Leg. Assem. 2007 Reg. Sess.) (Or. 2007).

[45] Assembly Bill No. 2208 (2003-2004 Reg. Sess.); Assembly Bill No. 2580 (2003-2004 Reg. Sess.); Senate Bill No. 565 (2005-2006 Reg. Sess.); Senate Bill No. 973 (2005-2006 Reg. Sess.); Senate Bill No. 1827 (2005-2006 Reg. Sess.); Senate Bill No. 105 (2007-2008 Reg. Sess.); Senate Bill No. 559 (2007-2008 Reg. Sess.); Assembly Bill No. 102 (2007-2008 Reg. Sess.).

Columbia;[47] and laws prohibiting discrimination based on sexual orientation have been enacted in Colorado, Hawaii, Illinois, Iowa, Maine, New Jersey, Oregon, and Washington.[48] In other words, the steady increase in states that recognize same-sex couples' unions or that prohibit discrimination based on sexual orientation was not halted by the conclusion of a state court that anti-discrimination statutes cast doubt on the existence of a rational basis for excluding same-sex couples from marriage.[49]

There is no reason to suppose that a similar ruling from California's judiciary would have any different effect. Indeed, the trial court in this case held in March 2005 that California's domestic partnership statutes "cut[] against" the rationality of the state's exclusion of same-sex couples from marriage. (Appellants' Appendix, Case No. A110450, p. 86 [filed by State Appellants] (hereafter AA).)[50] Since that ruling, Connecticut, New

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[46] House Paper No. 512 (123rd Leg. 1st Reg. Sess.) (Me. 2007).

[47] Laws 16-292 (16th Council 2006 Sess.) (D.C. 2006).

[48] Senate Bill No. 07-025 (66th Gen. Assem. 1st Reg. Sess.) (Colo. 2007); Senate Bill No. 1321 (23rd Leg. Reg. Sess.) (Hawaii 2007); Senate Bill No. 3186 (93rd Leg., Reg. Sess.) (Ill. 2005); Senate File No. 427 (82nd Gen. Assem. Reg. Sess.) (Iowa 2007); Senate Paper No. 413 (122nd Leg. 1st Reg. Sess.) (Me. 2005); Senate Bill No. 362 (2006-2007 Reg. Sess.) (N.J. 2006); Senate Bill No. 2 (74th Leg. Assem. 2007 Reg. Sess.) (Or. 2007); Senate Bill No. 725 (74th Leg. Assem. 2007 Reg. Sess.) (Or. 2007); Senate Bill No. 5123 (60th Leg. 2007 Reg. Sess.) (Wash. 2007).

[49] This point is explained in more detail in the Brief of Equality Federation & Gay and Lesbian Advocates and Defenders at pp. 12-18.

[50] Judge Kramer's opinion explained: "In this context, the existence of marriage-like rights without marriage actually cuts against the existence of a rational government interest for denying marriage to same-sex couples. California's enactment of rights for same-sex couples belies any argument that the State would have a legitimate interest in denying marriage in order

Hampshire, and New Jersey have enacted comprehensive civil union laws, Oregon has enacted comprehensive domestic partnership laws, Washington has enacted a limited domestic partnership statute, and Maine and California have expanded their domestic partnership protections.[51]

Respondents offer these observations solely to illustrate that this Court should not rely one way or the other on the types of considerations that the Coverdale Amici emphasize. Ultimately, this Court is not in a position to judge how voters or legislators in other jurisdictions may react to its rulings. The Court's responsibility, instead, is to construe the California Constitution faithfully and independently.[52]

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to preclude same-sex couples from acquiring some marital right that might somehow be inappropriate for them to have. No party has argued the existence of such an inappropriate right, and this court cannot think of one." (AA, p. 86.)

[51] Senate Bill No. 565 (2005-2006 Reg. Sess.); Senate Bill No. 973 (2005-2006 Reg. Sess.); Senate Bill No. 1827 (2005-2006 Reg. Sess.); Senate Bill No. 105 (2007-2008 Reg. Sess.); Senate Bill No. 559 (2007-2008 Reg. Sess.); Assembly Bill No. 102 (2007-2008 Reg. Sess.); House Bill No. 963 (2005 Reg. Sess.) (Conn. 2005); House Paper No. 512 (123rd Leg. 1st Reg. Sess.) (Me. 2007); House Bill No. 437 (160th Gen. Ct. Reg. Sess.) (N.H. 2007); Assembly Bill No. 3787 (2006-2007 Reg. Sess.) (N.J. 2006); House Bill No. 2007 (74th Leg. Assem. 2007 Reg. Sess.) (Or. 2007); Substitute Senate Bill No. 5336 (60th Leg. 2007 Reg. Sess.) (Wash. 2007).

[52] Professor Jesse H. Choper has submitted an amicus brief explaining why, in cases concerning individual constitutional rights, it is contrary to the judicial role to give weight to predictions regarding possible political responses to court rulings. (See Br. of Professor Jesse H. Choper at pp. 1-8.)

VIII. THE CAMPAIGN FOR CALIFORNIA FAMILIES AND THE PROPOSITION 22 LEGAL DEFENSE AND EDUCATION FUND LACK STANDING TO MAINTAIN THEIR LAWSUITS AGAINST THE CITY AND COUNTY OF SAN FRANCISCO.

Amici Pacific Justice Institute (hereafter PJI) and Capitol Resource Institute (hereafter CRI) argue that Campaign for California Families (hereafter CCF) and the Proposition 22 Legal Defense and Education Fund (hereafter the Fund) have standing to seek a declaration against the City and County of San Francisco that the state's statutory exclusion of same-sex couples from marriage is constitutional. The cases on which PJI and CRI rely, however, are inapplicable because they stand only for the proposition that otherwise moot cases can be heard when they involve wrongs that are capable of repetition yet evading review. [53] That rule has no application

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[53] See *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.* (2000) 528 U.S. 167, 174 ("A defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case."); *In re William M.* (1970) 3 Cal.3d 16, 23 ("[I]f a pending case poses an issue of broad public interest that is likely to recur, the court may exercise an inherent discretion to resolve that issue even though an event occurring during its pendency would normally render the matter moot."); *Ballard v. Anderson* (1971) 4 Cal.3d 873, 876 (same); *Zeilenga v. Nelson* (1971) 4 Cal.3d 716, 719-720 (observing that the same question will arise at future elections, and though now moot, appropriate to address); *Bd. of Education v. Watson* (1966) 63 Cal.2d 829, 832 (although action was moot, the tax assessing question at issue will occur annually and is likely to evade review); *Madera County v. Gendron* (1963) 59 Cal.2d 798, 803-804 (considering whether a district attorney could engage in the private practice of law during his term of office even though the defendant's term had ended while the dispute was pending, as the issue was likely to arise again); *Kirstowsky v. Superior Court* (1956) 143 Cal.App.2d 745, 749 (hearing dispute concerning reporters' access to criminal trial, even though trial had ended, because issue was one of great importance and was likely to arise again).

Another case on which PJI and CRI rely is distinguishable because it did not involve any issue of mootness, but simply held that the plaintiffs

here, because this Court has issued a writ of mandate requiring the City to cease issuing marriage licenses (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055), and there is no credible threat that the City will cease complying with this Court's ruling.

PJI and CRI also argue that it is unfair to permit Equality California to challenge the constitutionality of the marriage laws' exclusion of same-sex couples while preventing CCF and the Fund from seeking a declaration that this exclusion is constitutional. (Br. of Pacific Justice Institute, et al. at pp. 47-48.) This argument ignores the obvious, and dispositive, difference between Equality California and CCF and the Fund: Equality California's members include same-sex couples who wish to marry and therefore are directly and personally harmed by the marriage laws. CCF and the Fund, by contrast, "do[] not claim a ruling about the constitutionality of denying marriage licenses to same-sex couples will impair or invalidate the existing marriages of [their] members, or affect the rights of [their] members to marry persons of their choice in the future." (*City and County of San Francisco v. State of California* (2005) 128 Cal.App.4th 1030, 1038-1039.) For these reasons and the reasons stated in Respondents' Answer Brief, the Court of Appeal correctly held that the Fund's and the Campaign's suits are not justiciable for lack of standing and mootness.

CONCLUSION

For the reasons set forth in this brief and Respondents' prior briefing, Respondents respectfully request that this Court affirm the judgment and writ relief granted by the Superior Court requiring the State

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had standing to seek a writ of mandate and injunctive relief to compel compliance with a statute. (*Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, 1566.)

of California to issue marriage licenses to same-sex couples on the same terms as such licenses are issued to heterosexual couples.

Dated: November 12, 2007

Respectfully submitted,

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CERTIFICATE OF WORD COUNT
PURSUANT TO RULE 8.520(c)(1)

Pursuant to California Rule of Court 8.520(c)(1), counsel for Respondents hereby certifies that the number of words contained in this Consolidated Answer to Amicus Curiae Briefs, including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate, is 22,809 words as calculated using the word count feature of the computer program used to prepare the brief.

Dated: November 12, 2007 Respectfully submitted,

By: /CPS
Shannon Minter

APPENDIX

Amici Curiae in Support of Respondents Challenging the Marriage Exclusion

	Amici Curiae	Counsel
1	• Cal. State Conference of the NAACP	•Eisenberg and Hancock LLP
2	• NAACP Legal Defense and Educ. Fund, Inc.	•Paul Weiss Rifkind Wharton & Garrison LLP •NAACP Legal Defense and Educ. Fund, Inc.
3	• Howard Univ. School of Law Civil Rights Clinic	•Prof. Aderson B. Francois •Altshuler Berzon LLP
4	• Mexican Am. Legal Defense and Educ. Fund • Aguilas • Bienestar Human Services • Coalition For Humane Immigrant Rights • La Raza Centro Legal • Nat'l Black Justice Coalition • Nat'l Lawyers Guild Of San Francisco • Zuna Inst.	•O'Melveny & Myers LLP •Mexican Am. Legal Defense and Educ. Fund •Law Office of Ellen Forman Obstler
5	• Asian Am. Bar Assn. of the Greater Bay Area • Asian Pacific Am. Bar Assn. of Los Angeles County • Asian Pacific Bar Assn. of the Silicon Valley • Japanese Am. Bar Assn. of Greater Los Angeles • Korean Am. Bar Assn. of Southern Cal. • Nat'l Asian Pacific Am. Bar Assn. • Pan Asian Lawyers of San Diego • Philippine Am. Bar Assn. • South Asian Bar Assn. of Northern Cal. • South Asian Bar Assn. of San Diego • South Asian Bar Assn. of Southern Cal. • Southern Cal. Chinese Lawyers Assn. • Vietnamese Am. Bar Assn. of Northern Cal. • Asian Pacific Islander Legal Outreach • API Equality	•Pillsbury Winthrop Shaw Pittman LLP •Asian Pacific Islander Legal Outreach •Asian Pacific Am. Legal Ctr.

	• API Equality - SF • Asian Communities for Reproductive Justice • Asian Law Alliance • Asian Law Caucus • Asian Pacific Am. Labor Alliance – Alameda • Asian Pacific Islander Family Pride • Asian Pacific Bar Assn. of the Silicon Valley • Asian Pacific Islander Wellness Ctr. • Asian Women's Shelter • Chinese for Affirmative Action • Chinese Progressive Assn. • Filipinos for Affirmative Action • Gay Asian Pacific Alliance • Inst. for Leadership Development and Study of Pacific Asian North Am. Religion • Korean Community Ctr. of the East Bay • My Sister's House • Asian Pacific Am. Legal Ctr. • Asian/Pacific Bar of Cal. • API Equality – LA • Asian Am. Inst. • Asian Am. Justice Ctr. • Asian Am. Legal Defense & Educ. Fund • Asian Am. Psychological Assn. • Asian Am. Queer Women Activists • Asian and Pacific Islander Am. Health Forum • Asian and Pacific Islander Lesbian, Bisexual Women and Transgender Network • Asian and Pacific Islander Parents and Friends of Lesbians and Gays • Asian Pacific AIDS Intervention Team • Asian Pacific Am. Labor Alliance – Los Angeles • Asian Pacific Am. for Progress – Los Angeles • Asian Pacific Islander Pride Council • Asian Pacific Policy & Planning Council • Asian Pacific Women's Ctr. • Ctr. for the Pacific Asian Family • Conference of Asian Pacific Am. Law Faculty • Gay Asian Pacific Support Network • Japanese Am. Citizens League	

	• Khmer Girls in Action • Korean Resource Ctr. • Koreatown Immigrant Workers Alliance • Nat'l Asian Pacific Am. Law Student Assn. • Nat'l Asian Pacific Am. Women's Forum • Nat'l Korean Am. Service & Educ. Consortium • Orange County Asian & Pacific Islander Community Alliance • Satrang • South Asian Am. Leaders of Tomorrow • South Asian Network • Southeast Asian Community Alliance • Southeast Asia Resource Action Ctr.	
6	• City of Los Angeles • City of San Diego • City of San Jose • City of Long Beach • City of Oakland • City of Santa Rosa • City of Berkeley • City of Santa Monica • City of Santa Cruz • City of Palm Springs • City of West Hollywood • City of Signal Hill • City of Sebastopol • City of Cotati • Town of Fairfax • City of Cloverdale • County of Santa Clara • County of San Mateo • County of Santa Cruz • County of Marin	•Stephen Lewis and Michael Jenkins, City of West Hollywood Legal Services Division
7	• The Unitarian Universalist Assn. of Congregations • General Synod of the United Church of Christ • The Union for Reform Judaism • Soka Gakkai Internat.-USA • The Universal Fellowship of Metropolitan Community Churches • The Cal. Council of Churches	•Raoul D. Kennedy •Elizabeth Harlan •Joren S. Bass •Philip Leider •Eric Alan Isaacson •Rev. Silvio Nardoni •Jo Hoenninger

	• Cal. Faith for Equality • The United Church of Religious Science • The Unitarian Universalist Legislative Ministry – Cal. • The Reconciling Ministries Clergy of the Cal. Nevada Conference of the United Methodist Church • Pastor David Moss, Trinity United Methodist Church, Chico • Pastor Dr. Robert Goldstein, St. Francis Lutheran Church, San Francisco • Reverend Michael Schuenemeyer, United Church of Christ • Rabbi Arthur Waskow, The Shalom Ctr. • Reverend Lindi Ramsden, Unitarian Universalist Legislative Ministry – CA • Rabbi Elliot Dorff, Jewish Conservative Movement • Reverend Kathy Huff, First Unitarian Church, Oakland • Pastor Jay K. Pierce, United Methodist Church of Merced • Pastor Scott Landis, Mission Hills United Church of Christ, San Diego • Pastor Brenda Evans, Christ Chapel of North Park, San Diego • Diana Elrod, Women's Division Leader in the Castro District of Soka Gakkai Internat.-USA • Nancy Burns, Northern Cal. Soka Spirit Representative • Reverend Kevin Bucy, Midtown Church, United Church of Religious Science, San Diego • Reverend Diann Davisson, Religious Science Minister, Long Beach Memorial Hospital • William McKinney, PhD, Pacific School of Religion, Berkeley • Mary A. Tolbert, PhD, Pacific School of Religion, Berkeley • The Al-Fatiha Foundation • DignityUSA • Affirmation: Gay and Lesbian Mormons	

	• Muslims for Progressive Values[1]	
8	• Am. Psychological Assn. • Cal. Psychological Assn. • Am. Psychiatric Assn. • Nat'l Assn. of Social Workers • Nat'l Assn. of Social Workers, Cal. Chapter	•Am. Psychological Assn. •Jenner & Block LLP
9	• Am. Psychoanalytic Society • Am. Anthropological Assn. • Lawyers' Committee for Civil Rights of the San Francisco Bay Area	•Covington & Burling LLP
10	• Beverly Hills Bar Assn. • Los Angeles County Bar Assn. • San Francisco Trial Lawyers Assn. • Cal. Women Lawyers • Women Lawyers Assn. of Los Angeles	•Greines, Martin, Stein & Richland LLP
11	• Bar Assn. of San Francisco	•Amitai Schwartz, Bar Assn. of San Francisco •Nanci L. Clarence
12	• Santa Clara County Bar Assn.	•McManis Faulkner & Morgan
13	• Senator Elaine Alquist • Senator Ellen Corbett • Senator Christine Kehoe • Senator Sheila Kuehl • Senator Carole Migden • Senator Darrell Steinberg • Assemblymember Noreen Evans • Assemblymember Loni Hancock • Assemblymember Jared W. Huffman • Assemblymember Dave Jones • Assemblymember John Laird • Assemblymember Mark Leno • Assemblymember Sally J. Lieber • Assemblymember Fiona Ma • Assemblymember Anthony J. Portantino	•Remcho, Johansen & Purcell, LLP

[1] Amici joining the Brief of the Unitarian Universalist Association of Congregations, et al. included an additional 19 national and international faith organizations, 14 state and regional faith organizations, 97 local faith organizations, and 249 faith leaders.

	• Assemblymember Lori Saldaña	
14	• Prof. & Associate Dean Scott Altman • Prof. R. Richard Banks • Prof. Grace Ganz Blumberg • Prof. Janet Bowermaster • Prof. Carol S. Bruch • Prof. Jan C. Costello • Prof. Barbara J. Cox • Prof. Jay Folberg • Prof. Deborah L. Forman • Prof. Joan H. Hollinger • Prof. Lisa Ikemoto • Prof. Courtney G. Joslin • Prof. Herma Hill Kay • Prof. Jan Kosel • Prof. Lawrence Levine • Prof. Maya Manian • Prof. Mary Ann Mason • Prof. John Myers • Prof. E.Gary Spitko • Prof. Michael S. Wald • Prof. D. Kelly Weisberg • Prof. Lois Weithorn • Prof. Michael Zamperini	•Prof. Herma Hill Kay •Prof. Michael S. Wald
15	• Internat. Human Rights Clinic, Univ. of Toronto • Prof. William Aceves • Prof. Brenda Cossman • Prof. Sujit Choudry • Prof. Chai Feldblum • Prof. Hari Osofsky • Prof. Jaya Ramji-Nogales • Prof. Beth van Schaak	•Prof. Noah Novogrodsky •Morrison & Foerster LLP
16	• Prof. Pamela S. Karlan • Dean Paul Brest • Prof. Alan E. Brownstein • Prof. William Cohen • Prof. David B. Cruz • Prof. Mary L. Dudziak • Prof. Susan R. Estrich • Prof. David Faigman • Prof. Philip B. Frickey	•Prof. Kathleen M. Sullivan

	• Prof. Ronald R. Garet • Prof. Kenneth L. Karst • Prof. Goodwin Liu • Prof. Lawrence C. Marshall • Prof. Radkiha Rao • Prof. Kathleen M. Sullivan • Prof. Jonathan D. Varat • Prof. Adam Winkler	
17	• Prof. William N. Eskridge, Jr.	•Caldwell Leslie & Proctor, PC
18	• Prof. Jesse Choper	•Prof. Jesse Choper •Keker & Van Nest
19	• Prof. Joseph R. Grodin	•Prof. Joseph R. Grodin
20	• Prof. M.V. Lee Badgett • Gary J. Gates	•R. Bradley Sears •Clifford J. Rosky
21	• Am. Academy of Matrimonial Lawyers • Northern Cal. Chapter of the Am. Academy of Matrimonial Lawyers • Cal. District of the Am. Academy of Pediatrics	•Sideman & Bancroft, LLP
22	• Cal. Women's Law Ctr. • Equal Rights Advocates • Legal Momentum	•Irell & Manella LLP
23	• Southern Poverty Law Ctr.	•Manning & Marder, Kass, Ellrod, Ramirez LLP
24	• Equal Justice Society	•Prof. Tobias Barrington Wolff •McDermott Will & Emery LLP
25	• Counsel for Secular Humanism • Ctr. for Inquiry	•Ctr. for Inquiry
26	• Out and Equal Workplace Advocates • Levi Strauss & Co.	•Gibson, Dunn & Crutcher LLP
27	• Anti-Defamation League • Los Angeles Gay and Lesbian Ctr. • Sacramento Gay and Lesbian Ctr. • San Diego Lesbian, Gay, Bisexual and Transgender Community Ctr. • San Francisco LGBT Community Ctr.	•Proskauer Rose, LLP

	• Billy DeFrank Ctr. • The Gay and Lesbian Ctr. of Greater Long Beach • Desert Pride Ctr. • Lighthouse Community Pride Ctr. • The Pacific Ctr. • Stanislaus Pride Ctr.	
28	• Equality Federation • Gay and Lesbian Advocates & Defenders	• Weixel Law Office • Chapman Popik & White LLP • Gay and Lesbian Advocates & Defenders
29	• Nat'l Gay and Lesbian Task Force Foundation	• Winston & Strawn LLP • Prof. Suzanne B. Goldberg
30	• Bay Area Lawyers for Individual Freedom • Children of Lesbians and Gays Everywhere • Disability Rights Educ. and Defense Fund • Family Pride • Freedom to Marry • Human Rights Campaign • Human Rights Campaign Foundation • Legal Aid Society – Employment Law Ctr. • Lesbian and Gay Lawyers Assn. of Los Angeles • Marriage Equality USA • Nat'l Lesbian and Gay Law Assn. • Parents, Families and Friends of Lesbians and Gays, Inc. • People for the Am. Way Foundation • Pride at Work • Sacramento Lawyers for the Equality of Gays and Lesbians • Tom Homann Law Assn.	• Munger, Tolles & Olson LLP

Amici Curiae in Support of Appellants

	Amici Curiae	Counsel
1	• Knights of Columbus	• Wild, Carter & Tipton • Thomas More Society

2	•Judicial Watch, Inc.	•Judicial Watch, Inc.
3	•The Becket Fund for Religious Liberty	•Derek L. Gaubatz •Becket Fund for Religious Liberty
4	•Nat'l Legal Foundation	•The Nat'l Legal Foundation
5	•Am. Ctr. for Law & Justice	•Am. Ctr. for Law & Justice •Am. Ctr. for Law & Justice NE •Schuler & Brown
6	•Leland Traiman •Steward Blandón	•Mazur & Mazur
7	•Nat'l Hispanic Christian Leadership Conference •African Am. High Impact Leadership Coalition •Korean Church Coalition for North Korea Freedom •Council of Korean Churches in Southern Cal. •Traditional Family Coalition •Chinese Family Alliance •Am. Chinese Evangelical Seminary •The Lord's Grace Christian Church of Mountain View •Grace Gospel Christian Church at San Mateo •Mandarin Baptist Church •Home of Christ Church at Saratoga •Fremont Chinese Evangelical Free Church •West Valley Christian Alliance Church •Evangelical Free Church of San Francisco •San Francisco Agape Christian Church •HIS Foundation •Chinese Christians for Justice.	•The Western Ctr. for Law & Policy.
8	•Prof. John Coverdale •Prof. Scott FitzGibbon •Prof. Martin R. Gardner •Prof. Kris W. Kobach •Prof. Earl M. Maltz •Prof. Laurence C. Nolan •Prof. John Randall Trahan.	•Jeffrey N. Daly

9	•Prof. James Q. Wilson •Prof. Douglas Allen •Prof. Hadley P. Arkes •Prof. David Blankenhorn •Prof. Lloyd R. Cohen •Prof. David K. DeWolf •Prof. Robert P. George •Prof. Bernard E. Jacob •Prof. William H. Jeynes •Prof. Leon R. Cass •Prof. Charles Kessler •Prof. Daniel Hays Lowenstein •Prof. Katherine Shaw Spaht •Prof. Thomas G. West.	•Inst. for Marriage and Public Policy
10	•Prof. Douglas W. Kmiec •Prof. Helen M. Alvare •Prof. George W. Dent, JR. •Prof. Stephen G. Calabresi •Prof. Steven B. Presser •Prof. Lynn D. Wardle	•Natalie A. Panossian
11	•United Families Internat. •Family Watch Internat. •Family Leader Foundation	•Marriage Law Foundation
12	•Rev. Joshua Beckley, Ecclesia Christian Fellowship •Dr. Timothy Winters, Bayview Baptist Church •Pastor Chuck Singleton, Loveland Church •Dr. Raymond W. Turner, Temple Missionary Baptist Church.	•Robert A. Destro •The Marriage Law Project
13	•Church of Jesus Christ of Latter-Day Saints •Cal. Catholic Conference •Nat'l Assn. of Evangelicals •Union of Orthodox Jewish Congregations of Am.	•Kenneth W. Starr •Kirton & McConkie
14	•Pacific Justice Inst. •Capitol Resource Inst.	•Pacific Justice Inst.
15	•Jews Offering New Alternatives to Homosexuality •Parents and Friends of Ex-Gays and Gays •Evergreen Internat.	•Stewart & Stewart