Case No. S147999

IN THE
SUPREME COURT OF CALIFORNIA

Coordination Proceeding Special Title [Rule 1550(b)]
IN RE MARRIAGE CASES

Judicial Council Coordination
Proceeding No. 4365

After a Decision by the Court of Appeal,
First Appellate District, Division Three,
Case Nos. A110449; A110450; A110451; A110463; A110651; A110562

San Francisco County Superior Court Case Nos. JCCP4365; 428794,
429539, 429548, 503943, 504038,
Los Angeles Superior Court No. BC088506
Honorable Richard A. Kramer, Judge

Brief *Amicus Curiae* of The American Center for Law & Justice In Support of Respondent Proposition 22 Legal Defense And Education Fund.

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INTEREST OF AMICUS

The American Center for Law and Justice (ACLJ) is a public interest law firm dedicated to protecting Constitutional freedoms, and to preventing the erosion of traditional moral values via judicial fiat. The ACLJ is committed to preserving the traditional institution of marriage as the union of one man and one woman, and therefore opposes efforts to take public debates on moral issues, including the definition of marriage, out of the legislative process through the minting of new rights under federal and state constitutions. ACLJ attorneys have argued or participated as amicus curiae in numerous cases involving constitutional issues before the Supreme Court of the United States, as well as lower federal and state courts.

ARGUMENT

Appellants urge this Court to redefine the institution of marriage to include same-sex couples. Appellants' theme is that marriage is a malleable institution and the historic definition of the marital estate to one man and one woman is archaic, arbitrary, and serves no legitimate purpose. Appellants argue, as do all gay marriage advocates, that marriage is only about a loving commitment between two adults, and, therefore, the sex of the participants is irrelevant. Plaintiffs are wrong, and their argument is not much different than claiming that baseball is still baseball, even if a broom and balloon are exchanged for the bat and ball. The resulting game may be similar but it is definitely not baseball.

I. REDEFINING MARRIAGE TO INCLUDE SAME-SEX COUPLES WILL EVENTUALLY DEVALUE THE INSTITUTION TO THE DETRIMENT OF CHILDREN.

Marriage is one of the most meaningful of human social institutions because of its link to creating and raising the next generation. In short, "if human beings did not reproduce sexually, creating infants with their long periods of dependency, marriage would not be the universal human social institution that it is." (Cere & Glendon, The Future of Family Law: Law & the Family Crisis in North America (Institute for American Values 2005) p. 14.) The state's purpose in civil marriage is to channel "the erotic and interpersonal impulses between men and women in a particular direction: one in which men and women commit to each other and to the children that their sexual unions commonly (and even at times unexpectedly) produce." (*Id*. at 12.) Natural law theorist, John Rawls, explains the matter cogently:

> As an institution, conjugal marriage addresses the social problem that men and women are sexually attracted to each other and that, without any outside guidance or social norms, these intense attractions can cause immense personal and social damage. This mutual attraction is inherently linked to the "reproductive labor" that is essential to the intergenerational life of all societies, including modern liberal societies. *The default position for men and women attracted to the opposite sex, absent strong social norms, is too many children born without fathers, too many men abandoning the mothers of their children, and too many women left alone to care for their offspring. If law and culture choose to "do nothing" about sexual attraction between men and women, the passive, unregulated heterosexual reality is multiple failed relationships and millions of fatherless children.*

(Rawls, Justice as Fairness: A Restatement (Harvard University Press 2001) p. 162) (emphasis added.)

Thus, the institution of civil marriage is deployed to convey the seriousness of sexual relationships that result in children. This is especially

crucial for heterosexual males who have no physical connection to their offspring after conception. (*See* Kmiec, *The Procreative Argument for Proscribing Same-Sex Marriage* (2005) 32 Hastings Const. L. Q. 653, 657.)

With the exception of four justices on Supreme Judicial Court of Massachusetts, every court that has considered the constitutionality of traditional marriage has recognized that the state's interest in marriage has never been solely to promote loving, committed relationships as an end in themselves. (*See, e.g.*, *Andersen v. King County* (Wash. 2006) 138 P.3d 963, 979 n.12.) Rather, the state's interest in marriage is to promote the welfare of children who are the result of heterosexual couplings.

In *Hernandez v. Robles* (N.Y. 2006) 855 N.E.2d 1, the court held that New York's marriage laws survived rational basis review because:

> for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships. Heterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not. Despite the advances of science, it remains true that the vast majority of children are born as a result of a sexual relationship between a man and a woman, and the Legislature could find that this will continue to be true. The Legislature could also find that such relationships are all too often casual or temporary. It could find that an important function of marriage is to create more stability and permanence in the relationships that cause children to be born. It thus could choose to offer an inducement--in the form of marriage and its attendant benefits--to opposite-sex couples who make a solemn, long-term commitment to each other.

(*Id*. at 7.)

Similarly, the Washington Supreme Court acknowledged in *Andersen*, that

> The complementary nature of the sexes and the unique procreative capacity of one man and one woman as a reproductive unit provide one obvious and nonarbitrary basis for recognizing such marriage. The binary character of marriage exists first because there are two sexes. A society

> mindful of the biologically unique nature of the marital relationship and its special capacity for procreation has ample justification for safeguarding this institution to promote procreation and a stable environment for raising children. Less stable homes equate to higher welfare and other burdens on the State. Only opposite-sex couples are capable of intentional, unassisted procreation, unlike same-sex couples. Unlike same-sex couples, only opposite-sex couples may experience unintentional or unplanned procreation. State sanctioned marriage as a union of one man and one woman encourages couples to enter into a stable relationship prior to having children and to remain committed to one another in the relationship for the raising of children, planned or otherwise.

(138 P.3d at 990.)

The Indiana Court of Appeals also recognized that the institution of marriage is inextricably linked with society's interest in promoting the optimal environment for raising children:

> The institution of opposite-sex marriage both encourages such couples to enter into a stable relationship before having children and to remain in such a relationship if children arrive during the marriage unexpectedly. The recognition of same-sex marriage would not further this interest in heterosexual "responsible procreation." Therefore, the legislative classification of extending marriage benefits to opposite-sex couples but not same-sex couples is reasonably related to a clearly identifiable, inherent characteristic that distinguishes the two classes: the ability or inability to procreate by "natural" means.

(*Morrison v. Sadler* (Ind. Ct. App. 2005) 821 N.E.2d 15, 25.)

Appellants' claim that adopting same-sex marriage will have no effect on child welfare is soundly rebutted by the experience of European countries that have adopted same-sex marriage. For example, three years ago in Holland, the first country to adopt same-sex marriage, five Dutch scholars wrote a letter addressed to "parliaments of the world debating the issue of same-sex marriage." In the letter, the scholars advance a

compelling case that gay marriage in the Netherlands has contributed to the decline of married heterosexual couples and to an exponential increase in out-of-wedlock births.[1] The authors reported substantial statistical evidence documenting the decline of Dutch marriage since gay marriage became legal, and conclude:

> Over the past fifteen years, the number of marriages has declined substantially, both in absolute and in relative terms. In 1990, 95,000 marriages were solemnized (6.4 marriages per 1,000 inhabitants); by 2003, this number had dropped to 82,000 (5.1 marriages per 1,000 inhabitants). This same period also witnessed a spectacular rise in the number of illegitimate births--in 1989 one in ten children were born out of wedlock (11 percent), by 2003 that number had risen to almost one in three (31 percent). The number of never-married people grew by more than 850,000, from 6.46 million in 1990 to 7.32 million in 2003. It seems the Dutch increasingly regard marriage as no longer relevant to their own lives or that of their offspring.
> . . . .
>
> [T]here are good reasons to believe the decline in Dutch marriage may be connected to the successful public campaign for the opening of marriage to same-sex couples in The Netherlands. After all, supporters of same-sex marriage argued forcefully in favour of the (legal and social) separation of marriage from parenting. In parliament, advocates and opponents alike agreed that same-sex marriage would pave the way to greater acceptance of alternative forms of cohabitation.
>
> In our judgment, it is difficult to imagine that a lengthy, highly visible, and ultimately successful campaign to persuade Dutch citizens that marriage is not connected to parenthood and that marriage and cohabitation are equally

[1] Letter of Professors. M. van Mourik, A. Nuytinck, R. Kuiper, J. Van Loon PhD, & H. Wels PhD (August 8, 2004) *available at* <http:// www.marriagedebate.com/mdblog/2004_07_04_mdblog_archive.htm#1089307372607082 (as of Sept. 17, 2007).

> valid 'lifestyle choices' has not had serious social consequences.[2]

Similarly, Scandinavia has seen a dramatic decrease in heterosexual marriages since gay marriage was adopted. British demographer David Coleman and senior Dutch demographer Joop Garssen have written that "marriage is becoming a minority status" in Scandinavia. In Denmark, a slight majority of all children are born within marriage, but 60 percent of first-born children are born out-of-wedlock. Danish demographers Wehner, Kambskard, and Abrahamson argue that marriage has ceased to be the normative setting for Danish family life.[3]

In certain Norwegian counties where gay marriage is widely accepted, heterosexual marriages have declined and out-of-wedlock births have risen far greater than rates for Norway as a whole. In one county where gay marriage was widely accepted and even preached in local churches, 82 percent of first-born children were born out-of-wedlock. Sixty-seven percent of all children born in the same county were born out-of-wedlock, mainly to cohabiting couples. (Kurtz, *The End of Marriage in Scandanavia*, The Weekly Standard, Vol. 9, Issue 20, February 2, 2004.)[4] Cohabiting couples in Scandinavia break up at two to three times the rate of married couples. (*Id*.)

Not surprisingly, public attitudes toward marriage reflect societal devaluation in those countries where same-sex marriage has been adopted. In *The Future of Marriage*, sociologist David Blankenhorn reports the results of polls taken by the International Social Survey Programme (ISSP),

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[2] *Id*.
[3] Stanley Kurtz, *No Explanation*, Nat'l Rev. Online, June 3, 2004, <http://www.nationalreview.com/kurtz/kurtz200406030910.asp> (as of Sept. 17, 2007).
[4] *Available at* <http://www.weeklystandard.com/Content/Public/Articles/000/000/003/660zypwj.asp> (as of Sept 17, 2007).

a collaborative effort of universities in over 40 countries. In 2002, the ISSP polled 50,000 adults in 35 countries, asking whether they agreed or disagreed with six statements about the value of marriage: 1) Married people are generally happier than unmarried people; 2) People who want children ought to get married; 3) One parent can bring up a child as well as two parents together; 4) It is all right for a couple to live together without intending to get married; 5) Divorce is usually the best solution when a couple can't seem to work out their marriage problems; and 6) The main purpose of marriage these days is to have children. (Blankenhorn, The Future of Marriage (2007) pp. 223-224.)

The poll establishes strong correlations between societal attitudes devaluing marriage and the adoption of same-sex marriage. Positing that statements one, two, and six indicate support for traditional marriage and statements three, four, and five reflect a lack of support for traditional marriage, Blankenhorn concludes:

> Support for marriage is by far the weakest in countries with same-sex marriage. The countries with marriage-like civil unions show significantly more support for marriage. The two countries with only regional recognition of gay marriage (Australia and the United States) do better still on these support-for-marriage measurements, and those without either gay marriage or marriage-like civil unions do best of all.
>
> In some instances, the differences are quite large. For example, people in nations with gay marriage are less than half as likely as people in nations without gay unions to say that married people are happier. Perhaps most important, they are significantly less likely to say that people who want children ought to get married (38 percent vs. 60 percent). They are also significantly more likely to say that cohabiting without intending to marry is all right (83 percent vs. 50 percent), and are somewhat more likely to say that divorce is usually the best solution to marital problems. Respondents in the countries with gay marriage are significantly more likely

> than those in Australia and the United States to say that divorce is usually the best solution.

(*Id.* at 238-39.) [5]

Similarly, a study done by The World Values Survey, a Stockholm, Sweden-based group reveals the same correlation between acceptance of same-sex marriage and societal devaluation of marriage. The Survey, which polled over 100,000 people in 80 countries, (*id.* at 231),[6] contained three statements about marriage with which respondents were asked to approve or disapprove: 1) A child needs a home with both a father and a mother to

[5] In his book, Blankenhorn summarized the statistics published by the ISSP in the chart reproduced below.

Summary of Attitudes about Marriage in Surveyed Countries, by Legal Status of Same-Sex Marriage					
	Married people are happier	People who want children should marry	One parent can be as good as two together	Cohabitating without intending to marry is all right	Divorce is usually the best solution to marriage problems
Countries with Same-Sex Marriage	21.5	37.8	43.2	83.1	68.4
Countries with Civil Unions	36.0	51.2	39.7	69.9	67.6
Countries with Regional Recognition	42.7	65.6	36.3	56.6	48.1
Countries without Same-Sex Unions	43.5	60.3	46.7	49.7	60.6

[6] *See also* Blankenhorn, *Defining Marriage Down . . . Is No Way to Save It*, Vol. 012, Issue 28, April 02, 2007, <http://www.weeklystandard.com/Content/Public/Articles/000/000/013/451noxve.asp> (as of Sept. 17, 2007).

grow up happily; 2) It is all right for a woman to want a child but not a stable relationship with a man; and 3) Marriage is an outdated institution. (*Id.*)

Again, the highest percentage of those who approved the second and third statements lived in countries with same-sex marriage. (*Id.* at 231.)[7] By significant margins, support for marriage was highest in countries that do not recognize same-sex unions of any kind. (*Id.*) Thus, the correlation between societal devaluation of marriage and the acceptance of same-sex marriage is indisputable. As Blankenhorn concludes:

> Certain trends in values and attitudes tend to cluster with each other and with certain trends in behavior. A rise in unwed childbearing goes hand in hand with a weakening of the belief that people who want to have children should get married. High divorce rates are encountered where the belief in marital permanence is low. More one-parent homes are found where the belief that children need both a father and a mother is weaker. A rise in nonmarital cohabitation is linked

[7] Another table illustration from Blankenhorn's book follows:

Summary of Attitudes about Marriage in Surveyed Countries, by Legal Status of Same-Sex Marriage			
	A child needs a home with both a father and a mother to grow up happily	It is all right for a woman to want a child but not a stable relationship with a man	Marriage is an outdated institution
Countries with Same-Sex Marriage	76.6	48.3	23.6
Countries with Civil Unions	84.3	40.7	22.4
Countries with Regional Recognition	80.2	39.5	16.6
Countries without Same-Sex Unions	93.8	28.5	15.2

> at least partly to the belief that marriage as an institution is outmoded. The legal endorsement of gay marriage occurs where the belief prevails that marriage itself should be redefined as a private personal relationship. And all of these marriage-weakening attitudes and behaviors are linked. Around the world, the surveys show, these things go together.

(Blankenhorn, *Defining Marriage Down . . . Is No Way to Save It*, Vol. 012, Issue 28, April 02, 2007.)[8]

II. EXTENDING MARRIAGE TO SAME-SEX COUPLES THREATENS CHILDREN PRECISELY BECAUSE IT DIMINISHES THE IMPORTANCE OF CHILDREN BEING RAISED BY THEIR OWN BIOLOGICAL PARENTS.

Fragmenting parenthood and valuing "intentional" parenthood over all else will ultimately leave children more, rather than less, insecure. (Cere & Glendon, *supra*, at p. 38.) The overwhelming weight of social science data establishes that the well-being of the nation's children depends in enormous measure on healthy marriages between men and women who procreate the children. Civil marriage is ultimately about protecting the right of children to know and be raised by both of their biological parents. This central truth is recognized in the United Nations Convention on the Rights of the Child, which states that "the child shall … have the right from birth to a name, the right to acquire a nationality and, as far as possible, *the right to know and be cared for by his or her parents*." (U.N. Convention on the Rights of the Child art. 7, Nov. 20, 1989, 1577 U.N.T.S. 43) (emphasis added.)

Gay marriage advocates concede that gay marriage would profoundly affect children. A leading gay rights advocate, William Eskridge, has observed that gay marriage

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[8] *Available at* <http://www.weeklystandard.com/Content/Public/Articles/000/000/013/451noxve.asp> (as of Sept. 17, 2007).

> involves the reconfiguration of family — de-emphasizing blood, gender, and kinship ties and emphasizing the value of interpersonal commitment. In our legal culture the linchpin of family law has been the marriage between a man and a woman who have children through procreative sex. Gay experience with "families we choose" delinks family from gender, blood, and kinship. Gay families of choice are relatively ungendered, raise children that are biologically unrelated to one or both parents, and often form no more than a shadowy connection between the larger kinship groups.

(Eskridge Jr., Gaylaw: Challenging Apartheid in the Closet (Harvard University Press 1999) p. 11.)

Recent Canadian court decisions creating the right to same-sex marriage evaluate two features: the unity of the couple and functional parenthood (that is, the day-to-day raising of children). The procreative link between marriage and children is eliminated along with the right of children to know their parents. (*Halpern v. Att'y Gen.* (Ont. Ct. App. 2003) 65 O.R.3d 161.) More significantly, Canada's proposed new Civil Marriage Act eliminates the category of "natural parent" across federal law. In other words, parenthood loses its natural relationship to sexuality and childbirth, and becomes merely a legal construct. (*See* Cere & Glendon, *supra*, at p. 39.)

Thus, state-approved same-sex marriage sends the message to all citizens, including heterosexuals who might some day be parents, that it is immaterial to the state whether children are raised by their biological mother and father. Under the paradigm shift in which marriage is about adult close relationships, adults choose the relationships that best suit them at the moment and children are expected to adapt. But social science evidence establishes overwhelmingly "that family structure matters for children, and the family structure that helps the most is a family headed by two biological parents in a low-conflict marriage." (*See, e.g.*, Moore, et. al., Marriage from a Child's Perspective: How Does Family Structure Affect

Children and What Can We Do About It?, Child Trends Research Brief (Washington, D.C., Child Trends, June, 2002) p. 1.)[9] Compiling statistical data, the authors demonstrate that "children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes" in all areas. (*Id*. at 6.)

III. APPROVING SAME-SEX MARRIAGE ENDORSES THE NOTION THAT CHILDREN DO NOT NEED PARENTS OF BOTH SEXES.

State approval of gay marriage also sends the message that it is unimportant whether children have both a mother and a father. Fathers and mothers become interchangeable and the state thereby ignores abundant social science data establishing that both boys and girls do best when they have parents of both sexes.[10] As Supreme Court Justice Ruth Bader Ginsburg has pointed out, the "two sexes are not fungible; a community

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[9] *Available at* http://www.childtrends.org/files/MarriageRB602.pdf. *See also* Doherty, et. al., Why Marriage Matters: 21 Conclusions from the Social Sciences (New York City: Institute for American Values, 2002); Gallagher & Baker, *Do Moms and Dads Matter? Evidence from the Social Sciences on Family Structure and the Best Interests of the Child* (2004) 4 Margins 161, 162 (concluding that "family structure does matter, and that a married mother and father is the family structure that best protects children").

[10] Maccoby, The Two Sexes (Harvard University Press 1998) p. 284; Popenoe, Life Without Father (Harvard University Press 1996) 144, 146; Blankenhorn, Fatherless America: Confronting Our Most Urgent Social Problem (1995) p. 219; Pruett, Fatherneed (New York Press 2000) pp. 41-52; Biller, Fathers and Families: Paternal Factors in Child Development (1993) 1-3; Neitzel & Stright, *Mothers' Scaffolding of Children's Problem Solving: Establishing a Foundation of Academic Self-Regulatory Competence* (2003) 17 Journal of Family Psychology 75-92 ("The cognitive and emotional support of mothers is very important in helping a child develop "self-regulatory behavior.").

made up exclusively of one [sex] is different from a community composed of both." (*United States v. Virginia* (1996) 518 U.S. 515, 533 (quoting *Ballard v. United States* (1946) 329 U.S. 187, 193.) "Inherent differences between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity." (*Virginia*, 518 U.S. at 533.) The New York Court of Appeal recently held that one rational basis for New York's marriage law was the belief that it is better, other things being equal, for children to grow up with both a mother and a father. "Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like." (*Hernandez v. Robles* (N.Y. 2006) 855 N.E.2d 1, 4.) (*See also Lofton v. Sec'y of the Dept. of Children and Family Servs.* (11th Cir. 2004) 358 F.3d 804, 818) (upholding Florida's state's ban on same-sex adoption, noting the state's interest in protecting "[the] vital role that dual-gender parenting plays in shaping sexual and gender identity.")

Appreciating the innate differences between men and women and the unique contributions each sex makes in child-rearing is fundamentally at odds with the same-sex claim that "the modern individuation of women has resulted in the kind of fluidity of gender roles for men and women" that makes the presence of both genders within a family unnecessary. (Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy, and Same-Sex Marriage* (1997) 75 N.C. L. Rev. 1501, 1606.)

States that accept gay marriage advocates' efforts to dismiss or debunk the significance of biological parenthood, and the importance of dual-gender parenting are "standing on very thin ice." (Cere & Glendon, *supra*, at p. 39.) While it is true that many children grow up in alternative family structures and develop into well adjusted adults, it is also true that many of society's ills are rooted in adult alternative lifestyle choices in

which children are the chief victims. Now is not the time for California to retreat from promoting the ideal of children being raised by both their biological parents in stable homes. Leveling marriage into nothing more than a close relationship between two consenting adults would constitute just such a retreat.

IV. ONCE MARRIAGE IS REDEFINED TO INCLUDE SAME-SEX UNIONS, THERE IS NO PRINCIPLED BASIS UPON WHICH TO EXCLUDE ANY TWO OR MORE PEOPLE WHO HAVE A CLOSE INTERPERSONAL RELATIONSHIP.

Once marriage is reconfigured as merely one of many equally valid examples of a close relationship, no principled rationale exists for refusing legal recognition to all forms of long-term friendship and mutual care. (*See* Cere & Glendon, *supra*, at p. 31.) As Eric Lowther, a member of the Canadian Parliament pointed out in the context of a debate about legislation extending government benefits to same-sex couples:

> There are many types of gender relationships: siblings, friends, roommates, partners, et cetera. However, the only relationship the government wants to include is when two people of the same gender are involved in private sexual activity, or what is more commonly known as homosexuality. No sex and no benefits is the government's approach to this bill. Even if everything else is the same, even if there is a long time cohabitation and dependency, if there is no sex there are no benefits. Bill C-23 is a benefits-for-sex-bill. It is crazy.

(Cossman & Ryder, *What is Marriage-Like Like? The Irrelevance of Conjugality* (2001) 18 Can. J. Fam. L. 269, 323.)

The Superior Court of New Jersey recognized the logical impossibility of distinguishing on principled grounds same-sex marriage and polygamy.

> The same form of constitutional attack that plaintiffs mount against statutes limiting the institution of marriage to

> members of the opposite sex also could be made against statutes prohibiting polygamy. Persons who desire to enter into polygamous marriages undoubtedly view such marriages, just as plaintiffs view same-sex marriages, as "compelling and definitive expression[s] of love and commitment" among the parties to the union. Indeed, there is arguably a stronger foundation for challenging statutes prohibiting polygamy than statutes limiting marriage to members of the opposite sex "because, unlike gay marriage, [polygamy] has been and still is condoned by many religions and societies."

(*Lewis v. Harris* (N.J. Super. Ct. 2005) 875 A.2d 259, 270, *aff'd in part, modified in part* (2006) 908 A.2d 196; *see also Lawrence v. Texas* (2003) 539 U.S. 558, 559 (Scalia, J., dissenting) ("If . . . the promotion of majoritarian sexual morality is not even a legitimate state interest, [criminal laws against bigamy cannot] survive rational-basis review.")

A survey of recent scholarly literature reveals that bans on polygamy are the next target. Nearly a decade ago, Professor Judith Stacey of New York University wrote:

> Legitimizing gay and lesbian marriages would promote a democratic, pluralist expansion of the meaning and practice, and politics of family life in the United States. . . .People might devise marriage and kinship patterns to serve diverse needs. . . . some might dare to question the dyadic limitations of western marriage and seek some of the benefits of extended family life through small group marriages arranged to share resources, nurturance, and labor. After all, if it is true that "The Two-Parent Family is Better" than a single parent family, as family values crusaders proclaim, might not three-, four-, or more-parent families be better yet as many utopian communards have long believed?

(Stacey, *Gay and Lesbian Families: Queer Like Us* in All Our Families: New Policies for a New Century (Mason, et. al. eds., Oxford U. Press 1998) p. 117, pp. 128-29.) Professor Gillian Douglas of Cardiff Law School has criticized traditional views of marriage as "ideological" and has suggested

that bigamy laws are similarly suspect: “The abhorrence of bigamy appears to stem again from the traditional view of marriage as the exclusive locus for a sexual relationship and from a reluctance to contemplate such a relationship involving multiple partners.” (Douglas, An Introduction to Family Law (2001) pp. 30-31.) Similarly, a prominent professor from the University of Chicago Law School wrote a major work setting forth a legal defense of polyamory. (Emens, *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence* (2004) 29 N.Y. U. Rev. L. & Soc. Change 277.)

Indeed, the scholarship in support of polygamy and other forms of polyamory has mushroomed over the past five years. (*See, e.g.*, Calhoun, *Who's Afraid of Polygamous Marriage? Lessons for Same-Sex Marriage Advocacy from the History of Polygamy* (2005) 42 San Diego L. Rev. 1023; Babst, Liberal Constitutionalism, Marriage, and Sexual Orientation: A Contemporary Case for Dis-Establishment (2002) pp. 87-89 (arguing that there is a critical legal analogy between the bars to same-sex, interracial, and polygamous marriage insofar as legal reasoning in all three cases appeals to alleged Christian values and views of divine purpose); Askew, *Note: The Slippery Slope: The Vitality of* Reynolds v. U.S. *After* Romer *And* Lawrence (2006) 12 Cardozo J.L. & Gender 627 (As America continues to evolve its understanding of the meaning of families and of the meaning of marriage, polygamous Mormons (really polyamorous individuals of all stripes) should be included in that understanding of the institution.)

Princeton University historian Hendrik Hartog, a supporter of same-sex marriage, observed that “there is a conservative question that lots of people ask: If you allow gay marriage, don’t you have to allow polygamy as well? and I think the answer is yes. If you say people have a right to happiness and they have a right to form unions that will make them happy,

then you may have to allow more than two people to form unions, as long as you are vigilant to prevent coercion and to insist on the competence of those who would make such decisions."[11]

Bi-sexual persons, in particular, stand to gain from the invalidation of polygamy laws because such laws render impossible marriage among three homosexual, bisexual or transgendered persons who might wish to cooperate to conceive a child. It is easy to imagine scenarios like the following:

> John, Mary, and Ann are involved in a loving, committed, bisexual relationship. John and Ann are the natural parents of Seth and Anita, ages 10 and 6. Mary is the primary caretaker of the children. Seth and Anita call Ann "Momma" and Mary "Mommy." Seth and Anita wonder why their three parents cannot be married to one another, like their friends' parents are. They feel like second class citizens because their family is excluded from the benefits of marriage, just because there are two mothers instead of one.

Indeed, the logical result of Appellants' arguments is that John, Ann and Mary should be permitted to marry. If the opposite sex requirement of marriage is dispensable as an 'archaic remnant of less enlightened times,' then so also is the dyadic requirement.

Again the experience of European countries legalizing same-sex marriage is illustrative. In March of 2004, a local youth wing of Sweden's governing Social Democrat party had endorsed the idea of replacing marriage with a gender-neutral, multi-partner-friendly marriage system. Around the same time, the youth wing of Sweden's Green party called for

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[11] A Moment With Hendrik Hartog, Princeton Alumni Weekly, May 12, 2004, <http://www.princeton.edu/paw/archive_new/PAW03-04/14-0512/moment.html> (as of Sept. 17, 2007) (emphasis supplied).

formal recognition of polyamorous (i.e. multi-partner) relationships.[12] The Netherlands has given legal, political, and public approval to a cohabitation contract for a polyamorous bisexual triad.[13] Last year, two out of four reports on polygamy commissioned by the Canadian government recommended decriminalization and regulation of the practice.[14]

If traditional marriage is cast aside as irrelevant to the well-being of children, it is hard to see why the state should care about, much less condone, any sexually intimate relationships. As one commentator observed:

> should constitutional law abandon the principle that reproductive sex has a unique role, there will be no basis left upon which to draw principled constitutional distinctions between sexual relations that are harmful to individuals or society, and relations that are beneficial. In fact, the same arguments that would seemingly require constitutional protection for same-sex marriage would also require constitutional protection for any consensual sexual practice or form of marriage. After all, once the principled line of procreation is abandoned, we are left with nothing more than sex as a purely sensory experience.

(Wilkins, *The Constitutionality of Legal Preferences for Heterosexual Marriage* (2003-2004) 16 Regent U. L. Rev. 121, 133.)

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[12]*See* Kurtz, *Big Love From the Set*, Nat'l Rev. Online, March 13, 2006, *available at* <http://www.nationalreview.com/kurtz/kurtz.asp> (as of Sept 17, 2007).

[13] *See* Kurtz, *Here Come the Brides*, December 26, 2005, *available at* <http://www.weeklystandard.com/Content/Public/Articles/000/000/006/494pqobc.asp?pg=2> (as of Sept. 17, 2007).

[14]*See* Kurtz, *Dissolving Marriage*, Nat'l Rev. Online, Feb. 3, 2006, *available at* <http://www.nationalreview.com/kurtz/kurtz200602030805.asp> (as of Sept. 17, 2007).

CONCLUSION

Establishing an equivalency between same-sex couples and heterosexual unions undermines society's historic and compelling interest in promoting lasting bonds between men and women, in order to give children both a mother and father and to bond them to one another and their offspring. If all loving, sexually intimate relationships between two adults are equally worthy of society's approval and encouragement, then the bonds between men and woman that produce each succeeding generation are no longer unique. The result of such a paradigm shift will ultimately imperil the well-being of the nation's children and society itself.

For the foregoing reasons, the American Center for Law & Justice respectfully requests that this Court uphold the decision of the Court of Appeal on the merits, and order the entry of summary judgment on behalf of the Proposition 22 Legal Defense and Education Fund.

Dated: September ___, 2007

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule of Court 8.204(c)(1), I hereby certify that this brief has been prepared using proportionally double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains **5,475** words up to and including the signature lines that follow the conclusion of this brief.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on September ____ 2007.

Respectfully submitted,

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PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, Jenny Portillo-Moro, declare that I am over the age of eighteen years and that I am not a party to this action. My business address is Airport Center Building, 7100 Hayvenhurst Avenue, Suite 310, Van Nuys, CA 91406.

On September _____, 2007, I caused the foregoing documents described as the **Brief *Amicus Curiae* of the American Center for Law & Justice in Support of Plaintiff and Appellant Proposition 22 Legal Defense and Education Fund,** on the interested parties in this action, by placing a true copy thereof in sealed envelope(s) addressed as follows:

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