

THE SUPREME COURT OF THE STATE OF CALIFORNIA

Case No. S147999

Coordination Proceeding Special Title (Rule 1550(b))

IN RE MARRIAGE CASES

**BRIEF AMICUS CURIAE OF CALIFORNIA ETHNIC RELIGIOUS
ORGANIZATIONS FOR MARRIAGE (“CEROM”) IN SUPPORT OF
APPELLEES**

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APPLICATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to California Rule of Court 29.1, the undersigned, counsel for California Ethnic Religious Organizations for Marriage (“CEROM”), an unaffiliated collection of ethnic churches and religious organizations located in California, request leave to file the attached brief as *amicus curiae* in support of the Appellees. This application is timely made.

The names and institutional affiliations of *amici* are identified below and are also set forth in the attached Appendix. *Amici* are churches and religious organizations located in California, and subscribe to the sincerely held religious belief that in accordance with history, religion, and tradition, marriage should be defined exclusively as between one man and one woman.

Amicus National Hispanic Christian Leadership Conference (“NHCLC”) is an affiliate of the National Hispanic Association of Evangelicals. The NHCLC is committed to serve approximately 15 Million Evangelical Christians by providing leadership, fellowship, networking opportunities, strategic partnerships and governmental affairs representation.

Amicus African American High Impact Leadership Coalition exists to protect the moral compass of America and be an agent of healing to our nation by educating and empowering churches, community, and political leaders. The Coalition conducts educational summits around the country that empower High Impact leaders to make grassroots influence in our communities, states and nation. The High Impact Leadership Coalition has also developed a Black Contract with America on Moral Values that can close the gap of righteousness (personal morality) and justice (social action) in America.

Amicus Korean Church Coalition for North Korea Freedom (“KCC”) was formed in 2004 as a non-partisan and non-denominational Christian organization to bring an end to the sufferings endured by members’ brothers and sisters in North Korea, as well as China and other parts of the

world, through non-violent means. The main purpose of KCC is to pray for and aid the people of North Korea, and to tell the world about the sufferings endured by members' blood related North Koreans, who through no fault of their own, suffer from the repressive North Korean regime, as well as bring awareness to the local communities the types of brutality, torture, slavery, as well as other non-humane conditions, which are part of their daily lives. There are more than 675 California churches who are members of the KCC.

Amicus Council of Korean Churches in Southern California consists of approximately 1300 Korean-American member Churches who are representative of several major denominations and missionary groups and other Christian groups. The Council has been active in ministry since 1993.

Amicus Traditional Family Coalition (“TFC”) identifies its mission as “to protect healthy traditional family values through education, media and action.” TFC was formed during the inception of the protection of traditional marriage movement in 2004, when Rev. Thomas Wang and Rev. Pak Lo began meeting with other concerned church leaders in San Francisco. In early 2005 the two pastors formed a permanent organization to protect traditional marriage called Support Traditional Marriage Foundation, or “STMF.” Later that year, to broaden the work of the group, they formed Traditional Family Coalition. The Traditional Family Coalition is also a member of the Bay Area Chinese Ministerial Prayer Fellowship, which is headed by Rev. Thomas Wang.

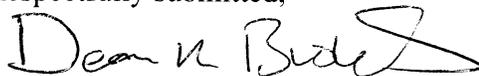
In addition to the Traditional Family Coalition, there are twelve other ethnic churches and religious organizations which are *amici* in this case and identify themselves as members of the Bay Area Chinese Ministerial Prayer Fellowship. Those churches and organizations are: Chinese Family Alliance, America 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, and Chinese Christians for Justice. Each of the above-referenced organizations is *amicus* in the instant case, and request to be heard on the issue of the definition of marriage in California.

This brief will assist the Court in making its decision insofar as it addresses the historical definition of the social institution of marriage in California and Western Society, and highlights the importance of the consequences of the Court of Appeal's decision in protecting the sanctity of marriage in California. The brief also addresses the legal standing of those engaging in homosexual behavior as a constitutionally protected class of persons and whether their right to marry someone of the same sex qualifies as "fundamental" in accordance with existing precedent and history of the institution of marriage.

Accordingly, we respectfully request that the Court accept and file the attached *amicus* brief.

Respectfully submitted,



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I.

CALIFORNIA'S MARRIAGE LAWS FOLLOW UNIVERSAL HISTORICAL TRADITION AND WERE NOT INTENDED TO DISCRIMINATE AGAINST HOMOSEXUAL PERSONS

In their briefing, Appellants attempt to taint the institution of marriage with the accusation that it discriminates against a targeted class, namely homosexual persons, and is thus violative of guarantees of equal protection in the California Constitution.

Amicus, California Ethnic Religious Organizations for Marriage (hereinafter "CEROM") is an unaffiliated collection of ethnic churches and religious organizations located in California. *Amici* are all churches and religious organizations located in California, and subscribe to the sincerely held religious belief in accordance with history, religion, and tradition that marriage should be defined exclusively as between one man and one woman.

Individuals who identify themselves as gay and lesbian have clearly been historically subjected to harsh and inappropriate treatment at times, but this reality cannot and should not be laid at the door of marriage. The history and tradition of marriage refutes the claim that marriage is a form of sexual orientation discrimination working an unjustifiable hardship on a particular class of California citizens. Rather, marriage as reflected in current California law has a meaning and logic that has nothing to do with discrimination as even the most cursory examination of history makes clear.

At the outset, we note that the issue in this case is not the right to marry recognized in *Perez v. Lippold*, 32 Cal. 2d 711 (1948) and *Loving v. Virginia*, 388 U.S. 1 (1967). Same-sex couples in California may have a wedding, consider themselves "married" and be so considered by any private individuals or entities (including employers) that choose to do so, without incurring legal sanctions. The question of this case is whether same-sex couples can demand recognition from the state or from individuals and entities that prefer not to give it.

A.

ALL KNOWN SOCIETIES HAVE RECOGNIZED MARRIAGE AS AN OPPOSITE-SEX INSTITUTION

In its decision invalidating the sodomy law of the State of Texas, the U.S. Supreme Court noted recent scholarship demonstrating that “the concept of the homosexual as a distinct category of person did not emerge until the late 19th century.” *Lawrence v. Texas*, 539 U.S. 558, 568 (2003) (citing J. Katz, *The Invention of Heterosexuality*, 10 (1995); J. D. Emilio & E. Freedman, *Intimate Matters: A History of Sexuality in America*, 121 (2d ed. 1997)).

1. Marriage Is Foundational to All Societies Throughout Recorded History

It hardly needs to be mentioned that marriage emerged as a social institution long before the 19th century. The definition of marriage as the union of a man and a woman itself goes back even farther than our modern understanding of sexual orientation as a classification. A group of scholars recently pointed out: “At least since the beginning of recorded history, in all the flourishing varieties of human cultures documented by anthropologists, marriage has been a universal human institution.” William J. Doherty, William A. Galston, Norval D. Glenn, John Gottman et al., *Why Marriage Matters: Twenty-One Conclusions from the Social Sciences* 8-9 (Institute for American Values) (2002).

In a recent book, David Blankenhorn said: “In all or nearly all human societies, marriage is socially approved sexual intercourse between a woman and a man, conceived both as a personal relationship and as an institution, primarily such that any children resulting from the union are understood to be—emotionally, morally, practically and legally affiliated with both of the parents.” *The Future of Marriage*, 91 (2007).

Even more ancient history illustrates male-female marriage as a common element in diverse societies from Mesopotamia, India, etc. See Jan Knappert, *The Family in Antiquity* in

THE FAMILY IN GLOBAL TRANSITION 29 (Gordon L. Anderson, editor, 1997). One scholar notes that “[m]arriage was a firmly established institution when recorded history began a few thousand years ago, and we can only speculate on its origins.” Bernard I. Murstein, *Love, Sex and Marriage Through the Ages*, 10 (1974). Another says: “Marriage, as the socially recognized linking of a specific man to a specific woman and her offspring, can be found in all societies.” G. Robina Quale, *A History of Marriage Systems*, (1988).

Some scholars and academics have suggested that various cultures have given some recognition to same-sex unions in the past. See William N. Eskridge, Jr., *A History of Same-Sex Marriage* 79 VA. L. REV. 1419 (1993). This author, however, notes that the evidence he cites is “episodic and fragmentary” and reveals that in the “modern period” society has generally “suppressed same-sex marriage.” *Id.* at 1435-1436. A review of these historical assertions strongly rebuts the claim for a historical practice of same-sex marriage and notes that the adduced evidence is more equivocal (when not downright contradictory). Peter Lubin & Dwight Duncan, *Follow the Footnote or the Advocate as Historian of Same-Sex Marriage* 47 CATH. U. L. REV. 1271 (1998).

2. Marriage Is Foundational to Our Nation’s Laws and Policies

In the United States, the original thirteen colonies and all of the states inherited the definition of marriage as the union of a man and a woman from English law. Charles P. Kindregan, Jr., *Same-Sex Marriage: The Cultural Wars and the Lessons of Legal History* 38 FAM. L. Q. 427, 430 (2004) (“Even though many colonies were established by religious dissenters and ecclesiastical courts based on the Church of England model were rare, the colonies, nonetheless, imported most of the substantive law of marriage created by the English Church and its ecclesiastical courts. Thus, the civil law reflected the religious English view of marriage as a permanent monogamous union of one man and one woman.”) The English

“inherited traditions relating to marriage from three major sources: from Roman law, from Judaeo-Christian tradition, and from Germanic society.” Conor McCarthy, *Marriage in Medieval England*, 8 (2004).

3. Marriage Is Foundational to California’s Laws and Policies

California law has recognized marriage from the state’s inception. The 1849 Constitution included protection of property ownership by married women. Joseph R. Grodin, Calvin R. Massey & Richard B. Cunningham, *The California State Constitution: A Reference Guide*, 6 (1993). The debate surrounding this provision includes numerous gender-specific references that suggest a clear understanding of the Framers that marriage was the union of a man and a woman. J. Ross Browne, *Report of the Debates in the Convention of California on the Formation of the State Constitution, in September and October, 1849*, at 257-267 (1850). This provision, which continues in the current constitution, has been labeled “Husband and wife; separate property” or some variation with sex specific terminology. Cal. Const., Art. I, §21. Although the title is not part of the Constitutional law, it is nevertheless suggestive of the intent of the provision.

The current statutory definition of marriage in California had its genesis in the 1872 Civil Code. The 1872 statute provided, “Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization, as provided in Sec. 74, or by a mutual assumption of marital rights, duties or obligations.” Cal. Civ. Code §55 (1872). There is no evidence that California’s marriage laws were drafted with the intent to vilify or stigmatize homosexuals.

The history of marriage demonstrates that non-recognition of same-sex “marriages” does not stem from a particular religious tradition; it is universal. Even secular and aggressively atheist regimes (like Soviet Russia) have never recognized same-sex “marriages.” The cultural

practices of human societies are remarkably varied including those related to marriage. Some cultures favor endogamy; others prohibit it. Some societies condone polygamy; others forbid it. It is particularly noteworthy, then, when all societies adhere to some particular norm. In such cases there is probably a good reason for that norm, a reason so strong that a society that abandons that norm would likely suffer serious damage. As the next section will describe, the importance of encouraging the raising of children by their biological parents illustrates the exclusively heterosexual focus of marriage in all societies in history.

B.

THE FOUNDATION OF MARRIAGE IS NOT IN THE LAW, BUT IN CULTURE AND RELIGION

The above history clearly demonstrates that marriage is not a purely legal construct. As Professor Richard Garnett points out: “The law no more ‘creates’ the family than the Rule Against Perpetuities ‘creates’ dirt.” Richard W. Garnett, *Taking Pierce Seriously: The Family, Religious Education, and Harm to Children* 76 NOTRE DAME L. REV. 109, 114 note 29 (2000). In reference to the historical origins of marriage, Professor F.C. DeCoste notes that the state cannot “claim ownership” over marriage:

[T]he facts are these: (a) prior to the thirteenth century, when the Church finally managed to take control of it, marriage was an entirely social practice; (b) marriage only became a sacrament in 1439; and c) the Catholic Church only began requiring the attendance of a priest for a valid marriage in 1563, after the Reformation. The state came to marriage even later than did the Church. Indeed, it was not until 1753, with the passage of Lord Hardwicke’s Marriage Act, that the British state became a significant player in the joining together of men and women as husbands and wives. F.C. DeCoste, *Courting Leviathan: Limited Government and Social Freedom in Reference re Same-Sex Marriage*, 42 ALBERTA L. REV. 1099, 1112-13 (2005) (citation omitted).

Rather, the genesis of marriage is in society and culture, as a response to the needs of the family, and has only later been extended legal recognition and regulation. Neither the social institution of marriage nor its later legal forms can be understood as a vehicle for promoting

discrimination against discrete classes of people. Marriage has always been primarily about inclusion in the service of future generations.

1. Marriage Serves the Best Interests of a Healthy and Productive Society

The scholars' statement cited above notes that, "[a]s a virtually universal human idea, marriage is about the reproduction of children, families, and society. . . marriage across societies is a publicly acknowledged and supported sexual union which creates kinship obligations and sharing of resources between men, women, and the children that their sexual union may produce." William J. Doherty, William A. Galston, Norval D. Glenn, John Gottman et al., *Why Marriage Matters: Twenty-One Conclusions from the Social Sciences*, 8-9 (Institute for American Values) (2002). English philosopher Roger Scruton says, "In all observed societies some form of marriage exists, as the means whereby the work of one generation is dedicated to the well-being of the next." Roger Scruton, *Sacrilege and Sacrament* in *THE MEANING OF MARRIAGE* 5 (Robert P. George & Jean Bethke Elshtain, eds., 2006).

Professor George Dent explains: "The law has traditionally been concerned with marriage because of the need to help children." George W. Dent, Jr., "*How Does Same-Sex Marriage Threaten You?*" 59 *RUTGERS L. REV.* 233, 249 (2006). Marriage scholar Maggie Gallagher elaborated:

Historically, the reason marriage exists as a legal institution is clear. A virtually uninterrupted series of both lower court decisions and Supreme Court decisions until quite recently affirmed the primary purpose of marriage as a legal institution is to manage the sexually-based phenomenon known as "procreation." This is not quite the same as saying "marriage is in order to produce children." Marriage is not a factory for childbearing. Marriage existed to encourage men and women to create the next generation in the right context and simultaneously to discourage the creation of children in other contexts--out of wedlock in fatherless homes. The reason marriage was singled out for special legal attention is that it is the only human relationship that can both (a) produce the next generation of babies and (b) connect those babies to both their mother and father. Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman* 2 *U. ST. THOMAS L. J.* 33, 43-44 (2004) (citations omitted).

Some will claim, of course, that the recognition of marriages involving infertile couples belies the child-centered rationale for state's sanction of marriage. It is important to note in response that the law often employs broad categories rather than making individual distinctions. For example, the age at which one may vote or drive a car is selected on the basis of general patterns of maturation, not on each individual's development. In the same vein, it makes sense for the law to recognize all marriages between opposite-sex couples rather than to make individual determinations of reproductive capacity (or intent). First, the ability to bear children often cannot be ascertained without an invasion of the body that would grossly violate our society's notions of human dignity. If the obstacle is intent not to bear children, a couple may still change its mind or create them accidentally. Even then a medical determination could be wrong; couples told they can't have children still often manage to do so. In short, any real effort to exclude infertile opposite-sex couples from marriage would be complicated, expensive and error-prone. Additionally, men and women who marry even without the ability to have children together are, as a result of observing their marriage vows, not creating children with others to whom they are not married.

2. California Laws Supporting Marriage do not Unconstitutionally Discriminate Against Anyone

None of these historically and universally recognized purposes of marriage has anything to do with disadvantaging any person or group of person because of their individual orientation. Marriage has been recognized as a social institution not because of whom it excludes, but because it brings together men and women to form stable unions that provide the optimal environment for raising the children their union may produce.

The majority of courts addressing the issue have consistently ruled that defining marriage as between a man and a woman only, as is the law here in California, does not discriminate in a

constitutionally prohibited manner against homosexuals.¹ This is true for two important reasons. First, sexual orientation is not a “suspect class” or “quasi-suspect class” under the equal protection clause. *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990); *Lawrence v. Texas*, 539 U.S. at 579-81; *Conaway v. Deane*, No. 44/06, slip op. at 59-60 (Md. September 18, 2007). Second, because there is no “fundamental right” to marry a person of your own sex under the due process clause. *Conaway v. Deane*, No. 44/06, slip op. at 96 (Md. September 18, 2007); *Wilson v. Ake*, 354 F.Supp 2d. 1298, 1305 (M.D. Fla. 2005); *Standhardt v. Superior Court of State*, 77 P.3d 451, 458 (Ariz. 2003); *Dean v. Dist. Of Columbia*, 653 A.2d 307, 333 (D.C. App.1995); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky.1973); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn.1971).

The definition of marriage as requiring an opposite-sex relationship is not related to a society’s treatment of same-sex sexual acts. Some societies have tolerated and even condoned homosexual acts in certain cases while still retaining the understanding of marriage as the union of a man and a woman. As the court below noted, even though California’s marriage law may disparately impact homosexual persons, that law makes “no reference to the sexual orientation of potential marriage partners.” *In re Marriage Cases*, 49 Cal. Rptr.3d 675, 709-710 (Cal. App. 1006).

II.

CONCLUSION

Marriage has long played a vital role in society not because it is a tool to promote invidious discrimination but rather because it is a universal social institution that provides the matchless benefit of a husband and wife committed to one another and to the children they may

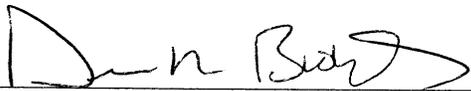
¹ *Amicus* urge this Court to follow the reasoning of Maryland’s highest state court which recently upheld the definition of marriage in that state as exclusively between one man and one woman on September 18, 2007. *Conaway v. Deane*, No. 44/06 (Md. September 18, 2007).

create. Opposite-sex couples should be treated differently because only these couples can bear children. The near universal and continuous historical understanding of marriage throughout recorded history calls, at least, for great caution in considering its redefinition.

Amicus CEROM respectfully urges this court to defer to the inherited understanding of marriage as the union of one man and one woman by affirming the decision of the court of appeals on the merits.

Dated: September 24, 2007

Respectfully submitted,



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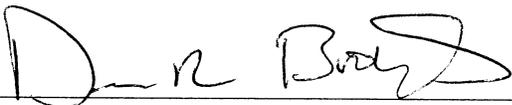
III.

CERTIFICATE OF WORD COUNT – C.R.C. Rules 28.1(d)m 14(c)(1) & 56(b)(6)

This brief complies with C.R.C. Rules 28.1(d)m 14(c)(1) & 56(b)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 12 point font and Times New Roman style, and because this brief contains 3,474 words, excluding the parts of the brief exempted by C.R.C. Rules 14(c)(1) and 56(b)(6).

Dated: September 24, 2007

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IV.

APPENDIX

Names and Institutional Affiliations of *Amici*

1. National Hispanic Christian Leadership Conference
2. African-American High Impact Leadership Coalition
3. Korean Church Coalition for North Korea Freedom
4. Council of Korean Churches in Southern California
5. Traditional Family Coalition*
6. Chinese Family Alliance*
7. America Chinese Evangelical Seminary*
8. The Lord's Grace Christian Church of Mountain View*
9. Grace Gospel Christian Church at San Mateo*
10. Mandarin Baptist Church*
11. Home of Christ Church at Saratoga*
12. Fremont Chinese Evangelical Free Church*
13. West Valley Christian Alliance Church*
14. Evangelical Free Church of San Francisco*
15. San Francisco Agape Christian Church*
16. HIS Foundation*
17. Chinese Christians for Justice*

* Member, Bay Area Chinese Ministerial Prayer Fellowship.

Institutional affiliations are provided for identification purposes only.

PROOF OF SERVICE

I, declare that I am over the age of 18 years and not a party to the within action. My business address is 300 West Grand Ave., Suite 200 Escondido, CA 92025

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1. BRIEF AMICI CURIAE OF CALIFORNIA ETHNIC RELIGIOUS ORGANIZATIONS FOR MARRIAGE (“CEROM”) IN SUPPORT OF APPELLEES

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BY PERSONAL SERVICE

I declare under penalty of perjury under the laws of the State of [State] and the United States of America that the above is true and correct.

DATE: September 24, 2007

Darlene Carter

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