

Case No. S147999

SUPREME COURT OF THE STATE OF CALIFORNIA

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**IN RE MARRIAGE CASES**  
**Judicial Council Coordination Proceeding No. 4365**

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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.

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**APPLICATION TO FILE BRIEF AMICI CURIAE;  
BRIEF AMICI CURIAE OF DOUGLAS W. KMIEC, HELEN M. ALVARE,  
GEORGE W. DENT, JR., STEPHEN G. CALABRESI; STEVEN B.  
PRESSER; AND LYNN D. WARDLE, PROFESSORS OF LAW IN  
SUPPORT OF THE STATE OF CALIFORNIA**

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STEPHEN G. CALABRESI; STEVEN B. PRESSER; AND LYNN D.  
WARDLE, PROFESSORS OF LAW IN SUPPORT OF THE STATE  
OF CALIFORNIA**

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Applicants Douglas W. Kmiec, Helen M. Alvare, George W. Dent, Jr., Stephen G. Calabresi, Steven B. Presser, and Lynn D. Wardle respectfully request permission to file the attached brief amici curiae in support of the Appellees in the above-captioned matter.

## I. INTEREST OF AMICI

Amici curiae are law professors at major U.S. law schools who teach and/or have a professional interest in the fields of family law, constitutional law, and civil rights law.

**Douglas W. Kmiec**, is Caruso Family Chair & Professor of Constitutional Law at Pepperdine University School of Law. Professor Kmiec is the author of numerous articles on marriage and the family, including *The Procreative Argument for Proscribing Same-Sex Marriage*, (32 *Hastings Constitutional Law Quarterly* 653 [2005]), “Marriage and Family,” (Ch. 5 in *Never A Matter of Indifference*, Berkowitz ed., Hoover 2003), and *Cease-Fire on the Family* (Crisis Books/Notre Dame 1995).

**Helen M. Alvare** is Associate Professor of Law at the Columbus School of Law at The Catholic University of America. Her publications in the field of marriage and family law include *The Moral Reasoning of Family Law: The Case of Same-Sex Marriage* (Winter 2007) 38 *Loy. U. Chi. L.J.* 349; *The Turn Toward the Self in the Law of Marriage & Family: Same-Sex Marriage & its Predecessors* (2005) 16 *Stan. L. & Pol’y Rev.* 135; and *Saying “Yes” Before Saying “I Do”: Premarital Sex and Cohabitation as a Piece of the Divorce Puzzle* (2004) 18 *Notre Dame J.L. Ethics & Pub. Pol’y* 7.

**George W. Dent, Jr., J.D.**, is Schott - van den Eynden Professor of Law at Case Western Reserve University School of Law. He has published a number of articles on the law of marriage, including *The Defense of Traditional Marriage*, 15 Va. J. L. & Politics 581 (1999), *Traditional Marriage: Still Worth Defending*, 18 B.Y.U. J. Pub. L. 419 (2004); and the forthcoming *Civil Rights for Whom? Gay Rights Versus Religious Freedom* (2006-2007) 95 Ky. L.J. 553.

**Stephen G. Calabresi, J.D.**, is George C. Dix Professor of Constitutional Law at Northwestern University School of Law and author of numerous articles including *The Historical Origins of the Rule of Law in the American Constitutional Order* (Fall 2004) Harv. J.L. & Pub. Pol'y 273; *Lawrence, the Fourteenth Amendment, and the Supreme Court's Reliance on Foreign Constitutional Law: An Originalist Reappraisal* (2004) 65 Ohio St. L.J. 1097; and *The Revitalization of Democracy in the New Millennium* (2000) 24 Harv. J.L. & Pub. Pol'y 151; *The Tradition of the Written Constitution: Text, Precedent & Burke* (2006) 57 Ala. L. Rev. 635.

**Steven B. Presser** is Raoul Berger Professor of Legal History at Northwestern University School of Law, where he teaches courses in American Legal History, Contracts and Corporations. His publications include *The American Constitutional Order: Introduction to the History*

*and Nature of American Constitutional Law* (with Douglas W. Kmiec, 1999) and *The Historical Background of the American Law of Adoption*, 11 J. Fam. L. 443 (1971), reprinted in W. Holt (ed.) *Essays in Nineteenth Century Legal History*, at p. 335 (1976), and in K. Hall (ed.) *Law, Society and Domestic Relations* (1987).

**Lynn D. Wardle, J.D.**, is Bruce C. Hafen Professor of Law at the J. Reuben Clark Law School of Brigham Young University, where he teaches courses in Conflicts of Law and Family Law. He is a member of the American Law Institute and former president of the International Society of Family Law. His numerous publications include: *Revitalizing the Institution of Marriage for the Twenty-First Century, An Agenda for Strengthening Marriage* (with Alan J. Hawkins & David Orgon Coolidge (eds.) Praeger 2002); *Deconstructing Family: A Critique of the American Law Institute's "Domestic Partners" Proposal*, 2001 B.Y.U.L. Rev. 1189; and "Multiply and Replenish": *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 Harv. J.L. & Pub. Pol'y 771 (2001).

## **II. REASONS FOR GRANTING THE APPLICATION**

Among the various arguments asserted by the Petitioners is a claim that the marriage laws constitute sex discrimination prohibited by Article 1, section 7 of the California Constitution. The Court's holding on this question may have far-reaching implications in other areas of California

law, and we seek leave to provide analysis and information relevant to Petitioners' claims.

Specifically, we suggest that Petitioners err in at least two respects: first by asserting that marriage creates a sex-based classification, and secondly by claiming that marriage arose out and continues to inappropriately perpetuate gender stereotypes.

Our brief seeks to supplement the State's response to the sex-based equal protection claims in three ways:

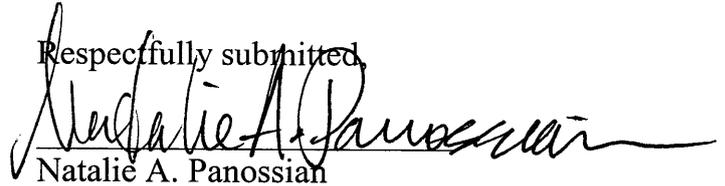
(1) As the overwhelming majority of courts have held over the past decade, including the recent decision of the Maryland Supreme Court in *Conaway v. Deane* (Md., Sept. 18, 2007) \_\_\_ A.2d \_\_\_, 2007 WL 2702132 at pp. \*4-\*13 (Case No. 44, Sept. Term 2006), marriage laws do not distinguish on the basis of sex, but rather treat men and women equally.

(2) Secondly, Petitioners' argument rests upon an extension of the race-based jurisprudence of *Perez v. Sharp* (1948) 32 Cal.2d 711, into fields of sex and sexual orientation that is unwarranted and inappropriate both legally and factually.

(3) Finally, we note that, unlike bans on interracial marriage which fostered segregation and inequality, laws recognizing marriage as the union of husband and wife promote integration and equality, particularly in ensuring that women do not unfairly bear the burdens of parenting alone.

We seek leave to present arguments which supplement, rather than merely repeat, those presented by the State defendants. For these reasons we request permission to file the attached brief as amici curiae in the above-captioned matter.

Respectfully submitted,

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

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## TABLE OF CONTENTS

TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	iii
SUMMARY OF ARGUMENT .....	1
ARGUMENT .....	2
<b>I. IN THE ABSENCE OF DISPARATE TREATMENT THERE CAN BE NO MERITORIOUS EQUAL PROTECTION CLAIM. ....</b>	<b>2</b>
A. The marriage statutes prefer neither men nor women, but treat both sexes equally. ....	4
B. To the extent that Petitioners have articulated an equal protection claim, the marriage statutes should be reviewed under a rational basis standard. ....	6
<b>II. PETITIONERS' RELIANCE UPON <i>PEREZ</i> AND <i>LOVING</i> AS THE BASIS OF AN EQUAL PROTECTION CLAIM FOR SAME-SEX MARRIAGE IS UNSUPPORTABLE. ....</b>	<b>8</b>
A. The Perez/Loving analogy does not historically, logically or legally extend to same-sex marriages. ....	8
B. The courts of sister states have overwhelmingly rejected Petitioners' analogy to Perez and Loving. ....	13
C. Unlike race-based classifications, sex-based equal protection rulings have always required a finding of actual disparity between the sexes. ....	20
<b>III. THE MARRIAGE LAWS ARE NOT ROOTED IN GENDER STEREOTYPES. ....</b>	<b>22</b>
<b>IV. MARRIAGE IS AN INTEGRATIVE INSTITUTION, AND UNLIKE <i>PEREZ</i> AND <i>LOVING</i>, PETITIONERS HERE ARE SEEKING A RIGHT TO SEGREGATED MARRIAGES. ....</b>	<b>24</b>

**V. MARRIAGE SUBSTANTIVELY FURTHERS  
GENDER EQUALITY IN PARENTING .....25**

**CONCLUSION .....28**

**CERTIFICATE OF COMPLIANCE .....29**

**SERVICE LIST FOR CONSOLIDATED MARRIAGE CASES,  
CALIFORNIA SUPREME COURT CASE NO. S147999  
JCCP NO. 4365 .....31**

## TABLE OF AUTHORITIES

### CASES

<i>Adoption of Kelsey S.</i> (1992) 1 Cal.4th 816.....	11
<i>Andersen v. King County</i> (Wash. 2006) 138 P.3d 963 .....	15, 16
<i>Arp v. Workers' Comp. Appeal Bd.</i> (1977) 19 Cal.3d 395.....	20
<i>Arthur v. College of St. Benedict</i> (D. Minn. 2001) 174 F. Supp.2d 968 .....	5
<i>Baehr v. Lewin</i> (Haw. 1993) 852 P.2d 44 .....	19
<i>Baker v. Baker</i> (1859) 13 Cal. 87.....	25
<i>Baker v. Nelson</i> (1972) 409 U.S. 810 (mem.) .....	9, 17
<i>Baker v. Nelson</i> (Minn. 1971) 191 N.W.2d 185 .....	17
<i>Baker v. State</i> (Vt. 1999) 744 A.2d 864 .....	19, 20
<i>Ballard v. United States</i> (1946) 329 U.S. 187 .....	2, 11
<i>Brown v. Board of Education</i> (1954) 347 U.S. 483 .....	11
<i>Catholic Charities of Sacramento, Inc., v. Superior Court</i> (2004) 32 Cal.4th 527.....	26
<i>Conaway v. Deane</i> (Md., Sept. 18, 2007) ___ A.2d ___, 2007 WL 2702132 (Case No. 44, Sept. Term 2006).....	14, 15, 24
<i>Connerly v. State Personnel Bd.</i> (Cal. App. 3 Dist. 2001) 92 Cal.App.4th 16 .....	20

<i>Cooley v. Superior Court</i> (2002) 29 Cal.4th 228.....	3
<i>Craig v. Boren</i> (1976) 429 U.S. 190 .....	21
<i>Dean v. District of Columbia</i> (D.C. 1995) 653 A.2d 307.....	15
<i>Frontiero v. Richardson</i> (1973) 411 U.S. 677 .....	22
<i>Goodridge v. Dept. of Publ. Health</i> (Mass. 2003) 798 N.E.2d 941 .....	18
<i>Hall v. County of Los Angeles</i> (2007) 148 Cal.App.4th 318.....	5
<i>Hardy v. Stumpf</i> (1978) 21 Cal.3d 1.....	20
<i>Hernandez v. Robles</i> (N.Y. 2006) 855 N.E.2d 1 .....	15, 16
<i>Hicks v. Miranda</i> (1975) 422 U.S. 332 .....	9
<i>In re Eric J.</i> (1979) 25 Cal.3d 522.....	3
<i>In re Kandu,</i> (Bkrtcy. W.D. Wash. 2004) 315 B.R. 123 .....	17
<i>In re Marriage Cases</i> (2006) 143 Cal.App.4th 873.....	6
<i>Lawrence v. Texas</i> (2003) 539 U.S. 558 .....	7
<i>Lewis v. Harris</i> (N.J. 2006) 908 A.2d 196.....	19
<i>Loving v. Virginia</i> (1967) 388 U.S. 1 .....	passim

<i>McLaughlin v. Florida</i> (1964) 379 U.S. 184 .....	12
<i>Michele W. v. Ronald W.</i> (1985) 39 Cal.3d 354.....	11
<i>Mississippi Univ. for Women v. Hogan</i> (1982) 458 U.S. 718 .....	21
<i>Molar v. Gates</i> (Cal. App. 4 Dist. 1979) 98 Cal.App.3d 1 .....	11, 21
<i>People v. Guzman</i> (2005) 35 Cal.4th 577.....	3
<i>People v. Hofsheier</i> (2006) 37 Cal.4th 1185.....	3, 7
<i>People v. Massie</i> (1998) 19 Cal.4th 550.....	3
<i>People v. Wutzke</i> (2002) 28 Cal.4th 923.....	3
<i>Perez v. Sharp</i> (1948) 32 Cal.2d 711.....	passim
<i>Sail'er Inn v. Kirby</i> (1971) 5 Cal.3d 1 .....	11, 20
<i>Skinner v. Oklahoma</i> (1942) 316 U.S. 535 .....	13
<i>Smelt v. County of Orange</i> (C.D. Cal. 2005) 374 F.Supp.2d 861, vacated in part on standing grounds, (9 <sup>th</sup> Cir. 2006) 447 F.3d 673 .....	18
<i>Stanhardt v. Superior Court</i> (Ariz. Ct. App. 2003) 77 P.3d 451 .....	16, 17
<i>United States v. Virginia</i> (1996) 518 U.S. 515 .....	2, 11, 21
<i>Varnum v. Brien</i> (Iowa Dist. Ct. (Polk County), Aug. 30, 2007) Case No. CV5965.....	19

<i>Wilson v. Ake</i> (M.D. Fla. 2005) 354 F.Supp. 2d 1298 .....	17
--	----

**CONSTITUTIONAL PROVISIONS**

Cal. Const. Art. 1, § 7 .....	1
-------------------------------	---

**STATUTES**

Act amending Book 1 of the Civil Code [of The Netherlands], concerning the opening up of marriage for persons of the same-sex (Dec. 21, 2000) Staatsblad 2001, nr. 9 (eff. April 1, 2001).....	23
Cal. Bus. & Prof. Code § 13651 .....	11
Cal. Educ. Code § 225 .....	11
Cal. Educ. Code § 49021 .....	11
Cal. Educ. Code § 66271.8(e).....	11
Cal. Stats. 1850, ch. 140, §§ 1-11 .....	23

**REGULATIONS**

5 Cal. Code of Regs. § 4921 .....	11
-----------------------------------	----

**OTHER AUTHORITIES**

Appellants’ Jurisdictional Statement (filed Feb. 11, 1971), <i>Baker</i> <i>v. Nelson</i> , 409 U.S. 810 (No. 71-1027).....	9
Bernard Schwartz, <i>A Book of Legal Lists: The Best and Worst in American Law</i> (1997) .....	19

Elaine Sorensen & Chava Zibman, <i>To What Extent Do Children Benefit from Child Support?</i> (The Urban Institute: January 2000) .....	26, 27
Lynn D. Wardle & Lincoln C. Oliphant, <i>In Praise of Loving, Reflections on the Loving Analogy for Same-sex Marriage</i> , (forthcoming 2007) 51 Howard L.J. __ .....	9
Lynn D. Wardle, <i>Loving v. Virginia and the Constitutional Right to Marry, 1790-1990</i> (1998) 41 How. L.J. 289 .....	9
McLanahan, et al., <i>Unwed Fathers and Fragile Families</i> (March 1998) Center for Research on Child Wellbeing, Working Paper #98-12 .....	26
Monte Neil Stewart & William C. Duncan, <i>Marriage and the Betrayal of Perez and Loving</i> , 2005 B.Y.U. L.Rev. 555 .....	12
Valerie King, <i>Variations in the Consequences of Nonresident Father Involvement for Children's Well-Being</i> (1994) 56 J. Marriage & Fam. 963 .....	27
Wendy D. Manning & Pamela J. Smock, <i>New Families and Non-Resident Father-Child Visitation</i> (Sept. 1999) 78(1) Social Forces 87 .....	27

## SUMMARY OF ARGUMENT

California law explicitly recognizes marriage as the legal union of a man and a woman as husband and wife.<sup>1</sup> Petitioners<sup>2</sup> allege, *inter alia*, that this definition of marriage unlawfully discriminates on the basis of sex, both facially and as applied, perpetuating outmoded gender stereotypes.

While sex-based classifications are constitutionally suspect under Article 1, section 7 of the California Constitution, disparate treatment remains a fundamental element of any sex discrimination claim. There can be no sex discrimination claim unless two similarly situated groups are in fact treated differently. Under the marriage laws all persons, both male and female, are treated equally, both formally and substantively – no person may marry someone of the same sex.

Much of Petitioners' sex discrimination claim rests upon an inapt analogy to the interracial marriage cases *Perez v. Sharp* (1948) 32 Cal.2d

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<sup>1</sup> See Cal. Fam. Code § 300 (describing marriage as a “personal relationship arising out of a civil contract between a man and a woman.”); Cal. Fam. Code § 301 (“An unmarried male of the age of 18 years or older, and an unmarried female of the age of 18 years or older, and not otherwise disqualified, are capable of consenting to and consummating marriage.”); Cal. Fam. Code § 308.5 (“Only marriage between a man and a woman is valid or recognized in California.”). The common law and other statutory provisions also reflect the dual-gendered nature of marriage, but have not been raised by Petitioners here.

<sup>2</sup> Throughout this brief, “Petitioners” will be used to refer collectively to the several groups of plaintiffs challenging the marriage statutes. The State of California and Attorney General Edmund G. Brown, Jr. will be referred to collectively as “the State.”

711, and *Loving v. Virginia* (1967) 388 U.S. 1. California courts, as well as the federal courts, however, have refrained from fully equating race- and sex-based classifications, recognizing enduring physical differences between men and women and that, as Justice Ginsburg wrote, "The two sexes are not fungible; a community 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). In numerous areas, the law takes sex into account in ways which would be repugnant if based on race (*e.g.*, public restrooms, school sports teams, and correctional facilities).

Unlike interracial marriage laws, designed to segregate the races and perpetuate inequality, marriage represents an integration of the sexes, reinforcing the equal contributions of husbands and wives, mothers and fathers, in the marriage relationship. Further, marriage in fact contributes to the equality of the sexes in parenting, sharing the parenting burden more equally between men and women, in contrast to the burden which is borne almost exclusively by women where marriages fail or fail to form.

## ARGUMENT

### I. IN THE ABSENCE OF DISPARATE TREATMENT THERE CAN BE NO MERITORIOUS EQUAL PROTECTION CLAIM.

“The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.” (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1198 (quoting *In re Eric J.* (1979) 25 Cal.3d 522, 530); see also *Cooley v. Superior Court* (2002) 29 Cal.4th 228; *People v. Wutzke* (2002) 28 Cal.4th 923; *People v. Massie* (1998) 19 Cal.4th 550, 571.) As this Court explained in *People v. Guzman*, disparate treatment is part of the “threshold inquiry” of any equal protection analysis, such that there can be no equal protection violation “absent [a] showing ‘that anyone comparably situated has been treated differently from petitioner.’” (*People v. Guzman* (2005) 35 Cal.4th 577, 584.)

This foundational element of equal protection analysis serves two important functions, both of which are relevant to the sex discrimination claim brought by the Petitioners.

First, this foundational element of equal protection analysis serves a definitional function, articulating *prima facie* elements of an equal protection claim. That is, every equal protection claim must allege that a governmental classification affects similar situated groups in an unequal manner. Once having established disparate treatment of similarly situated groups, the court may proceed to consider the appropriate standard of review and the state interests being advanced. In the absence of disparate

treatment, however, the analysis must end; there is no equal protection claim.

Additionally, this first prerequisite of equal protection serves an analytical function, aiding in the identification of the classification involved. Where there is a governmental classification which has produced disparate treatment, one must then look to identify the group(s) which have been treated unequally in order to determine the appropriate standard of review.

***A. The marriage statutes prefer neither men nor women, but treat both sexes equally.***

Disparate (or “unequal”) treatment is the touchstone of equal protection. Where two groups are treated equally, neither has been denied equal protection. Thus, a sex-based equal protection claim can succeed only where women and men are treated differently. If there is no inequality, there is no equal protection violation.

Petitioners’ sex discrimination claim simply ignores this “first prerequisite” of their equal protection challenge. Significantly, none of the Petitioners make any allegation that the marriage laws treat men and women unequally. Moreover, the City and County of San Francisco explicitly concede that “the marriage exclusion does not grant preferences to men or women.” (San Francisco Opening Br. at p.3.) This alone should negate Petitioners’ sex discrimination claim.

Petitioners contend instead that, while not disadvantaging either men or women *as a class*, the marriage statutes discriminate against them individually because each individual petitioner has been denied his or her wish to marry a partner of the same sex. Still, however, there is no unequal treatment. Each petitioner is treated the same as every other person applying for a marriage license in the State of California. Petitioners are ultimately seeking not equal treatment based on their sex, but *special* treatment because of their sexual orientation. They seek not equal treatment under the marriage laws, but rather an exemption from the general provision recognizing marriage as a dual-gendered union.

As the Court of Appeal recently explained in an analogous context under the Equal Pay Act, when a provision affects both men and women equally, there can be no discrimination claim: “The EPA does not require perfect diversity between the comparison classes, but at a certain point, when the challenged policy effects [*sic*] both male and female employees equally, there can be no EPA violation. [A plaintiff] cannot make a comparison of one classification composed of males and females with another classification also composed of males and females.” (*Hall v. County of Los Angeles* (2007) 148 Cal.App.4th 318, 324-25 (quoting *Arthur v. College of St. Benedict* (D. Minn. 2001) 174 F. Supp.2d 968, 976.) This is precisely what the Petitioners have attempted to do: comparing a one classification of males and females who wish to marry a

person of the same sex with another classification also composed of males and females who do not.<sup>3</sup>

As the Court of Appeal correctly noted below, there can be no equal protection claim where “a law that merely mentions gender . . . does not disadvantage either group.” (*In re Marriage Cases* (2006) 143 Cal.App.4th 873.) Petitioners fail even to allege that they have been treated in an unequal manner under the law on the basis of their sex. In short, disparate treatment is the *sine qua non* of any sex discrimination claim. Where men and women are treated equally under the law, there can be no sex discrimination claim.

***B. To the extent that Petitioners have articulated an equal protection claim, the marriage statutes should be reviewed under a rational basis standard.***

The second function of the preliminary equal protection requirement is an analytical function, aiding in identifying the class which has been subjected to disparate treatment. Implicit in the petitioner’s burden to show that the classification “affects two or more similarly situated groups in an

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<sup>3</sup> The collective petitioners include ten gay male couples and thirteen lesbian couples. The Tyler-Olson Petitioners include one gay male couple and one lesbian couple. (Tyler-Olson Reply Br.) The Clinton Petitioners include twelve individuals, apparently four gay male couples and two lesbian couples. (Clinton Reply Br. at p.6.) The Rymer Petitioners include fifteen same-sex couples, apparently five gay male couples and ten lesbian couples. (Rymer Reply Br.)

unequal manner,” (*People v. Hofsheier, supra*, 37 Cal.4th at p.1198), is the need to identify the groups subjected to unequal treatment.

The classification drawn by the marriage statutes, to which the Petitioners object, is a distinction between same-sex and opposite-sex couples. While Petitioners suggest that this should be considered a sex-based classification, the fit is a poor one. Sex-based classifications distinguish between male and female. There is no third or fourth gender of “same” or “opposite.”

Meanwhile, a developing consensus in American courts reinforces the conclusion that marriage statutes do not implicate any suspect classification and are thus considered under a rational basis standard of review. (See Section II.B, *infra*.) Even in *Lawrence v. Texas*, faced with a similar classification (same-sex and opposite-sex couples) in a criminal context, the Supreme Court applied rational basis review, declining to extend the heightened scrutiny that would attach to a sex-based classification. (*Lawrence v. Texas* (2003) 539 U.S. 558.)

The State of California and Governor Schwarzenegger have also noted that marriage laws do not formally classify on the basis of sexual orientation (*i.e.*, gays and lesbians are not legally precluded from marrying someone of the opposite sex). (State Answer Br. at p.22; Gov. Answer Br. at p.25.) In this regard, it cannot be argued that gays and lesbians experience – and we do not understand either the State or the Governor to

argue that they do experience – a disparate impact under the marriage laws. Any claimed impact or disparity flows from gays and lesbians themselves and relates only to the desirability or attractiveness of marriage to gays and lesbians. While marriage to a person of the opposite sex may be less attractive to gays and lesbians than to a heterosexual person, the marriage laws establish no *legal* impediment to the eligibility of gay men or lesbian women to enter into marriage with a person of the opposite sex.<sup>4</sup>

**II. PETITIONERS' RELIANCE UPON *PEREZ* AND *LOVING* AS THE BASIS OF AN EQUAL PROTECTION CLAIM FOR SAME-SEX MARRIAGE IS INAPPOSITE.**

***A. The Perez/Loving analogy does not historically, logically or legally extend to same-sex marriages.***

Few judicial decisions from the past century, particularly in the field of family law, have grown to be as significant and respected as have the Supreme Court decision in *Loving v. Virginia* (1967) 388 U.S. 1, and its predecessor in this Court, *Perez v. Sharp* (1948) 32 Cal.2d 711. These two cases carried the promise of equal protection and racial equality into marriage and family law, guaranteeing that a person's right to marry may not be abridged because of race.

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<sup>4</sup> Rationally, marriage laws have been historically ordered around the purpose of regulating natural or sexual procreation, and thus, not designed to meet other partnership interests that gays and lesbians have. As a matter of policy, the Legislature has chosen to address these non-marital partnership interests by creating domestic partnerships which extend benefits to same-sex couples that are identical to the legal incidents of marriage.

Petitioners' sex discrimination claim rests heavily, perhaps entirely, upon the urged application of *Perez* and *Loving* to the claims of same-sex couples. As respected as these two opinions are, Petitioners' reliance on *Perez* and *Loving* cannot mask the fact that Petitioners are in fact seeking a significant extension of existing law, while much of the compelling logic of *Perez* and *Loving* simply does not apply to the claims presented by the Petitioner same-sex couples.<sup>5</sup>

In *Perez*, this Court struck down a statute banning marriages between whites and other races. *Perez v. Sharp, supra*, 32 Cal.2d 711. Petitioners urge that *Perez* thus represents a rejection of the "equal application" doctrine, such that the marriage laws' equal treatment of men and women becomes irrelevant in Petitioners' efforts to frame marriage as sex-based discrimination.

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<sup>5</sup> As a matter of law, the *Loving* analogy to same-sex marriage has been directly rejected by the U.S. Supreme Court. In *Baker v. Nelson* (1972) 409 U.S. 810 (mem.), the Supreme Court dismissed an appeal from the Minnesota Supreme Court for want of a substantial federal question. Under the rule of *Hicks v. Miranda* (1975) 422 U.S. 332, this ruling constituted a decision on the merits, rejecting as insubstantial the petitioners' substantive claims which in this case had relied heavily on *Loving v. Virginia* in support of their equal protection and due process arguments. Appellants' Jurisdictional Statement at p.3 (filed Feb. 11, 1971), *Baker v. Nelson*, 409 U.S. 810 (No. 71-1027). For additional discussion of this and other aspects of the *Loving* analogy, see Lynn D. Wardle & Lincoln C. Oliphant, *In Praise of Loving, Reflections on the Loving Analogy for Same-sex Marriage*, (forthcoming 2007) 51 Howard L.J. \_\_; Lynn D. Wardle, *Loving v. Virginia and the Constitutional Right to Marry, 1790-1990* (1998) 41 How. L.J. 289.

Preliminarily, contrary to Petitioners' assertion, the *Perez* Court itself did not even go so far as to reject the equal application doctrine outright with respect to race (subsequent federal decisions have clearly and appropriately done so). Rather, the *Perez* court noted that the racial classification impinged upon the fundamental right to marry, and was thus not analogous to the federal equal application cases which were prevailing law under the U.S. Constitution at that time. (*Id.* at p.717.)

As the *Perez* Court noted, reviewing decisions of the United States Supreme Court:

In these cases the United States Supreme Court determined that the right of an individual to be treated without discrimination because of his race can be met by separate facilities affording substantially equal treatment to the members of the different races. A holding that such segregation does not impair the right of an individual to ride on trains or to enjoy a legal education is clearly inapplicable to the right of an individual to marry. Since the essence of the right to marry is freedom to join in marriage with the person of one's choice, a segregation statute for marriage necessarily impairs the right to marry.

(*Ibid.*)

More importantly, as *Loving v. Virginia* later explicitly rejected the equal application doctrine with respect to race,<sup>6</sup> sex and race are not identical in terms of constitutional scrutiny. As Justice Ginsburg explained

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<sup>6</sup> (1967) 388 U.S. 1, 8 (“[W]e reject the notion that the mere ‘equal application’ of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment’s proscription of all invidious racial discriminations.”).

in *U.S. v. Virginia*, “Physical differences between men and women, however, are enduring: ‘The two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.’” (*United States v. Virginia* (1996) 518 U.S. 515, 533 (quoting *Ballard v. United States* (1946) 329 U.S. 187, 193.) While California law extends strict constitutional scrutiny to sex-based classifications (see *Sail’er Inn v. Kirby* (1971) 5 Cal.3d 1), even under the California Constitution race- and sex-based classifications are not without legal distinctions.<sup>7</sup>

Racial discrimination has a unique and ugly place in our nation’s history, giving rise to findings that, in the context of race, “separate . . . [is] inherently unequal.” (*Brown v. Board of Education* (1954) 347 U.S. 483,

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<sup>7</sup> Enduring distinctions, but not inequality, between men and women are recognized in California law – distinctions which in the context of race would be clearly repugnant to the constitutional guarantee of equal protection. See, e.g., *Adoption of Kelsey S.* (1992) 1 Cal.4th 816 (differences between parental rights of unwed fathers and unwed mothers in context of adoption consent); *Michele W. v. Ronald W.* (1985) 39 Cal.3d 354 (affirming statute giving married mother status to challenge presumption of paternity); *Molar v. Gates* (Cal. App. 4 Dist. 1979) 98 Cal.App.3d 1 (single-sex correctional facilities permissible as long as equal accommodations are available to both sexes); Cal. Educ. Code § 66271.8(e) (“Nothing in this section shall be construed to require a public postsecondary educational institution to require competition between male and female students in school-sponsored athletic programs.”); Cal. Educ. Code § 49021 (separate male and female sports teams in elementary and secondary schools); Cal. Educ. Code § 225 (permitting mother/daughter and father/son school activities as long as comparable opportunities are provided students of both sexes); 5 Cal. Code of Regs. § 4921 (single sex athletic teams are permissible as long as there are teams for both sexes); Cal. Bus. & Prof. Code § 13651 (requiring certain service stations to provide separate restrooms for men and women).

495.) Again in *Loving v. Virginia*, the Court made clear that, although facially applying equally to both blacks and whites, the interracial marriage ban was in fact rooted in White Supremacist doctrine, and thus inherently and invidiously discriminatory against blacks. (*Loving v. Virginia, supra*, 388 U.S. at p.7). As Justice Stewart and Justice Douglas wrote in *McLaughlin v. Florida*, “[We] cannot conceive of a valid legislative purpose under our Constitution for a state law which makes the color of a person's skin the test of whether his conduct is a criminal offense.” (*McLaughlin v. Florida* (1964) 379 U.S. 184, 198 (Stewart, J. and Douglas, J., concurring).)

No such history attends the definition of marriage. Racial qualifications for marriage did not always exist, but were largely unique to the United States, and were added to the definition of marriage during a racist era in our nation's history.<sup>8</sup> The definition of marriage itself,

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<sup>8</sup> As Chief Justice Warren noted in *Loving v. Virginia*, “Penalties for miscegenation arose as an incident to slavery,” and date to the Colonial period. *Loving v. Virginia, supra*, 388 U.S. at p.6. The California anti-miscegenation statute dates to California's statehood in 1850, at which time California's admission to the union jeopardized the delicate balance between slave states and free states which would survive for another decade before the outbreak of the Civil War. (*Perez v. Sharp, supra*, 32 Cal. 2d at pp. 712-13; see also Monte Neil Stewart & William C. Duncan, *Marriage and the Betrayal of Perez and Loving*, 2005 B.Y.U. L.Rev. 555, 567-570 (explaining *Perez* and *Loving* as a repudiation of laws superimposing the political goals of the white supremacist and eugenic movements upon the marriage institution).)

however, as the union of a man and a woman, has existed in virtually every known culture from time immemorial.<sup>9</sup>

Finally, the holding in *Perez* was closely tied to the fact that the interracial marriage ban impinged upon the right to marry. Moreover, the *Perez* court, holding that “the right to marry is the right to join in marriage with the person of one’s choice,” clearly understood that the right to marry is the right of a woman to marry a husband or a man to marry a wife. (*Perez v. Sharp, supra*, 32 Cal.2d. at p.715.) The *Perez* Court quoted *Skinner v. Oklahoma*, noting, “Indeed ‘We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.’” (*Ibid.* (quoting *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541).) Indeed many of the eugenic claims considered by the court arose out of procreative concerns. (*Perez v. Sharp, supra*, 32 Cal.2d at pp.718-24.)

***B. The courts of sister states have overwhelmingly rejected Petitioners’ analogy to Perez and Loving.***

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<sup>9</sup> While common law and statutory doctrines attendant to marriage have at times in our own history reflected gender biases of the period, these have since been removed, usually by legislative action, reflecting and reinforcing the fundamental equality of men and women. Unlike race, where the separate treatment of blacks and whites is inherently unequal, in marriage the equal and integrated treatment of men and women is inherently equal and in fact reinforces our understanding of sex equality, rather than undermining it.

In short, neither the U.S. Supreme Court nor this Court have extended the equal application doctrine into the realm of sex, while a number of sister courts in other states, as well as lower federal courts, have recently rejected analogies to *Loving* and *Perez*, holding that a statute which applies equally to both men and women cannot be found to violate the equal protection guarantee.

The most recent, and perhaps most extensive, treatment of the sex discrimination argument is provided by the Maryland Court of Appeals in *Conaway v. Deane* (Md., Sept. 18, 2007) \_\_\_ A.2d \_\_\_, 2007 WL 2702132 at pp. \*4-\*13 (Case No. 44, Sept. Term 2006). The Maryland Court first established that the purpose of the Maryland Equal Rights Amendment, consistent with the equal protection jurisprudence of the U.S. Supreme Court and that of sister states, is to “place men and women on equal grounds as pertains to the enjoyment of basic legal rights under the law,” noting that “[i]n virtually every case . . . the challenged classification drew clear lines between men and women as classes.” (*Id.* at p.\*8.) The court continued:

Turning to the language of [the Maryland marriage statute], it becomes clear that, in light of the aforementioned purpose of the ERA, the marriage statute does not discriminate on the basis of sex in violation of Article 46. The limitations on marriage effected by Family Law § 2-201 do not separate men and women into discrete classes for the purpose of granting to one class of persons benefits at the expense of the other class. Nor does the statute, facially or in its application, place men and women on an uneven playing field. Rather, the

statute prohibits equally both men and women from the same conduct. . . . In other words, it “stretch[es] the concept of gender discrimination to assert that [the marriage statute] applies to treatment of same-sex couples differently from opposite-sex couples.”

(*Id.* at p.\*11 (quoting *Dean v. District of Columbia* (D.C. 1995) 653 A.2d 307, 363 n.2 (Steadman, J., concurring).)

Nor was the Maryland Court was not unaware of the recent decisions from other state jurisdictions: “Perhaps most persuasive here is the growing body of case law from foreign jurisdictions flatly rejecting the argument that statutes that limit marriage to unions between a man and a woman discriminate impermissibly on the basis of sex.” (*Ibid.*) The Court then concluded:

[T]he primary purpose behind [the Maryland Equal Rights Amendment] is to frustrate state action that separates men and women into discrete classes for disparate treatment as between the sexes. Absent some showing that [the marriage statute] was “designed to subordinate either men to women or women to men as a class,” . . . we find the analogy to *Loving* inapposite.

(*Id.* at p.\*13 (citations omitted) (quoting *Hernandez v. Robles* (N.Y. 2006) 855 N.E.2d 1, 11).)

Washington Supreme Court adopted a similar analysis with respect to the Washington Equal Rights Amendment, noting that the purpose of such provisions is “to end special treatment for or discrimination against either sex.” (*Andersen v. King County* (Wash. 2006) 138 P.3d 963, 988

(emphasis in original).) The Washington Court's analysis was straightforward:

The single inquiry under the ERA is whether "classification by sex" is "discriminatory," or stated in the "language of the amendment, Has equality been denied or abridged on account of sex?" "[I]f equality is restricted or denied on the basis of sex, the classification is discriminatory."

Men and women are treated identically under DOMA; neither may marry a person of the same sex. DOMA therefore does not make any "classification by sex," and it does not discriminate on account of sex.

*Ibid.* (citations omitted).

The New York Court of Appeals agreed in *Hernandez v. Robles*:

By limiting marriage to opposite-sex couples, New York is not engaging in sex discrimination. The limitation does not put men and women in different classes, and give one class a benefit not given to the other. Women and men are treated alike—they are permitted to marry people of the opposite sex, but not people of their own sex. This is not the kind of sham equality that the Supreme Court confronted in *Loving*; the statute there, prohibiting black and white people from marrying each other, was in substance anti-black legislation. Plaintiffs do not argue here that the legislation they challenge is designed to subordinate either men to women or women to men as a class.

(*Hernandez v. Robles* (N.Y. 2006) 855 N.E.2d 1, 10-11.)

In *Stanhardt v. Superior Court*, (Ariz. Ct. App. 2003) 77 P.3d 451, the Arizona Court of Appeals also rejected the *Loving* analogy, concluding that "[the *Loving*] decision was anchored to the concept of marriage as a union involving persons of the opposite sex. . . . We therefore conclude that *Loving* does not mandate a conclusion that the fundamental right to choose

one's spouse necessarily includes the choice to enter a same-sex marriage.”

(*Id.* at p.458.)

Nearly four decades earlier, just a few years after the *Loving* decision, the Minnesota Supreme Court also squarely rejected the *Loving* analogy:

*Loving v. Virginia*, 388 U.S. 1 (1967), upon which petitioners additionally rely, does not militate against this conclusion. Virginia's antimiscegenation statute, prohibiting interracial marriages, was invalidated solely on the grounds of its patent racial discrimination. . . . *Loving* does indicate that not all state restrictions upon the right to marry are beyond reach of the Fourteenth Amendment. But in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex.

(*Baker v. Nelson*, (Minn. 1971) 191 N.W.2d 185, 187, dismissed for want of a substantial federal question, (1972) 409 U.S. 801 (mem.).)

The *Loving/Perez* analogy has met with similar skepticism in the federal courts, with courts applying rational basis review to claims presented by same-sex couples in lieu of the heightened scrutiny that would be accorded sex discrimination claims. (See, e.g., *Wilson v. Ake*, (M.D. Fla. 2005) 354 F.Supp. 2d 1298, 1307-08 (“Moreover, DOMA does not discriminate on the basis of sex because it treats women and men equally.”); *In re Kandu*, (Bankr. W.D. Wash. 2004) 315 B.R. 123 (“Women, as members of one class, are not being treated differently from men, as members of a different class. . . . There is no evidence, from the

voluminous legislative history or otherwise, that DOMA's purpose is to discriminate against men or women as a class. Accordingly, the marriage definition contained in DOMA does not classify according to gender . . . ”); *Smelt v. County of Orange* (C.D. 2005) 374 F.Supp.2d 861, 886-87, vacated in part on standing grounds, (9<sup>th</sup> Cir. 2006) 447 F.3d 673 (“To date, the laws in which the Supreme Court has found sex-based classifications have all treated men and women differently. . . . Supreme Court precedent has only found sex-based classifications in laws that have a disparate impact on one sex or the other. This case is not in that category.”))

Even in Vermont and New Jersey, where the state supreme courts ultimately mandated the adoption of marriage-equivalent “civil unions” (virtually identical to California domestic partnerships) for same-sex couples, both courts strongly rejected the sex discrimination claims.<sup>10</sup> As the Vermont court wrote:

All of the seminal sex-discrimination decisions, however, have invalidated statutes that single out men or women as a discrete class for unequal treatment. . . . The difficulty here is that the marriage laws are facially neutral; they do not single out men or women as a class for disparate treatment, but rather prohibit men and women equally from marrying a person of the same sex. As we observed in *George*, 157 Vt. at 585, 602 A.2d at 956, “[i]n order to trigger equal protection

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<sup>10</sup> The Massachusetts Supreme Judicial Court remains the only appellate court in the country to have found that their state constitutional provisions require recognition of same-sex marriage. Even there, the court did not adopt the heightened scrutiny that would be accorded a sex-based classification, instead applying rational basis review. *Goodridge v. Dept. of Publ. Health* (Mass. 2003) 798 N.E.2d 941.

analysis at all ... a defendant must show that he was treated differently as a member of *one class* from treatment of members of *another class* similarly situated.” (Emphasis added.) Here, there is no discrete class subject to differential treatment solely on the basis of sex; each sex is equally prohibited from precisely the same conduct.

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

The New Jersey Supreme Court concurred, “From the fact-specific background of [*Loving v. Virginia*], which dealt with intolerable racial distinctions that patently violated the Fourteenth Amendment, we cannot find support for plaintiffs claim that there is a fundamental right to same-sex marriage. . . .” (*Lewis v. Harris* (N.J. 2006) 908 A.2d 196, 210.)

Thus, nearly 15 years later, the Hawaii Supreme Court’s much-maligned plurality opinion<sup>11</sup> in *Baehr v. Lewin* remains the only appellate opinion in the nation to have accepted Petitioners’ sex discrimination arguments.<sup>12</sup> *Baehr v. Lewin* (Haw. 1993) 852 P.2d 44, 64 (plurality

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<sup>11</sup> One commentator named the Hawaii court’s plurality opinion to a list the ten worst state supreme court decisions in American history. Bernard Schwartz, *A Book of Legal Lists: The Best and Worst in American Law* (1997) 182-84 (describing the second half of the plurality opinion “an affront to both law and language that well deserves its place on the list of worst decisions.”)

<sup>12</sup> A handful of trial court opinions have also adopted the *Perez/Loving* analogy, most recently an Iowa trial court decision in *Varnum v. Brien* (Iowa Dist. Ct. (Polk County), Aug. 30, 2007) Case No. CV5965 (available at <http://www.lambdalegal.org>). With the exception of the Iowa decision, stayed while an appeal is pending, each of the other trial court opinions has been reversed, either on appeal or by subsequent constitutional amendment.

opinion finding that the Hawaii marriage laws discriminated on basis of sex).

***C. Unlike race-based classifications, sex-based equal protection rulings have always required a finding of actual disparity between the sexes.***

Outside of the same-sex marriage context discussed above, we find no published case law, from any state – certainly none was presented by the petitioners – in which a court has found a sex-based equal protection claim to exist where men and women are treated equally. To the contrary, as the Vermont Supreme Court explained in *Baker v. State*, *supra*, 744 A.2d 864, sex discrimination cases are uniformly premised upon a finding of unequal treatment extended to men or to women.

Certainly this has been true in California. In *Sail'er Inn*, women had been denied the right to work as bartenders, while there was no barrier to such employment for men. *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1. In *Arp v. Workers' Comp. Appeal Bd.* (1977) 19 Cal.3d 395, male surviving spouses were denied the conclusive presumption of dependency that was extended to women for purposes of workers' compensation claims. See also *Connerly v. State Personnel Bd.* (Cal. App. 3 Dist. 2001) 92 Cal.App.4th 16 (affirmative action policy produced gender-based preferences in faculty hiring); *Hardy v. Stumpf* (1978) 21 Cal.3d 1 (female job applicant who

failed police department physical agility test unsuccessfully challenged test as unfairly discriminatory against women).

Even where California courts have rejected separate treatment of men and women, they have done so based on a finding of substantive inequality, not merely formal separation. For example, in *Molar v. Gates*, the Court of Appeal rejected the state's separate facilities for housing male and female inmates, but it did so based solely on a finding that the women had been denied the privileges of minimum security housing which was extended to qualified male inmates. *Molar v. Gates* (Cal. App. 4 Dist. 1979) 98 Cal.App.3d 1. The court in *Molar* specifically clarified that it was not rejecting separate housing for men and women in principle, but only as had been provided by the state in practice. *Ibid.*

Similarly, at the federal level, all sex-based equal protection cases have involved actual disparity between the sexes. For example, *Mississippi University for Women v. Hogan*, rested upon a man's denial of admission to a female nursing school, and at the Virginia Military Institute women had been excluded from admission to the predominately male institution. *Mississippi Univ. for Women v. Hogan* (1982) 458 U.S. 718, 731; *United States v. Virginia* (1996) 518 U.S. 515, 555-56. In *Craig v. Boren*, the Court struck down a statute allowing women to purchase beer at a younger age than men. *Craig v. Boren* (1976) 429 U.S. 190, 204. And *Frontiero v. Richardson* invalidated a statute making it more difficult for women in the

military to claim their spouses as dependents than it was for men. *Frontiero v. Richardson* (1973) 411 U.S. 677, 690.

When interpreting the provisions of the California Constitution, we recognize that this Court is not bound by the opinions of sister states, and may extend greater protections than have been recognized under the U.S. Constitution. Yet the petitioners' arguments here should be recognized for what they are: not merely the application of existing equal protection precedent, but the striking and significant extension of race-based jurisprudence into the field of sexual orientation.

### **III. THE MARRIAGE LAWS ARE NOT ROOTED IN GENDER STEREOTYPES.**

In lieu of arguing that the marriage laws create any substantive inequality between men and women, Petitioners argue that marriage reflects and even *arose* because of gender stereotypes: "Retaining the rule that marriage cannot be between persons of the same sex, long after the societal and legal conditions that gave rise to this stereotypical prohibition have ceased to exist, violates the requirement of equal protection for all Californians." (Rymer Opening Br. at p.45.)

Until very recently, every legal system on earth recognized marriage as the union of a husband and wife.<sup>13</sup> Historically, despite wide variety in

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<sup>13</sup> The Netherlands became the first nation to legally recognize same-sex marriages in April 2001. Act amending Book 1 of the Civil Code [of The

social traditions and customs, in both patriarchal and matriarchal societies, virtually every known society recognized marriage as a relationship between a man and a woman. (See generally, Br. Amici Curiae of James Q. Wilson, et al. at pp. 33-34.)

It strains credulity to suggest that the virtually universal understanding of marriage, across all social, ethnic, and historic lines, is the product of gender stereotypes which were articulated by the California Legislature in 1977. Moreover, the fact that outdated gender stereotypes may have been articulated as support for the marriage statutes in the past indicates neither that the statutes themselves, which long predate the 1977 amendments,<sup>14</sup> are invalid, nor that these are the only justifications for such statutes.<sup>15</sup>

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Netherlands], concerning the opening up of marriage for persons of the same-sex (Dec. 21, 2000) Staatsblad 2001, nr. 9 (eff. April 1, 2001).

<sup>14</sup> Marriage in California has been understood to be the union of a husband and wife since before the adoption of the 1849 Constitution, and was codified shortly after statehood. (Cal. Stats. 1850, ch. 140, §§ 1-11.)

<sup>15</sup> Petitioners Rymer, et al. further suggest that the marriage statutes perpetuate gender stereotypes, and are thus invalid. (Rymer Opening Br. at p.40.) Yet Petitioners point to nothing in the statutes today which supports this claim. First, California law says nothing about roles of men and women within marriage. Secondly, even if the marriage law is in some sense consistent with the view that men and women, and fathers and mothers, in particular, bring unique assets to their marriage and to their children, this still does not arise to the level of unequal treatment. Finally, to the extent that certain individuals may hold discriminatory views about men and especially women, such is not contained in the record here, and cannot support a conclusion that the marriage statutes are discriminatory either on their face or as applied. Petitioners' allegations in this regard thus represent

**IV. MARRIAGE IS AN INTEGRATIVE INSTITUTION, AND UNLIKE *PEREZ* AND *LOVING*, PETITIONERS HERE ARE SEEKING A RIGHT TO SEGREGATED MARRIAGES.**

Unlike bans on interracial marriage (which served to keep the races separate so that one race could oppress the other) the sex classification employed by marriage laws plays an integrative function with regard to gender. Marriage is a mixed-gender institution.

Petitioners turn equal protection principles on their head – seeking a right for sex-segregated marriages, rather than the integrative institution recognized by the State. The state is no more obligated, under principles of equal protection, to create same-sex marriages than it would be required, in the name of gender equality, to provide single-sex universities for men or women who prefer to study only with others of the same sex.

In this regard, laws creating a distinct legal status for opposite-sex unions are quite different from laws banning interracial marriage. *Loving v. Virginia* (1967) 388 U.S. 1. Laws against interracial marriage were not about any legitimate public purpose of marriage, they were openly about racism. They were about keeping two races separate, so that the laws of some jurisdictions could continue to discriminate against one race. A state

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merely opinion and conjecture. The Maryland Court of Appeal rejected a similar line of argument in *Conaway v. Deane, supra*, 2007 WL 2702132 at p. \*12, n.28 (distinguishing the marriage statute from cases suggesting particular gender roles within the home, and concluding “The distinction drawn by [the marriage statute] in the present case is not based on this sort of archaic stereotyping.”)

ban on interracial marriage is unconstitutional because the state has no legitimate interest in keeping two races “pure” by forbidding them to intermingle or discouraging them from raising children together. *Perez v. Sharp, supra*, 32 Cal.2d 711.

Marriage is rooted in no such exclusionary purpose, but is about bringing together men and women so that society has the next generation it needs, and so that children have the mothers and fathers for which they long. (*Baker v. Baker* (1859) 13 Cal. 87, 103 (“[T]he first purpose of matrimony, by the laws of nature and society, is procreation.”).) This is a legitimate, indeed compelling, state interest.

#### **V. MARRIAGE SUBSTANTIVELY FURTHERS GENDER EQUALITY IN PARENTING**

Unlike bans on interracial marriage (which were equal in form, but in practice intended to sustain segregation), California marriage law treats men and women equally not only formally but in fact. The very purpose of marriage is to create substantially greater equality of parenting between men and women (getting fathers as well as mothers for children) and thus reducing the likelihood that women as a class will unfairly bear the high and gendered costs of childbearing disproportionately.

In one sense, nature itself discriminates in the conception, birth, and raising of children. Marriage serves a compelling interest, mitigating the effects of this biological inequity. (*Catholic Charities of Sacramento, Inc.*,

*v. Superior Court* (2004) 32 Cal.4th 527 (noting that the state has a compelling interest in eradicating gender discrimination).) Women are naturally and uniquely connected to their children by the process of gestation and birth. Fathers by contrast may not *necessarily* even be present when the baby is born, and are thus less likely to bond with their children. Stated differently, absentee mothers are at birth a logical impossibility, while absentee fathers are a significant social concern. Marriage thus attempts to create a substantially greater equality in distributing parenting burdens between men and women than nature alone sustains.

Studies show that 2 out of 3 children born out of wedlock have nonresident fathers at birth. This percentage climbs as children grow older (though some couples eventually marry). (See, e.g., McLanahan, et al., *Unwed Fathers and Fragile Families* (March 1998) Center for Research on Child Wellbeing, Working Paper #98-12 at p.7.) An Urban Institute policy brief explains the impact: "Parents who do not live with their children are unlikely to be highly involved in their children's lives." (Elaine Sorensen & Chava Zibman, *To What Extent Do Children Benefit from Child Support?* (The Urban Institute: January 2000) at p.8.) According to the National Survey of America's Families, one in three (34%) children with a nonresident parent saw that parent on a weekly basis in 1997. Another 38 percent saw their nonresident parent at least once during the year, though not on a weekly basis. Fully 28 percent of children with a nonresident

parent had *no* contact with that parent during the course of the year. *Ibid.* Another review of several national surveys found that, by their mothers' estimates, roughly 40% of children with nonresident fathers saw their father once a month, while nearly the same number did not see their father at all in a given year. (Wendy D. Manning & Pamela J. Smock, *New Families and Non-Resident Father-Child Visitation* (Sept. 1999) 78(1) *Social Forces* 87, 89; see also Valerie King, *Variations in the Consequences of Nonresident Father Involvement for Children's Well-Being* (1994) 56 *J. Marriage & Fam.* 963 (finding half of children with nonresident fathers see their fathers only once a year, if at all, while just 21 percent see their fathers on a weekly basis).)

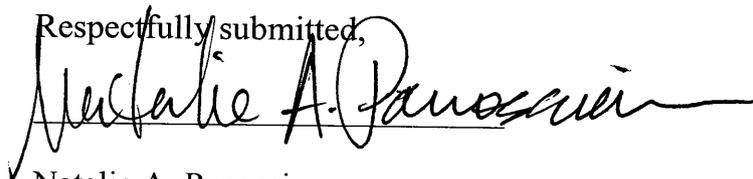
In this way, the state's definition of marriage as the union of male and female substantively furthers gender equality rather than diminishing it.

### **CONCLUSION**

For the foregoing reasons, Amici Curiae respectfully submit that the marriage statutes do not represent a sex-based classification and should thus be reviewed using rational basis review. We urge that the opinion of the

Court of Appeal upholding the marriage statutes be affirmed.

Respectfully submitted,

A handwritten signature in black ink that reads "Natalie A. Panossian". The signature is written in a cursive style with a long horizontal flourish at the end.

Natalie A. Panossian

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## **CERTIFICATE OF COMPLIANCE**

This brief has been prepared using proportionately spaced Times New Roman font, with lines double-spaced, in 13 point typeface, inclusive of footnotes. The brief was prepared using Microsoft Word software, and according to the Word Count feature therein, the brief contains 6,911 words, up to and including the signature lines that follow the conclusion of the brief, exclusive of cover, tables, and application for permission to file.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on September 24, 2007.

A handwritten signature in black ink, reading "Natalie A. Panossian". The signature is written in a cursive style with a long horizontal flourish at the end.

**NATALIE A. PANOSSIAN**

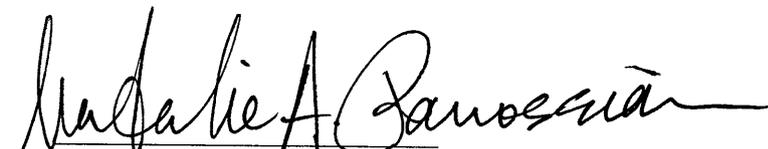
## CERTIFICATE OF SERVICE

I, Natalie A. Panossian, declare that I am over the age of eighteen years and am not a party to this action. My business address is 4391 Clearwood Drive, Moorpark, CA 93021.

On September 24, 2007, I served the APPLICATION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF DOUGLAS W. KMIEC, ET AL., on all parties listed below by depositing a true copy of the same in the United States Post Office, first class postage prepaid, addressed as follows:

**SEE ATTACHED SERVICE LIST.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on September 24, 2007, at Moorpark, California.

  
Natalie A. Panossian

**SERVICE LIST FOR CONSOLIDATED MARRIAGE CASES,  
CALIFORNIA SUPREME COURT CASE NO. S147999  
JCCP NO. 4365**

**COURTS**

<b>Honorable Richard A. Kramer</b> Judge of the Superior Court, Dept. 304 400 McAllister Street San Francisco, CA 94102 (1 copy)	<b>Court of Appeal</b> First Appellate District 350 McAllister Street San Francisco, CA 94102 (1 copy)
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**CITY AND COUNTY OF SAN FRANCISCO V. STATE OF  
CALIFORNIA**

California Court of Appeal, First Appellate District Case No. A110449  
San Francisco County Superior Court Case No. CGC-04-429539

Consolidated for trial with  
San Francisco County Superior Court Case No. CGC-04-429548

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California Court of Appeal, First Appellate District Case No. A110450  
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**PROPOSITION 22 LEGAL DEFENSE AND EDUCATION FUND V.  
CITY AND COUNTY OF SAN FRANCISCO**

California Court of Appeal, First Appellate District Case No. A110651  
San Francisco County Superior Court Case No. CGC-04-503943

Consolidated with

**CAMPAIGN FOR CALIFORNIA FAMILIES V. NEWSOM**  
California Court of Appeal, First Appellate District Case No. A110652  
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