NO. S147999

IN THE SUPREME COURT OF CALIFORNIA

In re Marriage Cases

Judicial Council Coordination Proceeding No. 4365

On appeal from a decision of the Court of Appeal
First Appellate District, Division Three
Nos. A110449, A110450, A110451, A110463, A110651, A110652

San Francisco Superior Court Nos. JCCP4365, 429539, 429548, 504038
Los Angeles Superior Court No. BC088506

Honorable Richard J. Kramer, Judge

APPLICATION FOR PERMISSION TO FILE BRIEF AMICI CURIAE; BRIEF AMICI CURIAE OF JAMES Q. WILSON, ET AL., LEGAL AND FAMILY SCHOLARS IN SUPPORT OF THE APPELLEES

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APPLICATION OF JAMES Q. WILSON, ET AL., LEGAL AND FAMILY SCHOLARS, FOR PERMISSION TO FILE A BRIEF AMICI CURIAE IN SUPPORT OF THE APPELLEES

I. INTERESTS OF AMICI CURIAE

Amici Curiae are an interdisciplinary group of legal and family scholars with an interest in the role of marriage in law and society.

James Q. Wilson, formerly Shattuck Professor of Government at Harvard University (1961-1987), is Professor Emeritus at UCLA and a professor of Public Policy at Pepperdine University. He is the recent author of *The Marriage Problem: How our Culture has Weakened Families* (New

York: Harper Collins, 2002), and is one of the nation's leading experts on crime and family structure.

Douglas Allen, Ph.D., is the Burnaby Mountain Professor of Economics at Simon Fraser University. An expert in the field of law and economics, he has studied issues related to the family for 20 years and has published 15 articles on family economics in journals such as the *American Economic Review, Economic Inquiry*, and the *American Law and Economics Review*. He was the co-editor of *It Takes Two: The Family in Law and Finance* (C.D. Howe, 1999).

Hadley P. Arkes is Edward N. Ney Professor of Jurisprudence and American Institutions at Amherst College. He is the author of *Natural Rights and the Right to Choose, Beyond the Constitution, and First Things: An Inquiry Into the First Principles of Morals and Justice*. Among his many publications on constitutional jurisprudence and the family is a chapter entitled "The Family and the Laws" in *The Meaning of Marriage: Family, State, Market, and Morals* (Robert P. George and Jean Bethke Elshtain, eds. 2006).

David Blankenhorn is founder and President of the Institute for American Values and a co-founder of the National Fatherhood Initiative. Books he has written or co-edited on marriage and family

include: *Promises to Keep: Decline and Renewal of Marriage in America* (Lanham, MD: Rowman & Littlefield, 1996); *Fatherless America: Confronting Our Most Urgent Social Problem* (New York: Basic Books, 1995); and *The Future of Marriage* (New York: Encounter Books, 2007).

Lloyd R. Cohen, J.D., Ph. D. is Professor of Law at George Mason University School of Law. His publications on the subject of marriage, divorce, and the social and legal relationships of men and women include: "Marriage: The Long-Term Contract," (in *The Law and Economics of Marriage & Divorce*, Anthony W. Dnes & Robert Rowthorn ed., Cambridge University Press 2002), "Marriage As Contract," (in *The New Palgrave Dictionary Of Economics And the Law*, Peter Newman ed., Stockton 1998), *Rhetoric, The Unnatural Family, And Women's Work,* (81:8 Virginia L. Rev. 2275 [1995]), and *Marriage, Divorce, and Quasi Rents or, 'I Gave Him the Best Years of My Life,'* (16:2 J. of Legal Stud. 267 [1987], reprinted in *Law and Economics*, Richard A. Posner & Francesco Parisi ed., Elgar 1995).

David K. DeWolf, J.D., is Professor of Law at Gonzaga University School of Law, where he teaches in the areas of First Amendment law, criminal law and tort law.

Robert P. George, J.D., D.Phil., is McCormick Professor of Jurisprudence and Director of the James Madison Program in American Ideals and Institutions at Princeton University. His publications on marriage and the family include: *The Meaning of Marriage: Family, State, Market, and Morals* (with Jean Bethke Elsthain (eds.), Dallas, TX: Spence, 2006); *"What's Sex Got to Do With It? Marriage, Morality, and Rationality* (49 American Journal of Jurisprudence 63 [2004]); *Marriage and the Liberal Imagination* (with Gerard V. Bradley) (84 Georgetown Law Journal 301 [1995]).

Bernard E. Jacob is Alexander M. Bickel Distinguished Professor of Communications Law at Hofstra Law School where he teaches courses in Constitutional Law, First Amendment, and Jurisprudence. Before coming to Hofstra Law, Professor Jacob was a tenured faculty member at the UCLA School of Law, and a graduate of the University of California, Berkeley, School of Law (Boalt Hall).

William H. Jeynes is a professor of education at California State University – Long Beach, specializing in empirical research on the effect of family structure on child well-being, especially educational outcomes. He is the author of *Divorce, Family Structure, and the Academic Success of Children* (Binghamton, New York: Haworth Press), and has authored numerous journal articles on family structure and child outcomes including:

The Impact of Parental Remarriage on Children: A Meta-Analysis (2006) 40(4) Marriage and Family Review 75-102; *Examining the Effects of Parental Absence on the Academic Achievement of Adolescents: The Challenge of Controlling for Family Income*, (2002) 23(2) Journal of Family and Economic Issues 189-210; *The Effects of Recent Parental Divorce on their Children's Consumption of Marijuana and Cocaine* (2001) 35(3/4) Journal of Divorce and Remarriage 43-65; and *The Effects of Recent Parental Divorce on Their Children's Consumption of Alcohol*, (2001) 30(3) Journal of Youth and Adolescence 305-319.

Leon R. Kass, M.D., Ph.D. is Addie Clark Harding Professor in the Committee on Social Thought and the College at the University of Chicago and Hertog Fellow in Social Thought at the American Enterprise Institute. He was chairman of the President's Council on Bioethics from 2001 to 2005. His publications include *Wing to Wing, Oar to Oar: Readings on Courting and Marrying* (Notre Dame Press, 2000, with Amy A. Kass), and "The End of Courtship," (*Public Interest*, 1997).

Charles Kesler, is Professor of Government and Director of the Salvatori Center at Claremont McKenna College.

Daniel Hays Lowenstein is Professor of Law at the UCLA School of Law, where he teaches courses in Statutory Interpretation and Legislative Process, Political Theory, Election Law, and Law & Literature.

Katherine Shaw Spaht, Jules F. and Frances L. Landry Professor of Law, Louisiana State University Law Center, is the author of three family law treatises and more than 40 law journal articles on family law. Professor Spaht has served since 1981 as the Rapporteur (Reporter) of the Persons (Marriage and Family) Committee of the Louisiana State Law Institute, and is recognized as the foremost expert in family law in the state of Louisiana. Her recent publications include *Matrimonial Regimes* (with Lee Hargrave), Vol. 16, Louisiana Civil Law Treatise (West 2nd ed., 1997) with annual pocket parts (1998-2004), *Family Law in Louisiana* (Law Center Publications Institute, 1994; 2nd ed. 1995; 3rd ed., 1998; 4th ed. 2000; 5th ed. 2003, 6th ed. 2004), "The Current Crisis in Marriage Law: Its Origins and Its Impact," in *The Meaning of Marriage: Family, State, Market and Morals* (Spence Pub. 2005), and "Postmodern Marriage As Seen Through the Lens of ALI's 'Compensatory Payments,'" in *Reconceiving the Family: Critical Reflections on the American Law Institute's Principles of the Law of Family Dissolution* (Cambridge Univ. Press, 2006).

Thomas G. West, Ph.D., is Professor of Politics at the University of Dallas. His numerous publications include *Vindicating the Founders: Race,*

Sex, Class, and Justice in the Origins of America (Lanham, MD: Rowman and Littlefield, 1997) and "Progressivism and the Transformation of American Government," in John Marini & Ken Masugi (eds.), *The Progressive Revolution in Politics and Political Science: Transforming the American Regime* (Lanham, MD: Rowman and Littlefield, 2005).

II. REASONS FOR GRANTING APPLICATION

Our brief filed at the appellate level was inappropriately repudiated by the Attorney General, who seriously misunderstood our argument. (See State Appellants' Response to Amicus Curiae Briefs at pp. 8-10, *In re Marriage Cases* (Cal. App. 1 Dist., Feb. 10, 2006) 2006 WL 937634.) We do not here assert the state's interest in marriage is grounded in negative views about gay people or their families. Instead we argue that marriage has a historic public and legal purpose which is not only rationally related, but deeply rooted in facts specific and unique to opposite sex couples: Marriage is a sexual union of male and female because only such a union can both produce the next generation and connect those children to their natural mother and father. Changing the "definition and conception" of marriage to a unisex relationship, is not merely "opening" the existing institution to new entrants, but a fundamental altering of its core conception, which requires a repudiation of procreation and paternity as a key public purpose.

Consequently we argue that California's marriage laws withstand not only the rational basis test, but heightened scrutiny.

Drawing upon our collective expertise in a variety of professional disciplines, we seek to offer this court a more comprehensive scholarly and legal perspective of the purposes of marriage, and how the current law furthers those purposes, than has been articulated by the parties. In doing so, we present argument which supplements, and does not repeat, that presented by the Appellees.

For these reasons, we seek permission to file a brief amici curiae in support of the Appellees.

Respectfully submitted,

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SUMMARY OF ARGUMENT

The Court of Appeal erred in refusing to consider "procreation and paternity" as a primary purpose of marriage in the State of California, in part because the Attorney General seriously mischaracterized the argument offered by our brief.

We do not here assert the state's interest in marriage is grounded in negative views about gay people or their families. Instead we argue that marriage has a historic public and legal purpose which is not only rationally related, but deeply rooted in facts specific and unique to opposite sex couples: Marriage is a sexual union of male and female because only such a union can both produce the next generation and connect those children to their natural mother and father. Changing the "definition and conception" of marriage to a unisex relationship, is not merely "opening" the existing institution to new entrants, but a fundamental altering of its core conception, which requires a repudiation of procreation and paternity as a key public purpose. Consequently we argue that California's marriage laws withstand not only the rational basis test, but heightened scrutiny.

We are aware of the hurdles we face when the Attorney General has specifically repudiated our brief, even if in this case (we believe) by mischaracterizing its argument, by lumping it with other amici who do

make arguments based on negative views of homosexuality. We ask the chance to offer to this Court clear, powerful and extensive legal evidence that marriage in the state of California has long had a primary purpose of procreation, and that arguments to the contrary by Petitioners or the Attorney General are unsubstantiated.

Given that Proposition 22 was passed by the people at large, this Court has a special obligation in common honesty to consider the arguments here made, for at the very least they are a large part of what the State inarticulately dubs the "tradition" of marriage in California. At a minimum, this Court owes the millions of Californians who voted to uphold this conception of marriage a careful consideration of the real issues at stake.

In addition, the Court has a basic obligation to consider the relationship between marriage and procreation as well in light of the Petitioners' appeal to marriage as a fundamental human right; for (unlike a statute's purpose), the Executive Branch's opinions as to the scope, nature, or essential legal attributes of a fundamental human right are entitled to no special deference by this Court.

The State in other words has no special authority to repudiate the evidence we wish to offer for this Court's consideration:

Absent this connection to procreation and paternity, marriage in law becomes virtually unintelligible: A human right to have the government

regulate and give a Good Housekeeping Seal of Approval on your most intimate, personal, private and sacred relationships, if and only if they are (a) sexual relations and (b) not close family members, and (c) only come in pairs? What possible justification can the government have for insisting that adult love come in this form and for dispensing special benefits only to adults who agree to live by and through this form? Unintelligibility and inarticulateness are the results of ignoring the clear, long, extensive legal record on the public purpose of marriage (as distinct from its many private uses).

We respectfully ask this Court to consider carefully the arguments and evidence laid out herein, for the Court shall receive this critical information from no other source. Indeed, in justice, it must be considered.

ARGUMENT

I. THE APPELLATE COURT ERRED IN REFUSING TO CONSIDER PROCREATION AS A PUBLIC PURPOSE OF MARRIAGE

A. The court below erred in concluding that, under the rational basis test, it need only consider those interests endorsed by the Attorney General.

The Court of Appeal erred in refusing to consider "responsible procreation," as a potential rationale for the law on grounds that this

interest had been "expressly disavowed" by the Attorney General. (*In re Marriage Cases* (2006) 49 Cal. Rptr. 3d 675, 724 at n.33.)

Under strict scrutiny, the burden shifts to the state to demonstrate that the classification drawn by the law is necessary to advance some compelling state interest. (*Hernandez v. City of Hanford* (2007) 41 Cal.4th 279, 299.) To meet this burden, the state must identify the *actual* purpose of the law. (*Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 38 [quoting *Shaw v. Hunt* (1996) 517 U.S. 899, 908].)

By contrast, under rational basis review, the Petitioners carry the burden "to negative every conceivable basis which might support [the challenged classification]." (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1201 [quoting *FCC v. Beach Communications, Inc*. (1993) 508 U.S. 307, 315].) As this Court stated in *Warden v. State Bar* (1999) 21 Cal.4th 628, the statutory classification must be upheld "*if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.*" (*Id.* at p. 644, emphasis in original, citations omitted) [quoting *FCC v. Beach Communications, Inc*., *supra* 508 U.S. at p. 313].) At minimum, a test considering "any reasonably conceivable" rationale clearly includes those presented to the court by amici.[1]

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[1] The general rule that "issues not raised by the appealing parties may not be considered if raised for the first time by amici curiae" (*Mercury Casualty Co. v. Hertz Corp.* (1997) 59 Cal.App.4th 414, 425) is not at issue here. Amici are not raising any new question or issue on appeal, but rather

B. *The Attorney General overstepped his rightful authority by unilaterally repudiating procreation, a state interest that has been clearly and repeatedly affirmed in the law of California and sister jurisdictions.*

The public purpose pointed to by amici—procreation and paternity—has been repeatedly affirmed by California courts, the courts of sister states, and the U.S. Supreme Court. It is deeply embedded in the legal record and legal structure of marriage in California. (See Section II, *infra.*)

Under these circumstances the mere unsubstantiated assertion on the Attorney General's part that this state interest has been repudiated cannot suffice to do justice to the people of California who voted to reaffirm our marriage tradition in voting for Proposition 22.

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assisting the Court with an additional perspective on the issues already raised by the parties, providing the Court with a "conceivable basis" in support of the marriage classification. (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 405, fn.14 ["Amicus curiae presentations assist the court by broadening its perspective on the issues raised by the parties. Among other services, they facilitate informed judicial consideration of a wide variety of information and points of view that may bear on important legal questions."].) Secondly, in this particular case, even if it were not raised by amici, the Court should consider procreation as a purpose of marriage on its own initiative, because it is the "first purpose" of marriage clearly articulated in California case law for more than 100 years. (See, e.g., *Baker v. Baker* (1859) 13 Cal. 87, 103.) Finally, even if amici were deemed to be raising a new issue on appeal, the rule is not absolute, and the Court "has discretion to consider new issues raised by an amicus curiae that concern only matters of law and involve important issues of policy." (*Neilson v. City of California City* (2005) 133 Cal.App.4th 1296, 1310, fn. 5.) The arguments presented herein by amici should be considered by the Court in that they can be decided as a matter of law, and clearly involve issues of important public policy.

When did the state of California repudiate procreation and paternity as a purpose of marriage? We have scoured the record and can find no clear answers from the Attorney General. In the Court of Appeal, our brief was lumped with other amici who urge negative views about gays and lesbians as parents or partners, which is no part of the argument we here make. The attorney general thus described our argument as one of several based on the idea that gays and lesbians are "unfit for marriage" and thus would harm the institution, an idea California public policy rejects. (State Appellants' Response to Amicus Curiae Briefs, 2006 WL 937634 at p. 8, *In re Marriage Cases* (2006) 49 Cal. Rptr. 3d 675.

He is simply wrong in describing our argument. It is not based on the idea that gays and lesbians are "unfit for" or will do something harmful to marriage. It is based on the idea that the public redefinition of marriage by this Court would harm marriage, by clearly and fundamentally altering its legal and public conception, so that it is no longer in law related to the need to bring men and women together to make and raise the next generation, in the process unjustly stigmatizing as irrational or hate-filled bigots those Californians who remain attached to this ancient conception of marriage. This would be a great injustice to the people of California and harmful to the state's interests in marriage.

The Attorney General's second argument is that "California statutory law and decisions by California courts have consistently

recognized that same-sex couples are raising families, and that those families need and deserve legal protections."[2] We agree with this description of California family law, but we do not understand how this fact constitutes a repudiation of procreation as a primary purpose of marriage in California law.

Throughout its history, California law has always recognized that people besides married couples raise families and has sought in various ways to facilitate or protect those relationships. **Marriage has never been the sole way to create a family, or a parent-child relationship in the state of California.** Indeed, Petitioners themselves note that "California's adoption statutes have always permitted adoption without regard to the marital status of prospective adoptive parents." (Tyler-Olson Open. Br. at p.14 [quoting *Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 433].)

Yet throughout this long period, this Court understood one of the key public purposes of marriage in law was procreation: that sexual unions between men and women are different from other kinds of relationships because of their powerful tendency to produce babies. For both individuals and the state this is a double-edged sword: both a gift and burden,

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[2] State Appellants' Response, *supra*, 2006 WL 937634 at p. 9 (citing Stats. 2003, ch. 421, § 1(b) ["Expanding the rights and creating responsibilities of registered domestic partners would further California's interests in promoting family relationships. . . ."]; *Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 439 [observing that the decision to allow second- parent adoption by domestic partner of a birth mother "encourages and strengthens family bonds."].)

depending on the circumstances. But it is a basic human reality that the legislature and the people of California are entitled to notice.

California law seeks to protect children in all family situations, including those of gay people. This fact does not imply the state has no further interest in whether men and women come together to raise the children of their sexual unions together. (*Adoption of Kelsey S.* (1992) 1 Cal. 4th 816, 844 [quoting *Caban v. Mohammed* (1979) 441 U.S. 380, 391] ["There is no dispute that 'The State's interest in providing for the well-being of illegitimate children is an important one.' Although the legal concept of illegitimacy no longer exists in California, the problems and needs of children born out of wedlock are an undisputed reality. The state has an important and valid interest in their well-being."] [citations omitted].)

Nor does it imply that the State no longer cares whether children's ties to their natural parents are respected and encouraged, where possible.

> The child has a genetic bond with its natural parents that is unique among all relationships the child will have throughout its life. "The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility."

(*Adoption of Kelsey S.* (1992) 1 Cal. 4th 816, 848 [quoting *Lehr v. Robertson* (1983) 463 U.S. 248, 256].)

The people of California are entitled, through their laws, to express care and concern about all children without thereby repudiating the special function of marriage. "The state's policy in favor of marriage, however, does not imply a corresponding policy *against* nonmarital relationships." (*Elden v. Sheldon* (1988) 46 Cal.3d 267, 281 (dis. opn. of Broussard, J.) [quoting *Norman v. Unemployment Ins. Appeals Bd.* (1983) 34 Cal.3d 1, 14 (dis. opn. of Broussard, J.)].)

C. The Attorney General is not entitled to special deference by this Court in predicting the likely changes in the public meaning of marriage as a result of its redefinition.

Is procreation (understood to include the sexual generation of children in such a way that children receive the care, love and nurture of both their mother and father) still a key public purpose of marriage in California? This is the question on which the Attorney General's opinion is normally entitled to special weight. Yet we can find no clear answer to this question in the record.

If the Attorney General's answer (as it appears to us to be) is "no, procreation has been repudiated as a purpose of marriage in California," the question becomes: when and on what evidence? Given the extensive legal record repeatedly affirming procreation as a purpose of marriage (See Section II.A., *infra*), and the millions of Californians who went to the polls in defense of this marriage tradition, surely the Court cannot in justice

permit mere unsubstantiated assertion to prematurely blind it from considering all the evidence.

Perhaps the Attorney General meant something like "Yes, procreation is a key public purpose of marriage, but redefining marriage so that it is no longer a union of husband and wife in law and culture will have no effect on that public understanding of what marriage is for, and thus will not hurt the state's interest." This, we submit, is "wild speculation" on the Attorney General's part. (Cf. State Appellants' Response to Amicus Curiae Briefs, 2006 WL 937634 at p. 8, *In re Marriage Cases* (2006) 49 Cal. Rptr. 3d 675 [dismissing arguments of amici curiae as "wild speculations about potential harm to the institution of marriage"].) Or to speak rather more courteously, it is a legislative judgment on which the Attorney General's opinion is no better or worse (or at any rate no more entitled to special deference by this Court) than that of any other Californian.

The special deference owed by the Court to the Attorney General extends only to his expertise in defining the state interests promoted by a law. In this case we argue his authority is not unlimited—in the presence of persuasive evidence from the legal record that procreation is a public purpose of marriage, long and repeatedly affirmed, the mere assertion of the Attorney General that it is not a state interest cannot in justice be presumed definitive by this Court, and so prevent it from examining the legal record.

But in no case does our constitutional system presume that the Attorney General has exclusive wisdom to offer evidence to this court about how a change in law of this magnitude might impair a recognized state interest.

This Court has the authority and the responsibility to decide whether, if procreation is a key public purpose of marriage, a rational legislator (or voter) could conclude that redefining marriage harms this interest, or, alternatively if the Court applies heightened scrutiny, whether this interest is sufficiently compelling and the classification narrowly tailored. In making this judgment, this Court ought in justice to consider all the arguments presented to it, and not permit the Attorney General to narrow its vision prematurely.

D. Even if the Court defers to the Attorney General's authority, it must still consider procreation and paternity as a key purpose of marriage because these are a substantive part of the marriage tradition in the minds of the people of California, which the State argues the marriage law seeks to respect and protect.

One of the statutes under question (Calif. Fam. Code § 308.5 ["Proposition 22"]) was not passed by the legislature. It was passed, just seven years ago, by more than 60 percent of Californians. (California Secretary of State, March 2000 Primary Election Results, State Ballot Measures Proposition No. 22, available at http://www.sos.ca.gov/elections/sov/2000_primary/contents.htm [last

visited September 11, 2007]). The initiative statute provisions of the California Constitution (Calif. Const. art. II, §§ 8, 10) are designed to permit the broad consensus of the California people to rule, and it is their understanding of the purpose of marriage as the union of husband and wife that this Court is obliged to consider.

The idea that marriage has as one of its core justifications the creation and nurture of the next generation by their own mother and father is not some obscure dead letter buried in old law texts. It is not, in other words, "invent[ing] fictitious purposes that could not have been within the contemplation of the Legislature [or in this case, the People]." (*Warden v. State Bar* (1999) 21 Cal.4th 628, 648; see also *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1201.) Procreation and paternity is not an obscure or absurd argument pulled out of a hat to confound gay marriage advocates (although we are aware many perceive it this way). It is the deep, broad reason why marriage in our tradition and in virtually every human culture is a sexual union of male and female.

The many people in California deeply attached to this traditional conception of marriage are entitled to expect the Court will at least consider the idea that it is rational for them to be concerned about changing the "definition and conception" of marriage and that concerns other than irrational animus may be motivating their desire to retain the traditional understanding of marriage.

At a minimum, this Court owes to the many Californians still deeply attached to this idea of marriage, an open explanation of when and how marriage ceased at law to be about procreation; to do even this minimum the Court must consider the record and evidence offered here.

E. No other proffered public purpose for marriage justifies the intrusion into intimate decisionmaking inherently a part of the special status of marriage.

Consider more indirect evidence that procreation is in fact a key public purpose of marriage: What possible other purpose powerful enough to justify governmental intrusion into people's intimate lives, by giving carrots only to those who love in a certain way?

If this Court willfully blinds itself the real "facts on the ground" that give rise to marriage, "civil marriage" becomes virtually unintelligible: A human right to have the government give a Good Housekeeping Seal of Approval to your most intimate, personal, and sacred relationships, if and only if they are (a) sexual relations and (b) not close family members, and (c) only come in pairs? What possible justification can the government have for dispensing special benefits only to adults who agree to live by and through this form?

The proferred alternative rationale for marriage—a state-sanctioned declaration of "the highest form of love"[3]—is, to put it mildly, odd. What business has the state of California determining for its citizens that the highest form of love is an exclusive sexual union of two people? If 'ordered liberty' means anything surely it means each individual has the right to define for him or herself what the 'highest form of love' consists of.

Unintelligibility and inarticulateness are the results of ignoring the clear, long, extensive legal record on the public purpose of marriage (as distinct from its many private uses): marriage as a natural human right, codified by California law, is the union of husband and wife, because only such a union can both produce children and connect them to their natural mother and father.

F. The Attorney General is not entitled to special deference by this Court in defining the scope, nature, or essential legal attributes of a fundamental human right.

1. Marriage as a fundamental human right is the right of an adult to enter a sexual union with a member of the opposite sex and to have care and custody of any children that sexual union produces.

Marriage as a fundamental human right is acknowledged by both U.S. and international human rights law to be grounded in its natural

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[3] San Francisco Open. Br. at p.53 ["I wanted my parents to get married because marriage is the way to show the highest form of love to someone."] [Statement of Michael Allen Quenneville, son of one of the plaintiff couples].

relationship to procreation, and this Court does not owe special deference to the executive branch in ascertaining the nature, scope, purpose, and essential legal attributes of a fundamental human right.

(A) *The Universal Declaration of Human Rights acknowledges that the human right to marry is a natural right of men and women to create families together.*

> Men and women of full age, without any limitation due to race, nationality, or religion, have the right to marry and to found a family. . . . The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

United Nations, Universal Declaration of Human Rights, Art. 16 §§ 1, 3.

The opposite-sex nature of the union, and its natural, inherent relationship to founding a family, were taken for granted at the time. But more recent court rulings in international courts have affirmed this basic view.

(i) The United Nation's Human Rights Committee recognizes the right to marry as intrinsically the right to marry and found a family with a person of the opposite sex.

Article 23, paragraph 2 of the International Covenant on Civil and Political Rights states "The right of men and women of marriageable age to marry and to found a family shall be recognized."[4] In a recent (2002)

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[4] United Nations High Commissioner for Human Rights, *International Covenant on Civil and Political Human Rights*, Art. 23, § 2 (entry into force 23 March 1976).

ruling, the United Nation's Human Rights Committee affirmed that the internationally recognized civil right of marriage created by the treaty confers the obligation on states "to recognize as marriage only the union between a man and a woman wishing to marry each other." *Joslin v. New Zealand*, (Communication No. 902/1999) (17 July 2002), U.N. Doc. CCPR/C/75/D/902/1999.

(ii) The European Court of Human Rights recognizes that the human right to marry is related to the natural ability of men and women to found families.

The European Convention on Human Rights states: "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."[5] The European Court of Human Rights has repeatedly held that "the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite biological sex."[6] In 2003, the European Court of Justice acknowledged this reading of Article 12, describing as "fact" that "Article

[5] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms* (CPHRFF), art. 12 (also referred to as the "European Convention on Human Rights).

[6] *Rees v. United Kingdom* (1987) 9 E.H.R.R. 56 at ¶49; see also *Cossey v. United Kingdom* (1991) 13 E.H.R.R. 622 at ¶43; *Sheffield and Horsham v. United Kingdom* (1999) 27 E.H.R.R. 163 at ¶66.

12 of the European Convention on Human Rights protects only marriage between two persons of opposite biological sex."[7]

(B) *The U.S. Supreme Court's rulings affirming and describing the fundamental human right to marry assume and affirm this right is importantly related to procreation.*

In articulating the human right to marry, the Supreme Court has clearly articulated the link to procreation. In *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541, the Court noted, "Marriage and procreation are fundamental to the very existence and survival of the race." Even earlier, the Court spoke of marriage more generally, linking it to the very existence of civilization: "[Marriage] is the foundation of the family and of society, without which there would be neither civilization nor progress." *Maynard v. Hill* (1888) 125 U.S. 190, 211. The Court echoed this view in *Loving v. Virginia,* writing, "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Loving v. Virginia* (1967) 388 U. S. 1, 12 [quoting *Skinner v. Oklahoma, supra* 316 U.S. at p. 541 and citing *Maynard v. Hill, supra,* 125 U.S. 190].) It is hard to see how marriage could be considered fundamental to our very existence and survival if it were not understood to be related to making and caring for the next generation. Moreover in *Loving*, Virginia's argument offering miscegenation as a purpose of interracial marriage bans (in order to keep

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[7] *K.B. v. National Health Service Pensions Agency, et al*. (10 June 2003) Case No. C-117/01, 2003 ECJ CELEX LEXIS 650 at ¶ 55.

races separate and distinct, a purpose properly rejected by the Supreme Court) underscores the extent to which courts understood that the right to marry was intrinsically connected to procreation, for absent this connection the argument becomes unintelligible.

In *Zablocki v. Redhail* (1978) 434 U.S. 374, 383-84, the Court again quoted and cited *Skinner, supra,* 316 U.S. at p. 541, *Maynard*, *supra,* 125 U.S. at pp. 205, 211*, and Loving v. Virginia*, *supra,* 388 U.S. at p. 12. The *Zablocki* Court also proceeded to quote *Meyer v. Nebraska* (1923) 262 U.S. 390, 399, noting that the right "to marry, establish a home and bring up children" is part of the constitutional right protected under a Due Process analysis.[8]

As the Maryland Supreme Court recently summarized the U.S. Supreme Court's right to marry jurisprudence:

> All of the cases infer that the right to marry enjoys its fundamental status due to the male-female nature of the relationship and/or the attendant link to fostering procreation of our species. . . . Thus, virtually every Supreme Court case recognizing as fundamental the right to marry indicates as the basis for the conclusion the institution's inextricable link to procreation, which necessarily and biologically involves

[8] Even in *Turner v. Safley* (1987) 482 U.S. 78, although the Court did not specifically include procreation among the list of marital purposes which could be satisfied by inmate marriages, the Court did note that one governmental purpose of marriage is the "legitimation of children born out of wedlock," contrasting this governmental benefit of marriage with the "religious and personal aspects of the marital commitment." (*Id.* at pp. 95-96.) The *Turner* Court's failure to clearly distinguish between the public and the merely private, individual purposes of marriage introduced confusion into the American jurisprudence on the right to marry.

> participation (in ways either intimate or remote) by a man and a woman. *Andersen*, 138 P.3d at 978 ("Nearly all United States Supreme Court decisions declaring marriage to be a fundamental right expressly link marriage to fundamental rights of procreation, childbirth, abortion, and child-rearing.").

(*Conaway v. Deane,* No. 44, Sept. Term 2006 (Md., Sept. 18, 2007) 2007 WL 2702132 at p. *27 [quoting *Andersen v. King County* (Wash. 2006) 138 P.3d 963].)

(C) *California courts have held that the natural human right to marry itself (and not merely the statutes that codify that right) is related to procreation.*

This Court's rulings on the human right of marriage have on multiple occasions agreed with overarching national and international articulations of that fundamental right, holding that "the first purpose of matrimony, *by the laws of nature and society*, is procreation." (*Baker v. Baker* (1859) 13 Cal. 87, 103 [emphasis added].)

This Court's ruling in *Perez v. Sharp* (1948) 32 Cal.2d 711, clearly assumes and affirms that procreation is a key purpose of marriage in California law, even though other sexual and family relationships are legal.

The *Perez* Court specifically noted that:

> Furthermore, there is no ban on illicit sexual relations between Caucasians and members of the proscribed races. Indeed, it is covertly encouraged by the race restrictions on marriage.
>
> Nevertheless, respondent has sought to justify the statute by contending that the prohibition of intermarriage between Caucasians and members of the specified races prevents the

> Caucasian race from being contaminated by races whose members are by nature physically and mentally inferior to Caucasians.

(*Perez v. Sharp, supra*, 32 Cal.2d at p.722.)

In other words, even though it was legal for interracial couples to have sex and to have children, the Court's decision makes it clear that marriage is still in some special way related to procreation. The extensive discussion (and rejection) of the eugenics concerns proffered in defense of the marriage law were never based on the fact that marriage is unrelated to procreation—its relationship to progeny is taken as a given. For example:

> Respondent contends, however, that persons wishing to marry in contravention of race barriers come from the 'dregs of society' and that their progeny will therefore be a burden on the community. There is no law forbidding marriage among the 'dregs of society,' assuming that this expression is capable of definition. If there were such a law, it could not be applied without a proper determination of the persons that fall within that category, a determination that could hardly be made on the basis of race alone.

(*Id.* at p. 724.)

> Again:
>
> Respondent contends that even if the races specified in the statute are not by nature inferior to the Caucasian race, the statute can be justified as a means of diminishing race tension and *preventing the birth of children* who might become social problems."
>
> *(Ibid*. [emphasis added].)[9]

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[9] See also *Perez v. Sharp*, *supra,* 32 Cal.2d at p. 726 ["It is contended that interracial marriage has adverse effects not only upon the parties thereto but

Similarly the fundamental right to marry considered by the Court was clearly presumed to be intimately related to procreation:

> The right to marry is as fundamental as the right to send one's child to a particular school or the right to have offspring. 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.'

Perez at 715 (quoting *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541).

It is hard to see how this Court could have concluded that marriage is fundamental "to the very existence and survival of the race," if its critical functions did not include managing the procreative potential of sexual unions successfully. And once again the Court took for granted, while dismissing the eugenics provisions offered in support of bans on interracial marriage as race classifications, the long-embedded assumptions about the relationship between marriage and procreation that alone render these arguments intelligible.

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upon their progeny. Respondent relies on *Buck v. Bell*, 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000, for the proposition that the state 'may properly protect itself as well as the children by taking steps which will prevent the birth of offspring who will constitute a serious social problem, even though such legislation must necessarily interfere with a natural right.' That case, however, involved a statute authorizing sterilization of imbeciles following scientific verification and the observance of procedural guarantees. . . . The racial categories in the miscegenation law are as illogical and discriminatory as those condemned by the Supreme Court in *Skinner v. Oklahoma*; and there is a corresponding lack of a fair hearing."].

II. CALIFORNIA COURTS HAVE REPEATEDLY AFFIRMED THAT PROCREATION IS A PRIMARY PURPOSE OF MARRIAGE.

It is simply not credible to state that marriage has never been about procreation, but was instead "designed to discriminate against lesbians and gay men." (San Francisco Open. Br. at p. 58.)

A. California court rulings have repeatedly affirmed that procreation is a primary purpose of marriage in California law.

Procreation has long been held a key purpose of marriage in California. For example in *Baker v. Baker* (1859), Justice Field, writing for this Court, held that "the first purpose of matrimony, by the laws of nature and society, is procreation." (*Baker v. Baker* (1859) 13 Cal. 87, 103.) In *Sharon v. Sharon* (1888) the Court cited a treatise stating "the procreation of children under the shield and sanction of the law" is one of the "two principal ends of marriage." (*Sharon v. Sharon* (1888) 75 Cal. 1, 33 [quoting Stewart on Marriage and Divorce, sec. 103].)

This interest of the state linking marriage and procreation was spelled out in *De Burgh v. De Burgh* (1952) 39 Cal.2d 858, 863-64:

> The family is the basic unit of our society, the center of the personal affections that ennoble and enrich human life. It channels biological drives that might otherwise become socially destructive; it ensures the care and education of children in a stable environment; it establishes continuity from one generation to another; it nurtures and develops the individual initiative that distinguishes a free people. Since the family is the core of our society, the law seeks to foster and preserve marriage.

The Second Appellate District held, in *Vileta v. Vileta* (1942), "[The] concealment of . . . sterility is a fraud that vitiates the marriage contract." (*Vileta v. Vileta* (1942) 53 Cal.App.2d 794, 796.) Three years later, the court quoted *Baker*, holding that the "first purpose of matrimony, by the laws of nature and society, is procreation." (*Schaub v. Schaub* (1945) 71 Cal.App.2d 467, 478.)

In *Aufort v. Aufort*, the Court of Appeals, again quoting *Baker*, declared: "Again, the first purpose of matrimony, by the laws of nature and society, is procreation." (*Aufort v. Aufort* (1935) 9 Cal. App. 2d 310, 311.) In *Maslow v. Maslow*, the Second Appellate District flatly called procreation "[o]ne of the prime purposes of matrimony." (*Maslow v. Maslow* (1953) 117 Cal.App.2d 237, 241.)

B. The law of marital annulments provides strong legal evidence that procreation goes to the essential of the marriage contract under California law.

Further evidence comes from the law of marital annulments. California courts have repeatedly ruled that misrepresentations of one's capacity or willingness to procreate are grounds for annulment. (See, e.g., *In re Marriage of Meagher and Maleki* (2005) 131 Cal.App.4th 1 ["[A]nnulments on the basis of fraud are generally granted only in cases where the fraud related in some way to the sexual or procreative aspects of marriage."]; *Mayer v. Mayer* (1929) 207 Cal. 685, 695 [annulment may be

granted where one party conceals intent not to consummate the marriage]; *Aufort v. Aufort* (1935) 9 Cal.App.2d 310 [annulment granted where one spouse concealed known sterility from the other]; *Vileta v. Vileta* (1942) 53 Cal.App.2d 794 [annulment granted where one spouse concealed known sterility from the other].)

But marital annulments are profoundly discouraged at law. (*Bruce v. Bruce* (1945) 71 Cal.App.2d 641, 643 ["It is settled law in this state that a marriage may only be annulled for fraud if the fraud relates to a matter which the state deems vital to the marriage relationship."].) Material fraud is not enough. Courts will not annul a marriage on the basis of fraudulent representations regarding love, money, or character.[10] Courts have even found that, although sexually transmitted diseases are grounds for

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[10] *See, e.g., Marshall v. Marshall* (1931) 212 Cal. 736 [petition for annulment denied where based only on misrepresentation as to husband's wealth]; *Gerardi v. Gerardi* (D.D.C. 1946) 69 F. Supp. 296, 296-97 [denying annulment when defendant husband wrote, "To tell the truth I was never in love with you, but it was good while it lasted"]; *Williams v. Williams* (Del. Super. Ct. 1922) 118 A. 638, 639 [denying annulment when husband had falsely represented himself to be "a man of large independent means [who] controlled certain patents which, of themselves, would make him wealthy"]; *Heath v. Heath* (N.H. 1932) 159 A. 418, 425 [denying annulment when "the charges of falsehood are of sober and industrious habits and sexual virtue in respect to character, of savings in respect to material worth, and of law-abiding conduct when there had been a conviction for the crime of adultery"]. Courts appear to have made an exception to this general rule, however, when one party has concealed a prior felony conviction. *Douglass v. Douglass* (1957) 148 Cal.App.2d 867.

annulment, concealment of diseases that do not affect the sexual relation are not.[11]

As Ira Ellman, Paul Kurtz, and Elizabeth Scott explain in their recent family law treatise:

> [C]ourts are very reluctant to grant fraud annulments. Rather than applying ordinary contracts doctrine, under which fraud exists if either party make a material misrepresentation causing the other's consent, courts traditionally require a misrepresentation concerning the "essentials" of marriage. . . misrepresentations concerning wealth, temper or character ordinarily are not grounds for annulment. By contrast, misrepresentation about a party's fertility, or willingness or ability to engage in sexual relations, goes to the essentials.

(Ellman, et al., *Family Law: Cases, Texts, Problems* (3d ed. 1998) at pp. 118-19.)

Thus, the fact that California courts have consistently found that misrepresentations about the capacity or willingness to procreate are grounds for annulment is unusually powerful evidence that procreation is a key purpose of marriage in the state of California.

This Court's current analysis must begin by recognizing that for many generations past, in cases far removed from any possible animus

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[11] See, e.g., *Nerini v. Nerini* (Super. Ct. 1943) 11 Conn. Supp. 361, 367 ["misrepresentations concerning one's health . . . are immaterial unless they involve the essentialia to the marriage relation such as a physical impediment making impossible the performance of the duties and obligations of the relation or rendering its assumption and continuance dangerous."]; see also *Lyon v. Lyon* (Ill. 1907) 82 N.E. 850; *Richardson v. Richardson* (Mass. 1923) 140 N.E. 73; *Lapides v. Lapides* (N.Y. 1930) 171 N.E. 911 [each denying an annulment where one party had concealed his or her epilepsy].

towards gays and lesbians, Californians in law and society have routinely asserted that one of the key purposes of marriage law is procreation.

C. The legal structure of marriage in California points to its relationship to procreation.

Evidence of this public purpose is built into the very legal structure of marriage. The legal elements of marriage in California that point to procreation and paternity as a key purpose include its definition: not just any committed and caring relationship of adults, but a sexually exclusive union of male and female, in which the law presumptively holds mother and father jointly responsible for any children born to the wife. (Calif. Fam. Code § 7540.) Moreover, this presumption of paternity is rebuttable by a finding that the father is not the biological parent of the child, clearly connecting the sexual relationship of the adults to the biological capacity to create new life, and the joint parenting responsibilities of the married couple. (Calif. Fam. Code § 7541(a).) Similarly, the prohibitions on consanguinity also point to the State's conception of marriage as a sexually exclusive union that can and often does give rise to children. (Calif. Fam. Code § 2200 [Incestuous marriages].)

If, as Petitioners suggest, the purpose of marriage in California is primarily a state-sanctioned declaration of personal love and commitment, then marriage clearly fails their own rational basis standard for both same-sex and opposite-sex couples, since there are many single people in loving

and committed relationships, some married people who are not especially loving, and many kinds of loving, intimate and familial relationships that involve more than two people that are not recognized as marriages, or offered its governmental benefits.

D. California's marriage law is part of a broader legal tradition; Rulings in other states and in the federal courts also clearly establish that procreation is one of the key state purposes in marriage

Courts throughout the United States clearly and repeatedly asserted procreation as a key state interest in marriage, even though, throughout this period, sterility or age was never a bar to marriage.

Numerous courts from across the country have articulated the same understanding of the purpose of the law of marriage, for example:[12] *Poe v. Gerstein* (5th Cir. 1975) 517 F.2d 787, 796 ["[P]rocreation of offspring could be considered one of the major purposes of marriage. . . ."]; *Singer v. Hara* (Wash. App. 1974) 522 P.2d 1187, 1195 ["[M]arriage exists as a protected legal institution primarily because of societal values associated

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[12] Courts throughout the United States clearly and repeatedly asserted procreation as a key state interest in marriage, even though, throughout this period, sterility or age was never a bar to marriage (although impotence was). See Laurence Drew Borten, *Sex, Procreation, and the State Interest in Marriage* (2002) 102 Colum. L. Rev. 1089, 1109 ["No state permits annulment or divorce on the basis of infertility per se. Courts have, not surprisingly rejected claims that 'impotence' encompasses those who have the capacity to copulate but are infertile."]. As an 1898 New York court put it, "[I]t has never been suggested that a woman who has undergone [menopause] is incapable of entering the marriage state." (*Wendel v. Wendel* (2d Dept. 1898) 30 A.D. 447, 449.)

with the propagation of the human race."]; *Baker v. Nelson* (Minn. 1971) 191 N.W.2d 185, 186, *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972) ["The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis."]; *Heup v. Heup* (Wis. 1969) 172 N.W.2d 334, 336 ["Having children is a primary purpose of marriage."]; *Zoglio v. Zoglio* (D.C. App. 1960) 157 A.2d 627, 628 ["One of the primary purposes of matrimony is procreation."]; *Stegienko v. Stegienko* (Mich. 1940) 295 N.W. 252, 254 [stating that "procreation of children is one of the important ends of matrimony"]; *Gard v. Gard* (Mich. 1918) 169 N.W. 908, 912 ["It has been said in many of the cases cited that one of the great purposes of marriage is procreation."]; *Grover v. Zook* (Wash. 1906) 87 P. 638, 639 ["One of the most important functions of wedlock is the procreation of children."]; *Adams v. Howerton* (C.D. Cal. 1980) 486 F. Supp. 1119, 1124, aff'd on other grounds (9th Cir. 1982) 673 F.2d 1036 [observing that a "state has a compelling interest in encouraging and fostering procreation of the race"); *Dean v. District of Columbia* (D.C. 1995) 653 A.2d 307, 337 (Ferren, J., concurring and dissenting) [finding that this "central purpose . . . provides the kind of rational basis . . . permitting limitation of marriage to heterosexual couples"].

E. Virtually every known human society also links marriage with procreation and paternity.

Moreover, marriage is a virtually universal human institution. Although marriage traditions vary greatly, marriage is everywhere recognizably related to furthering the goals of procreation and paternity. "Although the details of getting married – who chooses the mates, what are the ceremonies and exchanges, how old are the parties – vary from group to group, the principle of marriage is everywhere embodied in practice. . . . The unique trait of what is commonly called marriage is social recognition and approval . . . of a couple's engaging in sexual intercourse and bearing and rearing offspring." (Kingsley Davis (ed.), *Contemporary Marriage: Comparative Perspectives on a Changing Institution* (New York: Russell Sage Foundation, 1985) p. 5.)[13]

Even societies that institutionalized same-sex relations in some contexts did not typically define these relations as marriages.[14] Even these societies recognized the need for a distinct social institution dedicated to

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[13] See also, Helen Fisher, *Anatomy of Love: A Natural History of Mating, Marriage and Why We Stray* (1992) pp. 65-66; George P. Murdock, *Social Structure* (1949).

[14] For example, "Transgenerational homosexual relations have been studied most thoroughly in New Guinea and parts of island Melanesia, where, in a number of cultures, they are a part of boys' initiation rites, and are thus fully institutionalized. . . . After leaving his mother's hut at age twelve to thirteen to take up residence in the men's house, Marind-Anim boy enters into a homosexual relationship with his mother's brother, who belongs to a different lineage from his own. The relationship endures for roughly seven years, until the boy marries." (David F. Greenberg, *The Construction of Homosexuality* (University of Chicago Press, 1988) pp. 27-28.)

managing sexual relationships between men and women in the interests of securing procreation and paternity.

In this sense, and as a matter of historical record, marriage is clearly not rooted in animus towards gay and lesbian people or their relationships. It has its own historic dignity and purpose, rooted in real and enduring human realities.

We are perhaps belaboring the obvious in pointing out how deeply, and in how many ways in the legal record, marriage in California and the United States has always been both held and assumed to be related to procreation. We are forced to do so because what is obviously in the record has been ignored by the appellate court, which did not so much reject the argument as refuse even to consider the powerful evidence for it.

F. The state interest in marriage known as "procreation" does not consist of encouraging reproduction in any and all circumstances, but rather encouraging reproduction in family unions where children will be raised and loved by their own mothers and fathers.

What do these various courts mean by asserting that one key purpose of marriage is procreation? Surely not that, in any literal sense, *only* a husband and wife can make a baby. Human beings (and American courts) have long known that marriage is not technically required for making a baby, that sexual acts outside of marriage can and frequently do produce children.

Instead, courts and society have seen marriage to be about two related things: procreation and paternity, or creating children who are raised by their own mothers and fathers in the same family union. As one commentator notes, "This concern with illegitimacy was rarely spelled out, but discerning it clarifies why courts were so concerned with sex within marriage and renders logical the traditional belief that marriage is intimately connected with procreation even as it does not always result in procreation." (Laurence Drew Borten, *Sex, Procreation, and the State Interest in Marriage* (2002) 102 Colum. L. Rev. 1089, 1114-15.)

Marriage thus simultaneously encourages procreation in the ideal context and reduces the number of men and women at risk of producing children outside of wedlock, where children in fatherless households would suffer disadvantages and hardships themselves, and at the same time impose financial hardships and social costs on third parties and society.[15]

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[15] "Divorce and unwed childbearing create substantial public costs paid by taxpayers. Higher rates of crime, drug abuse, education failure, chronic illness, child abuse, domestic violence, and poverty among both adults and children bring with them higher taxpayer costs in diverse forms: more welfare expenditure; increased remedial and special education expenses; higher day-care subsidies; additional child-support collection costs; a range of increased direct court administration costs incurred in regulating post-divorce or unwed families; higher foster care and child protection services; increased Medicaid and Medicare costs; increasingly expensive and harsh crime-control measures to compensate for formerly private regulation of adolescent and young-adult behaviors; and many other similar costs. While no study has yet attempted precisely to measure these sweeping and diverse taxpayer costs stemming from the decline of marriage, current research suggests that these costs are likely to be quite extensive." (*The Marriage*

The fact that men and women can and do procreate outside of marriage is not evidence that marriage is not really about procreation. To the contrary, this is the very problem that, in this and every known human society, marriage as a social institution, and a special legal status, attempts to ameliorate.

We are not arguing that procreation is the only justification for marriage. American jurists were drawing on an older common law tradition that had roots in long-standing philosophical discourse that understood the word "procreation" to refer to more than the mere physical generation of children's bodies.

> Procreation, however, means more than just conceiving children. It also means rearing and educating them for spiritual and temporal living—a common Stoic sentiment. The good of procreation cannot be achieved in this fuller sense simply through the licit union of husband and wife in sexual intercourse. It also requires maintenance of a faithful, stable, and permanent union of husband and wife for the sake of their children.

(John Witte, Jr., *Propter Honoris Respectum: The Goods and Goals of Marriage* (2001) 76 Notre Dame L. Rev. 1019, 1035.)

This historic cultural synthesis, which views marriage as a loving sexual union that has as a core purpose encouraging men and women to make and rear the next generation together, continues to hold. (See Norval D. Glenn, *With this Ring: A Survey on Marriage in California* (National

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Movement: A Statement of Principles (New York: Institute for American Values, 2000).)

Fatherhood Initiative: Gaithersburg, MD, 2004) pp. 18-19 (available at https://www.fatherhood.org/marriagesurvey.asp) (last visited September 10, 2007) [75 percent of Californians agree that marriage should both promote adult happiness and "produce[ ] children who are well adjusted and who will become good citizens."].)

The claim that this link between marriage as a male-female sexual bond and procreation is today so irrational that no sane or well-intentioned legislator could ever entertain it and that procreation is *merely a pretext* for other, more invidious and undeclared motives is difficult to credit. As the New York Court of Appeals recently held in *Hernandez v. Robles,* "A court should not lightly conclude that everyone who held this belief was irrational, ignorant or bigoted." (*Hernandez v. Robles* (N.Y. 2006) 855 N.E.2d 1, 8.)

Moreover, the *Goodridge* decision finding no rational relation between marriage and procreation is a notable exception in American law. (*Goodridge v. Dept. of Publ. Health* (Mass. 2003) 798 N.E.2d 941.) At least eight other state and federal courts within the last ten years have ruled there is a rational relation between the states' definition of marriage and procreation, including recent decisions from the high courts of Maryland, New York, and Washington, as well as the U.S. Court of Appeals for the 8th Circuit. (*Conaway v. Deane,* No. 44, Sept. Term 2006 (Md., Sept. 18, 2007) 2007 WL 2702132; *Hernandez v. Robles* (N.Y. 2006) 855 N.E.2d 1;

Andersen v. King County (Wash. 2006) 138 P.3d 963; *Citizens for Equal Prot. v. Bruning* (8th Cir. 2006) 455 F.3d 859.) As the New York court clearly articulated:

> [T]he Legislature could rationally decide that, 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. . . . . The Legislature could find that unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples, and thus that promoting stability in opposite-sex relationships will help children more.

Hernandez v. Robles (N.Y. 2006) 855 N.E.2d 1, 7.

The Washington Supreme Court came to the same conclusion: "We conclude that limiting marriage to opposite-sex couples furthers the State's interests in procreation and encouraging families with a mother and father and children biologically related to both." (*Andersen v. King County* (Wash. 2006) 138 P.3d 963, 985.) The 8th Circuit agreed: "We hold that § 29 and other laws limiting the state-recognized institution of marriage to heterosexual couples are rationally related to legitimate state interests and therefore do not violate the Constitution of the United States." (*Citizens for Equal Prot. v. Bruning* (8th Cir. 2006) 455 F.3d 859*,* 871.) The court held that the Nebraska amendment defining marriage as the union of a man and a woman was related to the state's interest in "steering procreation into marriage," through "laws [that] encourage procreation to take place within

the socially recognized unit that is best situated for raising children." (*Id.* at p. 867.)

The Indiana Court of Appeals explained the connection using a "responsible procreation" analysis: "The State, first of all, may legitimately create the institution of opposite-sex marriage, and all the benefits accruing to it, in order to encourage male-female couples to procreate within the legitimacy and stability of a state-sanctioned relationship and to discourage unplanned, out-of-wedlock births resulting from 'casual' intercourse." (*Morrison v. Sadler* (Ind. App. 2005) 821 N.E.2d 15, 24.)[16]

If these diverse, disinterested judges in many other states can still see a potentially rational relation between procreation and the state's definition of marriage as the union of husband and wife, *then so too could the people of California*. The spirit if not the letter of comity forbids attributing irrationality or malice to so many sister jurisdictions.

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[16] See also *Wilson v. Ake* (M.D. Fla. 2005) 354 F. Supp. 2d 1298, 1309 ["[T]his court … is bound by the Eleventh Circuit's holding that encouraging the raising of children in homes consisting of a married mother and father is a legitimate state interest. . . . DOMA is rationally related to this interest."]; *In re Kandu* (Bankr. W.D. Wash. 2004) 315 B.R. 123, 146 ["Authority exits [*sic*] that the promotion of marriage to encourage the maintenance of stable relationships that facilitate to the maximum extent possible the rearing of children by both of their biological parents is a legitimate congressional concern."]; *Standhardt v. Superior Court* (Ariz. App. Div. 1, 2003) 77 P.3d 451, 463-64 (review denied 2004 Ariz. LEXIS 62, May 25, 2004) ["We hold that the State has a legitimate interest in encouraging procreation and child-rearing within the marital relationship, and that limiting marriage to opposite-sex couples is rationally related to that interest."].

G. The State and Petitioners err in asserting the recent developments in California law have repudiated procreation as a public purpose of marriage.

The purpose of a domestic partnership statute is to maximize benefits to same-sex couples while minimizing changes in California's marriage tradition. The decision to retain the traditional understanding of marriage is not primarily a judgment about individuals' moral capacities but rather about the public meaning and purpose of an institution. At law, in our history, and in the current public understanding, "a union of husband and wife" is not the entry requirement into something separate called marriage, but a substantive part of what marriage *is*. Petitioners seek the cultural and social associations of marriage—that is, not the benefits conferred by law (which they have already received), but the shared social understanding in the minds of fellow citizens. The way to achieve that end is to persuade their fellow citizens, and not this Court. [17]

1. California adoption and foster care laws do not repudiate the procreation as a purpose of marriage

[17] See Monte Neil Stewart & William C. Duncan, *Marriage and the Betrayal of* Perez *and* Loving, 2005 B.Y.U. L. Rev. 555, 560-61 ["[B]ecause social institutions are constituted by shared public meanings, they are necessarily changed when those meanings are changed and/or no longer sufficiently shared. Indeed, that is the only way a social institution can be changed."].

Adoption and foster care are legal institutions that arise to cope with the consequences of family fragmentation: They exist to protect children, not to further adult interests in creating family forms of choice.[18]

Children available for adoption or foster care typically do not have even one parent able and willing to care for them. The State could reasonably decide that public policy favors any competent adoptive parent or parents for a parentless child, without necessarily affirming or even implying that the State no longer cares whether children of sexual unions, created by bodies in passion, are raised by their natural mother and father.

Indeed, in *Sharon S. v. Superior Court,* the Court noted this child-centered focus, observing: "The basic purpose of an adoption is the 'welfare, protection and betterment of the child,' and adoption courts ultimately must rule on that basis. . . . Second parent adoption can secure the salutary incidents of legally recognized parentage for a child of a nonbiological parent who otherwise must remain a legal stranger." (*Sharon S. v. Superior Court* (2003) 31 Cal. 4th 417, 437.)

III. THE STATE'S DECLARED INTEREST IN MARRIAGE IS NOT ONLY LEGITIMATE, IT IS COMPELLING.

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[18] This child-centered focus of adoption law is well-established in California. Among other requirements, in every adoption the judge must find that "the interest of the child will be promoted by the adoption." (Calif. Fam. Code § 8612.)

Social science evidence supports the conclusion that the state's ongoing interest in marriage is not only legitimate, it is compelling.

A. Procreation is not only a legitimate state purpose but a compelling one.

It is uncontroversial to note that the welfare of children is a compelling governmental interest. In *Adoption of Kelsey S.* (1992) 1 Cal. 4th 816, this Court was even more specific, highlighting the State's interest in protecting children born out of wedlock:

> There is no dispute that "The State's interest in providing for the well-being of illegitimate children is an important one." . . . [T]he problems and needs of children born out of wedlock are an undisputed reality. The state has an important and valid interest in their well-being.
>
> (*Id.* at 844 [quoting *Caban v. Mohammed* (1979) 441 U.S. 380, 391].)

If it is true, as the research noted below (section III.D) suggests, that there is something unique about the bond between a child and his or her biological parents, then the legal structure of marriage is the least restrictive means of furthering that compelling interest. Indeed, several courts have reached this conclusion.

In *Adams v. Howerton*, the federal district court simply noted that a "state has a compelling interest in encouraging and fostering procreation of the race." (*Adams v. Howerton* (C.D. Cal. 1980) 486 F. Supp. 1119, 1124, *aff'd on other grounds* (9th Cir. 1982) 673 F.2d 1036.)

B. Society needs babies

There are no signs that artificial reproduction can replace the natural sexual unions of male and female for this purpose. A large majority of modern democracies are now experiencing very low birthrates, causing increasingly urgent concern among scientific experts about the social, economic, and political consequences. The European Union's total fertility rate from 1995 to 2000, for example, was only 1.42 children per woman, sufficiently below the 2.1 replacement level that demographers label this "very low fertility."[19] In 2004, a U.N. demographer warned:

> A growing number of countries view their low birth rates with the resulting population decline and ageing to be a serious crisis, jeopardizing the basic foundations of the nation and threatening its survival. Economic growth and vitality, defense, and pensions and health care for the elderly, for example, are all areas of major concern.

Joseph Chamie, "Low Fertility: Can Governments Make a Difference?" (April 2, 2004) paper presented at the Annual Meeting of the Population Association of America, Boston Massachusetts.

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[19] John C. Caldwell & Thomas Schindlmayr, *Explanation of the Fertility Crisis in Modern Societies: A Search for Commonalities* (2003) 57(3) Population Studies 241, 241. "Lowest low fertility" is often defined as a total fertility rate of 1.3 or less. Hans-Peter Kohler, et al., *The Emergence of Lowest-Low Fertility in Europe During the 1990's* (2002) 28(4) Population & Development Rev. 641, 641; Population Division of the Department of Economic and Social Affairs of the United Nations Secretariat, *World Population Prospects: The 2002 Revision. Highlights* (New York: United Nations, February 26, 2003) at p. 4 (Table 2). North America, by contrast has near-replacement level fertility at 2.01 children per woman. *Id.*

A state interest that if not met jeopardizes "the basic foundation of the nation" and "threatens its survival" certainly must be deemed not only legitimate, but compelling.[20]

C. Sex between men and women still makes babies.

Second, numerous studies have shown that unintended pregnancy remains a common, not rare, consequence of male-female sexual relationships. Nationally, three-fourths of births to unmarried couples were unintended by at least one of the parents.[21] By their late thirties, 60 percent of American women have had at least one unintended pregnancy.[22] Almost 4 in 10 women aged 40-44 have had at least one unplanned birth.[23]

The existence of contraceptives thus does not eliminate the state's interest in encouraging voluntary marital sexual unions between men and women to other kinds of sexual unions between men and women. The vast majority of children born to a married couple will have a mother and a

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[20] See *Adams v. Howerton, supra*, 486 F. Supp. at p. 1124 [observing that a "state has a compelling interest in encouraging and fostering procreation of the race."].

[21] J. Abma, et al., *Fertility, Family Planning, and Women's Health: New Data from the 1995 National Survey of Family Growth* (National Center for Health Statistics, 1997) 23(19) Vital Health Stat. 28 (Table 17) [70.4 percent of births to married women were intended by both parents, compared to just 28 percent of births to unmarried mothers.].

[22] *Id.* at 28 (Table 3) [finding 60.0% of women aged 35-39 had had at least one unintended pregnancy].

[23] *Id.* at 28 (Table 3) [finding 38.1% of women aged 40-44 had had at least one unplanned birth].

father already committed to caring for them. Most children conceived in sexual unions outside of marriage (and all children of same-sex unions) will not.[24]

D. Children need mothers and fathers.

Child Trends (a leading and respected child research organization) sums up the current social science consensus on common family structures that have been well-studied using large, nationally representative databases:

> Research clearly demonstrates 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

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[24] 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) 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].)

> marriage. Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes. . . . There is thus value for children in promoting strong, stable marriages between biological parents.[25]

The risks to children when mothers and fathers do not get and stay married include: poverty,[26] suicide,[27] mental illness,[28] physical illness,[29]

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[25] Kristin Anderson 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* (June 2002) p. 1. This research brief on family structure does not compare outcomes for children raised by same-sex couples to children in other types of families.

[26] Sara McLanahan, *Family, State, and Child Well-Being* (2000) 26 Annual Rev. of Sociology 703; I. Sawhill, "Families at Risk," in H.H. Aaron & R.D. Reischauer (eds.) *Setting National Priorities* (1999) pp. 97-135; Mark R. Rank & Thomas A. Hirschl (1999) *The Economic Risk of Childhood in America: Estimating the Probability of Poverty Across the Formative Years*, 61 J. Marriage & Fam. 1058.

[27] Gregory R. Johnson, et al., *Suicide Among Adolescents and Young Adults: A Cross-National Comparison of 34 Countries* (2000) 30 Suicide & Life-Threatening Behavior 74; David Lester, *Domestic Integration and Suicide in 21 Nations, 1950-1985* (1994) XXXV Int'l J. of Comparative Sociology 131; David M. Cutler, et al., *Explaining the Rise in Youth Suicide* (2000) National Bureau of Economic Research Working Paper 7713.

[28] E. Mavis Hetherington & John Kelly, *For Better or For Worse: Divorce Reconsidered* (2002); Paul R. Amato, *Children of Divorce in the 1990s: An Update of the Amato and Keith (1991) Meta-Analysis* (2001) 15 J. of Fam. Psychol. 355; Ronald L. Simons, et al., *Explaining the Higher Incidence of Adjustment Problems Among Children of Divorce Compared with Those in Two-Parent Families* (1999) 61 J. Marriage & Fam. 1020; Andrew J. Cherlin, et al., *Effects of Parental Divorce on Mental Health Throughout the Life Course* (1998) 63 Am. Soc. Rev. 239.

[29] Ronald Angel & Jacqueline Worobey, *Single Motherhood and Children's Health* (1988) 29 J. Health & Soc. Behav. 38; Olle Lundberg, *The Impact of Childhood Living Conditions on Illness and Mortality in Adulthood* (1993) 36 Soc. Sci. & Med. 1047.

infant mortality,[30] lower educational attainment,[31] juvenile delinquency and conduct disorder,[32] adult criminality,[33] early unwed parenthood,[34] and lower life expectancy.[35]

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[30] J.A. Gaudino, Jr., et al., *No Fathers' Names: A Risk Factor for Infant Mortality in the State of Georgia* (1999) 48 Soc. Sci. & Med. 253; C.D. Siegel, et al., *Mortality from Intentional and Unintentional Injury Among Infants of Young Mothers in Colorado, 1982 to 1992* (1996) 150(10) Archives of Pediatric & Adolescent Med. 1077; Trude Bennett & Paula Braveman, *Maternal Marital Status as a Risk Factor for Infant Mortality* (1994) 26(6) Fam. Planning Perspectives 252; Trude Bennett, *Marital Status and Infant Health Outcomes* (1992) 35(9) Soc. Sci. & Med. 1179.

[31] See, e.g., Paul R. Amato, *Children of Divorce in the 1990s: An Update of the Amato and Keith (1991) Meta-Analysis* (2001) 15(3) J. Fam. Psychol. 355; William H. Jeynes, *The Effects of Several of the Most Common Family Structures on the Academic Achievement of Eighth Graders* (2000) 30(1/2) Marriage & Fam. Rev. 73; Sara McLanahan & Gary Sandefur, *Growing Up with a Single Parent: What Helps, What Hurts* (Cambridge, MA: Harvard University Press) (1994); Timothy J. Biblarz & Gregg Gottainer, *Family Structure and Children's Success: A Comparison of Widowed and Divorced Single-Mother Families* (2000) 62(2) J. Marriage & Fam. 533; Zeng-Yin Cheng & Howard B. Kaplan, *Explaining the Impact of Family Structure During Adolescence on Adult Educational Attainment* (1999) 7(2) Applied Behav. & Sci. Rev. 23; Dean Lillard & Jennifer Gerner, *Getting to the Ivy League* (1996) 70(6) J. Higher Educ. 206.

[32] Ross L. Matsueda & Karen Heimer, *Race, Family Structure and Delinquency: A Test of Differential Association and Social Control Theories* (1987) 52 Am. Soc. Rev. 171; Chris Coughlin & Samuel Vuchinich, *Family Experience in Preadolescence and the Development of Male Delinquency* (1996) 58(2) J. Marriage & Fam. 491.

[33] Cynthia Harper & Sara McLanahan, *Father Absence and Youth Incarceration* (August 1998) paper presented at the annual meeting of the American Sociological Association.

[34] E. Mavis Hetherington & John Kelly, *For Better or For Worse: Divorce Reconsidered* (2002); Catherine E. Ross & John Mirowsky, *Parental Divorce, Life-Course Disruption, and Adult Depression* (1999) 61(4) J. Marriage & Fam. 1034; Andrew J. Cherlin et al., *Parental Divorce in*

Research on children raised by same-sex couples is in its beginning stages. We do not have a single study based on nationally representative data that can tell us how the typical child raised from birth by a same-sex couples fares, compared to children in other family structures.[36] If future research shows that such children fare as well as children raised by married biological parents, the most likely explanation will point to the vast difference in the way in which opposite sex and same-sex couples become parents.

Childhood and Demographic Outcomes in Young Adulthood (1995) 32 Demography 299.

[35] J.E. Schwartz, et al., *Childhood Sociodemographic and Psychosocial Factors as Predictors of Mortality Across the Life-Span* (1995) 85 Am. J. Pub. Health 1237; Joan S. Tucker., et al., *Parental Divorce: Effects on Individual Behavior and Longevity* (1997) 73(2) J. Personality & Soc. Psychol. 381.

[36] See William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting and America's Children* (Fall 2005) 15(2) Future of Children 97, 104 ["What the evidence does not provide, because of the methodological difficulties we outlined, is much knowledge about whether those studied are typical or atypical of the general population of children raised by gay and lesbian couples. We do not know how the *normative* child in a same-sex family compares with other children."]; Nock Aff. ¶ 3, *Halpern v. Attorney General of Canada*, Case No. 684/00 (Ont. Sup. Ct. of Justice), available at http://marriagelaw.cua.edu/Law/cases/Canada/ontario/halpern/aff_nock.pdf (last visited September 11, 2007) ["Through this analysis I draw my conclusions that 1) all of the articles I reviewed contained at least one fatal flaw of design or execution; and 2) not a single one of those studies was conducted according to generally accepted standards of scientific research."]; Diana Baumrind, *Commentary on Sexual Orientation: Research and Social Policy Implications* (1995) 31(1) Developmental Psychol. 130.

The State does not have the same interests at stake in regulating same-sex and opposite-sex sexual unions, because same-sex couples become parents only after much deliberation and joint consultation, at much greater expense, and/or by bringing a potential third party or parties into the relationship. Their sexual unions do not produce children. Meanwhile there remains a pressing urgent need to ensure that children created by acts of passion are protected and cared for by their parents. For better and/or worse, same-sex and opposite sex couples are simply not similarly situated with respect to the great public purposes of marriage.

IV. THE REDEFINITION OF MARRIAGE WOULD RADICALLY TRANSFORM THE PUBLIC NATURE, MEANING AND PURPOSE OF THE INSTITUTION, SEVERING ITS RELATIONSHIP IN THE PUBLIC MIND TO ITS HISTORIC PUBLIC ROLE IN FURTHERING "PROCREATION AND PATERNITY."

As one commentator put it:

> Same-sex marriage in Massachusetts is not merely about opening a new set of legal benefits to more individuals. . . . The meaning of marriage itself must change. . . . The procreative potential of sexual unions must be reduced from the great, brute, obvious, important fact it has been through most of human history, to a minor, not very significant feature of human relationships, largely unrelated to any key purpose of marriage.

(Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman* (2004) 2 U. St. Thomas L.J. 33, 59-60.)

Among the consequences reasonably foreseeable by the legislature and the People of California:

A. Marriage will become disconnected from "procreation and paternity" in the public mind.

Many gay marriage advocates argue that same-sex marriage will work a radical transformation in the public understanding of marriage, and they applaud it for that reason.[37] For example, same-sex marriage activist E.J. Graff argues that "[i]f same-sex marriage becomes legal, that venerable institution will ever after stand for sexual choice, for cutting the link between sex and diapers." (E.J. Graff, "Retying the Knot," in *Same-Sex Marriage: Pro and Con: A Reader* (Andrew Sullivan ed., 1st ed., Vintage Books 1997) p. 136.)

Judith Stacey, sociology professor at New York University argues:

> Legitimizing gay and lesbian marriages would promote a democratic, pluralist expansion of the meaning, practice, and

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[37] As Professor Douglas Kmiec notes, some advocates of same-sex marriage contend that there never has been any link between marriage and procreation, or that such a link no longer exists today. Criticizing such claims, Kmiec writes: "In truth, the advocates of same-sex marriage cannot genuinely mean that procreation has not been, in fact, linked with marriage. Rather, what same-sex partisans actually mean is that they would prefer procreation not to be associated with the marital estate. . . . Sexual reproduction for the human species is not merely one of several equally attractive ways to bring forth a child, it is the assumed way. It is no coincidence that those with religious beliefs that correspond most strongly with a traditional understanding of marriage as linked to procreation do, indeed, have the most children." (Douglas W. Kmiec, *The Procreative Argument for Proscribing Same-Sex Marriage* (2004) 32 Hastings Const. L.Q. 653, 660.)

> politics of family life in the United States . . . [P]eople might devise marriage and kinship patterns to serve diverse needs. . . . Two friends might decide to "marry" without basing their bond on erotic or romantic attachment. . . . Or, more radical still, perhaps 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?

Judith Stacey, "Gay and Lesbian Families: Queer Like Us," in Mary Ann Mason, et al. (eds.), *All Our Families: New Policies for a New Century* (Oxford U. Press 1998) pp. 128-29.

Former NYU professor Ellen Willis described same-sex marriage as "an improvement over the status quo," in that "conferring the legitimacy of marriage on homosexual relations will introduce an implicit revolt against the institution to its very heart, further promoting the democratization and secularization of personal and sexual life." "For starters, if homosexual marriage is OK, why not group marriage--which after all makes a lot of sense when the economic and social fragility of the family is causing major problems?" (Ellen Willis, contribution to "Can Marriage Be Saved? A Forum," *Nation*, July 5, 2004, pp. 16-17.)

Of course not all gay marriage advocates wish to radically transform the meaning of marriage, but that so many highly credentialed gay marriage

advocates believe that it will, makes it clear it is equally reasonable for the people of California (and state legislators) to express similar concerns.

B. Accepting Petitioners' reasoning on the fundamental right to marry "the person of one's choice" will offer new support for polygamy in culture and possibly law.

If individuals have a right, not only to marry, but to change the legal "definition and conception" of marriage so that it fits their relationships better, polygamists and polyamorists will receive new cultural support. And indeed it is clear that this principle will give powerful new cultural and legal support to polygamy. Petitioners argue to the contrary because (they say) the fundamental right to marry is the right to marry only *one person* of one's choice, and applicants to a polygamous marriage have already exercised that right. Not necessarily. A man who already has one spouse of his choice may not (as Petitioners assert) have a fundamental right to marry a second person of his choice. But the single woman who wishes to marry a man who is already married will in fact be denied her fundamental right to marry the one person of her choice by the laws insisting on monogamy. As the New Jersey Appellate Division explained:

> 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."

(*Lewis v. Harris* (N.J. Super. App. Div. 2005) 875 A.2d 259 (aff'd as modified, (N.J. 2006) 908 A.2d 196) [quoting George W. Dent, Jr., *The Defense of Traditional Marriage* (Fall 1999) 15 J.L. & Pol. 581, 628].)

In this way, the argument of petitioners is profoundly different from that made in *Perez* and *Loving* about interracial marriage. Interracial marriages were always acknowledged to be a form of marriage (hence racists felt a need to ban them). By contrast Proposition 22 does not bar a class of individuals from entering marriage. (Gay people can and do enter marriages in the state of California; whether or not it is wise or satisfying of them to do so.). Instead Proposition 22 clarifies that marriage in the state of California, by its nature, requires a husband and wife. This is not an entrance requirement, it is part of what the substance of marriage is, what marriage consists of.

V. CALIFORNIA'S DECISION TO PROVIDE CIVIL UNIONS, INSTEAD OF MARRIAGE, FOR SAME-SEX COUPLES IS RATIONALLY RELATED TO PROTECTING THE STATE'S MARRIAGE TRADITIONS

A. Petitioners err in arguing that changing the "definition and conception" of marriage cannot possibly affect the state's interest in furthering procreation and paternity.

Petitioners argue that changing the "definition and conception" of marriage to include same-sex unions cannot possibly affect the state's interest in procreation and paternity because heterosexual couples may still marry. Yes, but the meaning of their marriages, at least the meaning

publicly endorsed by law, will have changed. The principle that the Petitioners ask this Court to endorse under the equal protection claim is that same-sex couples and opposite sex couples are similarly situated for the purposes of marriage. Such a declaration by this Court requires a repudiation of the idea that marriage is intimately rooted in and related to the two great and related ways in which same-sex and opposite sex couples are differently situated: that only unions of husbands and wives can make the next generation and connect that child to his or her own mother and father. The Petitioners' own argument makes it clear that if procreation is a purpose of marriage, getting to same-sex marriage on equal protection grounds requires the state to repudiate that purpose publicly. One could hardly offer more clear evidence that the state's classification is powerfully and substantively related to the state interest so described.

B. Petitioners are incorrect to characterize **Eldon v. Sheldon** *and other cases as holding marriage is not about procreation.*

Petitioners cite *Elden v. Sheldon* (1988) 46 Cal.3d 267, in support of the proposition the primary state interest in marriage is adult love. (San Francisco Ans. Br. at pp. 11-12.) The case involved tort law (loss of consortium, emotional distress), which is necessarily about the private relational interests affected by the loss of a marital partner, and the court in this case had no occasion to comment on the state's interest in procreation in marriage in this case.

Nor does another case cited by the Petitioners, *In re Marriage of Haines* (1995) 33 Cal.App.4th 277, repudiate procreation as a purpose of marriage: it merely affirms the legal commonplace that the state has a "vital public interest" in the marital status of the husband and wife, without very clearly articulating exactly what the "vital public interest" served by marriage is. (*Id.* at p. 287 [quoting *Borelli v. Brusseau* (1993) 12 Cal.App.4th 647, 651].) Inarticulateness in an appellate court decision is not repudiation, especially not of a public purpose so deeply imbedded in the legal record. We are unable to find any appellate court decision in California specifically repudiating procreation as a key public purpose of marriage before this case.

C. The Equal Protection right that led to the elimination of distinctions based on legitimacy was not the right of adults to form families in absolutely any manner they choose, but the right of the child to equal protection of the laws regardless of his or her parents' marital status.

Today, the legal concept of illegitimacy has been effectively abolished. (See, e.g., *Susan H. v. Jack S.* (2004) 30 Cal.App.4th 1435, 1440.) The U.S. Supreme Court grounds this right solely in the right of a child not to be penalized by the state because of his or her parents' marital status:

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing

> disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.

(*Weber v. Aetna Casualty & Surety Co.* (1972) 406 U.S. 164, 175-76.)

Five years later, the Court again affirmed the abolition of legitimacy distinctions was a right of the child, not of the adults:

> In subsequent decisions, we have expressly considered and rejected the argument that a State may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships. . . . The parents have the ability to conform their conduct to societal norms, but their illegitimate children can affect neither their parents' conduct nor their own status.

(*Trimble v. Gordon* (1977) 430 U.S. 762, 796-770.)

It would be paradoxical and self-contradictory to grant adults in a same-sex couple the right to marry and attempt to ground that right in the existing Constitutional obligation to provide equal protection for all children regardless of marital status. If California is failing in its obligation to provide equal protection to all its children, regardless of marital status, it cannot remedy that neglect by expanding marital status.

CONCLUSION

In separating the legal benefits conferred by marriage from the cultural institution (or tradition) of marriage itself, the state of California is acting rationally to pursue twin goals: to maximize new legal benefits for

gay couples while minimizing a potentially quite serious threat to those aspects of the public understanding of marriage most related to child and community well-being. In so doing, the legislature is not demonstrating irrational animus, but exercising legislative judgment.

The state interests advanced by marriage are not only legitimate, they are compelling. No same-sex couples can further these interests. Every opposite-sex union does so, at least in the minimal sense. There is no fundamental human right to change the conception of marriage so that it fits ones' own relationships better. To endorse an equal protection claim to marriage requires this Court to repudiate the state's compelling interest in procreation and paternity, because it requires this Court to assert that same-sex and opposite-sex couples are similarly situated with respect to marriage's purposes. Both advocates and opponents of same-sex marriage recognize this truth.

For the foregoing reasons, amici curiae respectfully request that this Honorable Court affirm the judgment of the Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
[Pursuant to California Rules of Court, Rule 8.204(c)(1)]

Pursuant to California Rules of Court, Rule 8.204(c)(1), I hereby certify that the attached BRIEF AMICI CURIAE OF JAMES Q. WILSON, ET AL., LEGAL AND FAMILY SCHOLARS IN SUPPORT OF THE APPELLEES has been prepared using proportionately spaced Times New Roman font, with lines double-spaced, in 13 point typeface. The brief was prepared using Microsoft Word software, and according to the Word Count feature therein, the brief contains 13,823 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 25, 2007.

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PROOF OF SERVICE

I, _____ declare that I am over the age of eighteen years and am not a party to this action. My business address is 239 Seebold Spur, Manchester, MO 63026.

On September ___, 2007, I served the APPLICATION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF JAMES Q. WILSON, ET AL. IN SUPPORT OF THE APPELLEES, 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 Missouri that the foregoing is true and correct and that this declaration was executed on September 25, 2007, at _____, Missouri.

_____
Joshua K. Baker, Esq.

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

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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
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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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California Court of Appeal, First Appellate District Case No. A110463
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