

No. S147999

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re Marriage Cases
Judicial Council Coordination Proceeding No. 4365

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

Application for Leave to File Amicus Curiae Brief

and

Amicus Curiae Brief

In Support of the City and County of San Francisco

By City of Los Angeles, City of San Diego, City of San Jose, City of Long Beach,
City of Oakland, City of Santa Rosa, City of Berkeley, City of Santa Monica, City
of Santa Cruz, City of Palm Springs, City of West Hollywood, City of Signal Hill,
City of Sebastopol, Town of Fairfax, City of Cloverdale, County of Santa Clara,
County of San Mateo, County of Santa Cruz, and County of Marin

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Application for Leave to File Amicus Curiae Brief

To the Honorable Chief Justice Ronald M. George and Associate Justices of the California Supreme Court:

Amici City of Los Angeles, City of San Diego, City of San Jose, City of Long Beach, City of Oakland, City of Santa Rosa, City of Berkeley, City of Santa Monica, City of Santa Cruz, City of Palm Springs, City of West Hollywood, City of Signal Hill, City of Sebastopol, Town of Fairfax, City of Cloverdale, County of Santa Clara, County of San Mateo, County of Santa Cruz, and County of Marin respectfully seek this Court's permission to file the attached *amicus curiae* brief, which is based on an experience and perspective that is unique to local government. We file this brief in the hope that it may help the Court to evaluate the appellate court's conclusion that gay and lesbian Californians may be excluded from the right to marry based only on a popular and long-standing desire to exclude them.

The attached brief demonstrates that the historical exclusion of gays and lesbians from the marriage right resulted from, and was of a piece with, a deep-seated antipathy toward them. The attached brief demonstrates also that recent and current efforts to preserve that historical exclusion, by codifying it in statutes governing marriage, are likewise the result of antipathy toward gays and lesbians, and a desire to enshrine in law a popular view of them as lesser citizens.

In the proceedings below, neither the State nor the Court of Appeal adduced any reason why gay and lesbian Californians may be denied the right to marry to the same extent as their heterosexual counterparts, other than that the right has been denied to them for a long time, and continuing to deny them the right is an idea that may be popular with voters. But because the historical and current denial of the marriage right to gays and lesbians results purely from antipathy toward them as a socially and politically disfavored group, the desire to preserve that denial in law is necessarily unconstitutional. It is by now well settled that a denial of any right based only on antipathy toward the group whose rights are denied violates the constitutional guarantee of equal protection of the laws.

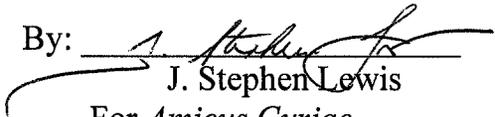
In contravention of this equal-protection principle, the Court of Appeal held constitutional the denial of the marriage right to gay and lesbian Californians based only on a longstanding and continuing desire to exclude them. Because that desire is itself based on a longstanding and continuing desire to harm them as a politically-disfavored group, we urge this Court to reverse the Court of Appeal's decision.

We further urge this Court to hold that gay and lesbian Californians are entitled to the equal protection of the marriage laws of this State, and to reaffirm the principle that the mere desire to exclude a traditionally disfavored group—even a desire that is popular and of long standing—can never be a constitutionally sufficient reason to deprive Californians of any right conferred by this state's laws.

Local government amici file this brief jointly as *amicus curiae* in order to raise arguments that we believe have not been addressed in sufficient detail in the briefs submitted by the parties. Amici also believe that this brief will help the Court decide this case by framing the issue in a way that is simpler and narrower than suggested by briefs submitted by the parties.

Accordingly, amici respectfully request that this Court grant leave to file the attached *amicus curiae* brief.

Dated: September 24, 2007

By: 

J. Stephen Lewis

For *Amicus Curiae*
City of Los Angeles
City of San Diego
City of San Jose
City of Long Beach
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City of Sebastopol
Town of Fairfax
City of Cloverdale
County of Santa Clara
County of San Mateo
County of Santa Cruz
County of Marin

Identification of Amicus Curiae and Amicus Curiae's Interest

Amici are California local governments, both cities and counties.

County amici have a direct and obvious interest in the outcome of this litigation. As counties, they are charged with processing applications for marriage licenses and granting or denying those applications as the law dictates. Under current law, California counties must deny marriage licenses to same-sex couples, even when there is no impediment to their marriage other than their being gay or lesbian.

Together with municipal amici, the counties understand that these laws forbidding them to issue marriage licenses to gay and lesbian couples result from nothing but a bare desire to disadvantage California's gay and lesbian residents as a politically-disfavored group. Laws that disadvantage a group only because that group is politically unpopular are necessarily unconstitutional. Thus, under the state laws forcing counties to deny marriage licenses to gay and lesbian couples, county amici are compelled to violate their gay and lesbian citizens' constitutional right to the equal protection of the laws. A decision by this Court invalidating the state laws that forbid gay and lesbian California couples to marry would relieve the counties of their statutorily-imposed obligation to improperly and unconstitutionally discriminate against their gay and lesbian residents in this way.

Although they do not issue marriage licenses, the interest of the municipal-government amici in this litigation is no less important. California municipal governments were pioneers in the creation of domestic partnerships, enacting

domestic-partnership legislation in recognition that gay and lesbian relationships were entitled to societal respect and dignity, but were often lawfully denied it. In many cases the legislation, enacted at the height of the AIDS epidemic, was borne at least in part of the indignity that our gay residents suffered by being denied the right to visit their partners as they lay dying in the hospital on the grounds that, because they were not married and not related by blood, they were not entitled to family visitation.

By enacting domestic partner legislation, these local governments were able to create legal recognition of gay and lesbian families, and establish at least a floor of decency in government treatment of same-sex couples. But they were aware that their legislative enactments were a long way from the ceiling of true equality with married couples. That was a ceiling that local government could not help its gay and lesbian residents reach, because so many laws governing family relationships—and marriage in particular—were exclusively matters of state law.

Now the state itself has enacted domestic partnership legislation, and by so doing has created a level of government recognition of same-sex families throughout the state. Amici recognize that, by doing so, the state has advanced the cause of equality for all Californians further than it could have been advanced by local government alone. We support that advancement, and we applaud it.

But we also recognize that, while state domestic-partnership legislation has lessened the inequality that exists between our state's gay and lesbian families on the one hand and our heterosexual families on the other, and thus lessened the

indignity that gay and lesbian families suffer by being marked as inferior, the stain of inequality lingers. For domestic partnership is not marriage, but something that is, of necessity, less than marriage. By allowing our gay and lesbian couples to participate only in the lesser arrangement of domestic partnership while our heterosexual couples may participate in the fundamental human right of marriage, the state marks our gay and lesbian residents as correspondingly lesser, as not worthy of marriage's dignity.

Local government amici have always sought to treat their gay and lesbian residents equally with their heterosexual ones, and we believe that doing so is a fundamental duty of all levels of California government. This means affording them not merely something like equality with the rest of our residents, but affording them equality itself. By creating domestic partnership as a substitute for marriage that is set aside for gay and lesbian couples, we believe that the state has failed in that duty. The State has now made domestic partnership a creature of state law, and by doing so has continued the work of moving *toward* equality for all Californians that local government started. But the State has not yet reached that ultimate destination. Local government created domestic partnership knowing that that institution was less than marriage, but realizing that, because marriage is a state-law matter, it was the most that local government could do. The state has no such disability. It could grant marriage equality to all its residents, but it has chosen not to. As a result, our gay and lesbian residents continue to suffer from

the mark of inferiority that amici sought to eliminate by creating domestic partnerships in the first place.

Issue

This appeal presents a single, narrow, and simple question: may the State exclude gay and lesbian Californians from the right to marry merely because there has been a popular and long-standing desire to exclude them? Under this Court's equal protection jurisprudence, the answer to this question is "no." Because the Court of Appeal reached the contrary conclusion in *In re Marriage Cases*, that decision should be reversed.

Preliminary Statement

The State of California has always forbidden its gay and lesbian residents to marry their same-sex partners, though for over a century this prohibition was not made explicit in any statute. It hardly needed to be; in an era when the state itself defined gays and lesbians as "sex perverts,"¹ "sexual deviants," and mentally "disordered,"² it was unnecessary explicitly to disavow the intention to officially license them to marry.

¹ *Morell v. Department of Alcoholic Beverage Control* (1962) 204 Cal.App.2d 504, 22 Cal.Rptr. 405

² *People v. Rowland* (1968) 262 Cal.App.2d 790, 796, 69 Cal.Rptr. 269, 273

(allowing as a defense to a charge of assault with a deadly weapon the defense that the victim made "homosexual advances" toward the defendant, and stating

Despite the state's continued official hostility toward them,³ in the latter half of the twentieth century, gays and lesbians began to participate more openly in public life, and to insist on a greater degree of equality with their heterosexual fellow-Californians. In 1969, when the Legislature made part of the Family Law Act gender neutral, the Legislature feared that the gay and lesbian push toward greater legal equality might include the argument that the statute's gender neutrality allowed them to wed.⁴ To foreclose that possibility, the Legislature amended the Family Law Act in 1977 to state explicitly that "marriage is . . . between a man and a woman."⁵

that if the victim "was a homosexual and if he was trying to pick up a male partner, there would be a strong motive or interest to camouflage his deviate personality disorder.")

³ *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 251, 158 Cal.Rptr. 330, 338 (citing to studies conducted in the late 1960s and early 1970s, showing that police "selected techniques and locations of enforcement deliberately designed to detect a disproportionate number" of gay men, and arrested them for conduct that, if committed by heterosexuals, did not result in arrest.)

⁴ SEN. REPUBLICAN CAUCUS, analysis of ASSEM BILL NO. 607 (1977–1978 Reg. Sess.)

⁵ ASSEM BILL NO. 607 (1977–1978 Reg. Sess.); Former CIV. CODE § 4100, later recodified as FAM. CODE § 300

While this amendment barred the creation of marriages between persons of the same sex in California, it did not foreclose state recognition of same-sex marriages altogether. Under Family Code § 308, any valid out-of-state marriage would also be valid and recognized in California, so if a gay or lesbian couple were lawfully married in another state, California would have to recognize that marriage as valid here. In 2000, that possibility, too, was foreclosed. By voter initiative, § 308.5 was added to the Family Code to state that “only marriage between a man and a woman is valid or recognized in California.”

Thus, it is true, as the Attorney General and the Court of Appeal have noted, that California has a “tradition” of forbidding gays and lesbians to marry, and that the State’s decision to allow or recognize only heterosexual unions is one with a long historical pedigree. It is also true that enough Californians continue to value the idea of marriage as an institution from which gays and lesbians are excluded to have passed a referendum making the exclusion complete by barring even recognition of marriages of same-sex couples performed in other states.

The State asserts this historical and currently-popular desire to exclude gay and lesbian Californians from the marriage right as its reason for enforcing the exclusion through state law. The question is whether, under our Constitution, that desire to exclude is sufficient to deny gay and lesbian Californians the right to marry that the majority has long enjoyed. This Court’s equal protection jurisprudence makes clear that it is not. Because the Court of Appeal reached a contrary conclusion, the opinion of that court should be reversed.

Argument

By denying gay and lesbian Californians the right to marry, the State of California deprives those Californians of the equal protection of the laws guaranteed by the California Constitution.

All laws that make a distinction between groups of persons “discriminate” in a general sense. But discrimination in the general sense does not, by itself, offend the state or federal constitution. For example, the law may impose different levels of punishment for persons who commit different levels of crime, or impose restrictions on persons engaged in a particular occupation that do not apply to persons engaged in other lines of work.⁶ The courts have recognized that the basic legislative function necessarily requires this sort of line drawing; and for that reason, courts are appropriately reluctant to second-guess legislative distinctions and thus intrude into an area that is generally within the sole purview of a coequal branch of government.⁷

But there is one absolute limit on the government’s right to discriminate between one group and another: whenever the government discriminates, it must have at least a minimally legitimate reason for doing so. There must be some

⁶ See, e.g. *California Gillnetters Assn. v. Dept. of Fish and Game* (1995) 39 Cal. App. 4th 1145, 46 Cal. Rptr. 2d 338.

⁷ *Kenneally v. Medical Board* (1994) 27 Cal.App.4th 489, 496, 32 Cal.Rptr.2d 504, 506

legitimate government interest that its discrimination is intended to advance, and the discrimination must actually advance it.⁸

The State's prohibition on marriage between gay and lesbian couples fails to satisfy even this minimum test for legitimacy. The State can identify no legitimate government interest that the prohibition is intended to advance, or that the prohibition actually does advance.

A. The prohibition on gay and lesbian Californians marrying their same-sex partners necessarily does not advance a legitimate government interest because it is based solely on a desire to harm gays and lesbians as a politically unpopular group.

The Attorney General's brief to the Court of Appeal is 45 pages and nearly 14,000 words long. But nowhere in those words and pages did the Attorney General posit a public-policy goal that is advanced by excluding gay and lesbian Californians from the right to marry; rather, he argued that the exclusion is a goal in and of itself. This goal is legitimate, the Attorney General claimed, because gay and lesbian couples have been excluded from the right to marry for so long that the exclusion has become a tradition—and not only a tradition, but a popular one.⁹

⁸ *Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 913
13 Cal.Rptr.2d 245

⁹ Appellants' Opening Brief before the Court of Appeal, p. 6 ("The common understanding of marriage as between a man and a woman is deeply rooted in

It is a theme that the Attorney General returned to again and again, stating, for example, “that maintaining the understanding of marriage that has always existed in California¹⁰ is a goal unto itself. Elaborating on this point, the Attorney General said that:

[m]arriage has been understood to be a union between a man and a woman throughout California history. [citation omitted] This common understanding of marriage is also recognized in federal law [citation omitted] and in every state but Massachusetts. And in the year 2000, California voters passed Proposition 22, providing that only marriage between a man and a woman is valid or recognized in California. [Citations omitted] The word “marriage” has a particular meaning for millions of Californians, and that common understanding of marriage is important to them.¹¹

Thus, the Attorney General argued, the State has an interest in denying gay and lesbian Californians the right to marry because it has always done so; other jurisdictions also deny them that right; and the majority wants the denial of that right to continue.

The Court of Appeal, below, adopted this line of reasoning as its own. The court held, in part, that the State has an interest in “preserving the institution of

our culture, and it is legitimate for California to maintain this understanding . . .

.”)

¹⁰ Id. p. 33

¹¹ Id. p. 33

marriage in its *historical* opposite-sex form”¹² Thus, the Court of Appeal concludes, the state interest that is advanced by denying the marriage right to gay and lesbian couples is a desire to perpetuate the denial, which is of long standing.

Amici acknowledge—as any honest person must—the fact on which this conclusion is predicated: there is a popular desire to exclude gay and lesbian Californians from the right to marry, and the majority has harbored that desire for a long time. But that there is a popular desire to exclude gay and lesbian Californians from the right to marry, and that the desire is of long standing, has never been in dispute.

The dispute is over whether that desire is sufficient by itself to exclude one group of Californians from a right that is freely conferred on another. A review of the reasons that underpin that desire shows that it is not.

The desire to exclude gays and lesbians from the right to marry, and indeed from many aspects of public life, is not a mere benign historical curiosity. Rather, it results from—and is of a piece with—a long and unhappy tradition of invidious discrimination against gays and lesbians in Western society generally, and in California specifically. The current laws that embody and perpetuate that tradition are intended to continue to mark gay and lesbian Californians as less than full and equal citizens. They are intended to disadvantage gays and lesbians as a

¹² *In re Marriage Cases* (2006), (previously published at 143 Cal.App.4th 873) 49 Cal.Rptr.3d 675, 723 (emphasis added)

politically-unpopular group. And laws that are based on a bare desire by the majority to harm a politically-unpopular minority are necessarily unconstitutional.

1. The historical understanding of marriage as an institution reserved exclusively for opposite-sex couples is the result of a historical animosity toward gays and lesbians.

It is true that, from its earliest days, the institution of marriage as we understand it in our Western culture was reserved for opposite-sex couples. But that reservation—and the necessarily-correlating exclusion of gays and lesbians—must be understood in its historical context. And that context is a culture that, from its early days, has not only been hostile to gays and lesbians, but has actually sought to legislate them out of existence. Forbidding gay and lesbian couples to marry was just one manifestation of that discriminatory effort.

The history of animosity toward gays and lesbians in Western society stretches back for at least two thousand years, and the animosity has thrived throughout the centuries. In 390 A.D., the Emperor Theodosius decreed that gay men should be burnt alive.¹³ In Medieval Europe, King Phillip IV of France dismantled the Knights of the Temple in the 14th Century largely by accusing them of practicing and condoning homosexuality.¹⁴ In order to encourage Templars to confess to that crime and seek absolution, hundreds of Templars were jailed in a

¹³ CODE THEOD. 9.7.6; See also D. BAILEY, *HOMOSEXUALITY AND THE WESTERN CHRISTIAN TRADITION* 70-81 (1975)

¹⁴ MALCOLM BARBER, *TRIAL OF THE TEMPLARS* (1978)

place from which they could see and smell 54 of their number collectively burned alive. During the Renaissance, the court known as the Officers of the Night was charged with investigating and punishing those who engaged in homosexual conduct.¹⁵

And as recently as 1986, in *Bowers v. Hardwick*, the United States Supreme Court upheld laws criminalizing homosexual conduct on the ground that the citizens of Georgia had every right to decide that homosexuality itself is immoral. Footnote 6 of that decision lists in exhaustive detail 38 states' Victorian-era anti-sodomy laws, and in a concurring opinion, the Chief Justice wrote separately to underscore the contempt in which gays and lesbians were historically held by society. The Chief Justice pointed out that from Theodosius through the 1980s, gay sex was thought to be "a deeper malignity than rape," and a "disgrace to human nature."¹⁶

These legal decrees, acts, and conclusions simply mirrored the broadly-held and largely-unquestioned view of gays and lesbians as worthy only of contempt, as depicted throughout the history of our Western culture in our literature. Chaucer's two most disreputable characters in *The Canterbury Tales* were the summoner and the pardoner. Lest the reader not understand the degree to which

¹⁵ MICHAEL ROCK, *FORBIDDEN FRIENDSHIPS: HOMOSEXUALITY AND MALE CULTURE IN RENAISSANCE FLORENCE* (1996)

¹⁶ *Bowers v. Hardwick* (1986) 478 U.S. 186, 196, 106 S.Ct. 2841 at 2847

these two men were meant to be objects of hatred, Chaucer depicted them as engaged in a romantic relationship with each other.¹⁷ Attitudes had not changed two hundred years later when Christopher Marlowe wrote *Edward II*, in which the king is depicted first as malevolent, then as merely tragic, due to his romantic relationship with Peirs Gaveston.¹⁸ Late in the 19th Century, in his poem “Two Loves,” Lord Alfred Douglas referred to same-sex romantic love as “the love that dare not speak its name.” Douglas’s poem, and that phrase in particular, played an important role in the trial of his lover, Oscar Wilde, for the alleged “gross indecency,” of having loved him.¹⁹

This long-standing and deeply-rooted animus toward gays and lesbians was no less deeply rooted in California than elsewhere. In the 1930s, this Court considered the mental health of a gay criminal defendant, discussing at length his history of “homosexual vices and perversions,” and noting that, as a gay person, he suffered from “sexual abnormalities.” As part of this consideration of the defendant’s sexual orientation, which the Court called “an abnormal state of

¹⁷ JOHN H. FISHER AND MARK ALLEN, *THE COMPLETE CANTERBURY TALES OF GEOFFREY CHAUCER* (Heinle 2005)

¹⁸ CHRISTOPHER MARLOWE, *EDWARD II* (Nick Hern Books 1999)

¹⁹ TIM COATES, *THE TRIALS OF OSCAR WILDE: TRANSCRIPT EXCEPTS FROM THE TRIALS AT THE OLD BAILEY, LONDON, DURING APRIL AND MAY 1895* (2001)

mind,” the Court also concluded that the defendant must have experienced “the urge of resentment or revenge, which is a symptom or trait of homosexuality.”²⁰

In 1957, the Court of Appeal considered the case of a school teacher who was excluded from the right to teach because he had made “homosexual advances” toward an undercover police officer—not in school or in the presence of students, but on the beach. The Court concluded that any gay sexual conduct, or even the proposition of such conduct, in and of itself, no matter when, where, or in what context it occurs, disqualifies a person from teaching in the California schools.²¹

In 1962, the Department of Alcoholic Beverage Control revoked a bar owner’s license to sell alcohol because the bar had become known as a gathering place for gay men who kissed each other, hugged each other, held hands, occasionally touched one another on the knee, or spoke in a “sexually suggestive” manner. In upholding the license revocation, the Court of Appeal accepted the ABC’s conclusion that men who would do such things (i.e., gay men) are “sex perverts,” and that by allowing such sex perverts to gather and to touch one another, even if only on the knee or hand, the bar owner had operated a “bawdy house” dangerous and offensive to public morals.²²

²⁰ *People v. Walter* (1936) 7 Cal. 2d 438, 60 P. 2d 990

²¹ *Sarac v. State Board of Education* (1957) 249 Cal.App.2d 58, 57 Cal. Rptr. 69

²² *Morell v. Department of Alcoholic Beverage Control* (1962) 204 Cal.App.2d 504, 22 Cal.Rptr. 405

In 1968, the Court of Appeal upheld a conviction for “lewd and dissolute” conduct of a bar patron who touched an undercover policeman on the leg and suggested that they go to a private home to have sex. In ruling on the defendant’s constitutional claim that the state had no legitimate interest in prosecuting people for a mere proposal to engage in a legal sexual act in a private home, the court held that, when the proposal is from one man to another, it is so outrageous that it constitutes a threat to public safety and order.²³ Although the court did not say so explicitly, it suggested that mere flirtation by one man toward another amounts to constitutionally unprotected “fighting words.”²⁴ In making that suggestion, the court relied on the earlier decision of *People v. Dudley*, in which that court stated that “it is not to be forgotten that to some a homosexual proposition is inflammatory, which public utterance might well lead to a breach of the peace.”²⁵

²³ *People v. Mesa* (1968) 265 Cal.App.2d 746, 71 Cal.Rptr. 594

²⁴ *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 599 P.2d 636 (in which this Court noted the *Mesa* court’s implied fighting-words analogy, and for the first time concluded that sex between persons of the opposite sex is not, in and of itself, “lewd and dissolute” conduct.)

²⁵ *People v. Dudley* 250 Cal.App.2d 955, 959, 58 Cal.Rptr. 557, 559 (in which the court also describes a “homosexual proposition” as “the blandishments of deviates.”)

Only as recently as 1969, this Court began for the first time to disavow the idea that gays and lesbians are, merely by virtue of their status as gays and lesbians, fundamentally unworthy of participation in the public life of this State. In *Morrison v. State Board of Education*, this Court overturned a lower court holding that a teacher could be deprived of the right to teach merely because he had engaged in a romantic liaison with another person of the same sex. But even in reaching that conclusion, this Court accepted the fundamental idea that gays and lesbian Californians are in some way unequal to, and lesser than, their heterosexual counterparts. The *Morrison* court made clear that it based its holding at least in part on the factual finding that the teacher's same-sex liaison was a relatively well-kept secret, and there was no evidence that it would ever happen again. There is no reported case in which this Court (or any other) conditioned a heterosexual teacher's right to teach on his or her keeping secret any opposite-sex romantic relationship, or on the suggestion that no such romantic relationship is likely to occur in the future.

This is the historical context in which it was taken for granted that gays and lesbians could not marry, and were later explicitly barred from marrying when that assumption could be taken for granted no longer. It is true that in the institution's earliest days the laws governing marriage did not expressly exclude gays and lesbians, and that those laws were apparently enacted with no specific intent to harm them. But that is only because the marriage laws were enacted at a time when gays and lesbians were not only feared and reviled, but effectively legislated

into a state of total invisibility; a time when the state (in the form of the Roman Empire) officially sanctioned the execution of those unlucky few whose efforts to remain invisible proved unsuccessful. Because, in those early days, it was unthinkable that a gay or lesbian couple could be permitted even to exist in society, much less participate in it openly, it was unnecessary to specifically consider whether they should be permitted to join publicly in a sexual and economic union sanctioned by the state. But it must be understood that there was no need to consider this only because the unworthiness and inferiority of gays and lesbians was universally accepted as self-evident.

2. The contemporary enactment of laws limiting marriage to opposite-sex unions, and thus excluding gays and lesbians, is purely the result of continuing animosity toward gays and lesbians and a popular desire to harm them as a politically-disfavored group.

It was only in more contemporary times, when the attitude toward gays and lesbians as “sex perverts,” “deviants,” and “abominations” ceased to be universal, and when gay and lesbian Californians began, however haltingly, to participate openly in public life that the State had any reason to amend the marriage laws to make the exclusion of gays and lesbians from that institution explicit. And when it did so, it did so to ensure that the exclusion of gays and lesbians from marriage

that had previously been maintained by negative attitudes toward gays and lesbians alone would endure in law even if the attitudes did not.²⁶

But the fact is that those attitudes have continued, and they continue to animate the desire to exclude gays and lesbians from the right to marry. If one doubts this, one has only to look at the reasons advanced by the groups seeking to enshrine the exclusion in law for the doubt to be dispelled.

Focus on the Family, for example, argues, in part, that gays and lesbians should not be permitted to marry because “the Bible clearly proscribes any form of homosexual behavior as sinful.”²⁷ William Bennett, of the Claremont Institute, writes that “[t]he stated goal of homosexual activists is not merely tolerance; it is to force society to *accept*. It is normalization, validation, public legitimation, and finally public endorsement. That is a radically different matter. Once we were to codify [permission for gays and lesbians to marry] in law, we would be saying that homosexual life and heterosexual life are equal in all important respects”²⁸

²⁶ See, SEN. COM. ON JUDICIARY, ANALYSIS OF ASSEM. BILL NO. 607 (1977-1978 Reg. Sess.)

²⁷ From the official website of Focus on the Family, at web page www.family.org/socialissues/A000000464.cfm

²⁸ William J. Bennett, *Homosexual Unions* (December 3, 2003), posted on Claremont.org at www.claremont.org/publications/pubid.313/pub_detail.asp

In his essay “Against Homosexual Marriage,” James Q. Wilson, one of the authors of an amicus brief to the Court of Appeal in this matter, writes that “[o]f course, homosexual ‘families’ with or without children, might be rather few in number. Just how few, it is hard to say. Perhaps [gay author Andrew] Sullivan himself would marry, but, given the great tendency of homosexual males to be promiscuous, many more like him would not, or if they did, would not marry with as much seriousness.”²⁹

Likewise, the Catholic Church argues that “[t]here are absolutely no grounds for considering homosexual unions to be in any way similar or even remotely analogous to God’s plan for marriage and family. Marriage is holy, while homosexual acts go against the natural moral law,” and that “[l]egal recognition of homosexual unions or placing them on the same level as marriage would mean not only the approval of deviant behavior, with the consequence of making it a model in present-day society, but would also obscure basic values which belong to the common inheritance of humanity.”³⁰

²⁹ James Q. Wilson, *Against Homosexual Marriage*, Commentary 101 (March 1996): 34-39 (quotation marks around the word “family” in original)

³⁰ Congregation for the Doctrine of the Faith (approved by Pope John Paul II) *Considerations Regarding Proposals to Give Legal Recognition to Unions between Homosexual Persons*, June 3, 2003

In a program sponsored by the Hoover Institution, Anthony Pugno, then chief of staff for Senator William “Pete” Knight, the principal proponent of Proposition 22, the 2000 ballot measure forbidding the state to recognize valid marriages between gay and lesbian couples entered into in other jurisdictions, was asked “what’s so bad about” the idea of allowing gay and lesbian Californians to marry. He replied that “. . . [if it were permitted] many people who have moral objections to the idea of same-sex marriage, . . . [would be] compelled to participate through their government in sanctioning and promoting a kind of lifestyle they don't feel comfortable with.”³¹

Randy Thomasson, president of Campaign for Children and Families, one of the California-based institutions that seeks to intervene in this litigation, asserts that laws that treat gay and lesbian Californians as equal to their heterosexual counterparts are evidence that “the gates of hell are prevailing against the church.”³²

³¹ *The Wedding Zinger: The Definition of Marriage* a segment of “Uncommon Knowledge,” produced by the Hoover Institution in conjunction with KTEH-TV, San Jose filmed March 28, 2000

³² *Law of the Land*, WorldNetDaily.com (August 29, 2006) posted at www.worldnetdaily.com/news/article.asp?ARTICLE_ID=51732

In his essay “Jaffa vs. Mansfield,” Thomas G. West, another of the authors of an amicus brief for the Court of Appeal in this matter, likens gay and lesbians’ claim of a right to marry to a claimed right to have “sex with one’s mother, father, sister, brother, son, or daughter.” Because gay romantic relationships are the moral equivalent to incest, he argues, allowing gays and lesbians to marry would violate John Locke’s injunction that “no doctrines adverse and contrary to human society, or to the good morals that are necessary to the preservation of civil society, are to be tolerated by the magistrate.”³³

So it is clear that animosity toward gays and lesbians is not a mere historical fact, but a fact that is with us still. And it is this fact—this lingering, contemporary animosity—that drives the ongoing effort to exclude gays and lesbians from the right to marry.

3. The desire to exclude gays and lesbians from the right to marry, being based solely on a desire to disadvantage them as a politically-unpopular group, violates the constitutional guarantee of equal protection of the law.

It is evident from the long, sad history of discrimination against gays and lesbians, stretching back over two millennia, that the original understanding of marriage as necessarily excluding gays and lesbians was the result (albeit only one of many) of a view of gays and lesbians as sinful, deviant, and worthy only of

³³ Thomas G. West, *Jaffa vs. Mansfield* (November 29, 2002) posted at

http://www.claremont.org/publications/pubid.2/pub_detail.asp

societal condemnation. It is evident from the justifications by the most prominent individual, and largest mainstream institutional, proponents of modern efforts to continue that exclusion in this state's laws by measures such as the 1977 amendment to the Family Law Act and Proposition 22, that those efforts are likewise the result of a view of gays and lesbians as lesser citizens.

But under the constitutional guarantee of equal protection, the simple desire to enshrine in law antipathy toward a popularly-disfavored group is not, and can never be, a legitimate goal of American government. The United States Supreme Court made that clear in *City of Cleburne v. Cleburne Living Center*.³⁴

In that case, the Court considered a local zoning ordinance that required group homes for the mentally retarded to obtain special planning approval, but permitted all other group homes as a matter of right. Cleburne Living Center challenged the ordinance on the ground that it deprived a politically-disfavored group of the equal protection of the laws, merely because it was disfavored. In analyzing that claim, the Court first acknowledged what all parties agreed to: that retarded persons were deprived of something (by-right planning approval) freely granted to other groups; i.e., that the government treated retarded persons differently from everyone else. The Court then asked the question that is the threshold for any equal-protection claim: what interest does the government seek

³⁴ *City of Cleburne, Texas v. Cleburne Living Center* (1985) 473 U.S. 432, 105 S.Ct. 3249

to advance by imposing this burden only on a particular group, and is that interest really advanced by the imposition?

To discover the government's interest in imposing a permit requirement on the mentally retarded that it did not impose on other groups, the Court looked to the interests that the city actually asserted. The first was that it was "concerned with the negative attitude of the majority of property owners within 200 feet of the [proposed group home], as well as the fears of the elderly residents in the neighborhood."³⁵ The Court dismissed the idea that such negative attitudes and fears could be legitimate bases for discrimination easily and succinctly, writing in the very next sentence, that ". . . mere negative attitudes, or fear . . . are not permissible bases for treating [a minority group] differently from [the majority]. It is clear that the electorate as a whole, whether by referendum or otherwise, could not order [government] actions violative of the Equal Protection Clause."³⁶ The second interest offered by the city was preventing local school children from harassing the group home's retarded occupants. The Court likewise dismissed that concern as illegitimate as a matter of law because it is, at its root, simply "permitting some portion of the community to validate what would otherwise be an equal protection violation."³⁷

³⁵ *Cleburne*, supra, 473 U.S. at 448, 105 S.Ct. at 3258–59

³⁶ *Id.*

³⁷ *Cleburne*, supra, 473 U.S. 449, 105 S.Ct. 2359

Finally, after reviewing all of the reasons offered by the city for imposing a legal burden uniquely on the mentally retarded, the Court framed the question more pointedly: “[t]he question is whether it is rational to treat the [minority group] differently.”³⁸ Answering that question, and harkening back to the rule that “a bare . . . desire to harm a politically unpopular group” is never a rational basis for government action, the Court answered the question that it had so starkly posed. It said that, in the absence of any proffered reason other than those based on popular dislike or fear of the retarded, “[t]he short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against [a politically disfavored group]”³⁹ Because the differential treatment was irrational, the Court struck it down as unconstitutional.

Following this rule that government action that is based solely on societal fear and prejudice can never be rational, and thus cannot be constitutional, the Court here must ask a question of the same searching character that the United States Supreme Court posed in *Cleburne*: is it rational to treat gay and lesbian couples differently with respect to the right to marry?

It appears to amici that it is not. For the Attorney General and the Court of Appeal offer only one reason why gay and lesbian couples are not permitted to marry: it has always been that way, and (as evidenced by the 1977 amendments to

³⁸ Id.

³⁹ Id.

the Family Law Act and the 2000 ballot measure) many people want it to remain that way. But in view of the long and unhappy history, in Western societies in general and in California specifically, of animus toward gays and lesbians, it is simply too facile to say that gays and lesbians may be excluded from the right to marry simply because the majority has long wished to exclude them. Given the clearly-articulated animus toward gays and lesbians behind our contemporary laws explicitly excluding them from the right to marry, it is also too facile to say that the exclusion may continue merely because the majority desires it still.

The historical evidence, and the statements made in the contemporary efforts to continue to deprive gay and lesbian Californians of the right to marry, make clear that that wish is, at its root, solely a desire to disadvantage gays and lesbians as a politically-unpopular group. This is the essence of prejudice.

It is therefore difficult to understand the Court of Appeal's statement, below, that ". . . the state's reliance on the history and tradition of opposite-sex marriage, and the common understanding of most citizens [that marriage is currently reserved for opposite-sex couples] does not appear to be a smokescreen hiding a discriminatory intent."⁴⁰

While it may be true that the State itself harbors no specific ill will toward its gay and lesbian residents, and that the State asserts an interest in denying those residents the marriage right only to enforce in law the popular will, it is apparent

⁴⁰ *In re Marriage Cases*, supra, 49 Cal.Rptr.3d at 724

that the popular will is motivated by a simple prejudice against gays and lesbians. And as the United States Supreme Court made clear in *Cleburne*, the electorate as a whole, whether by referendum or by the state’s divining the popular will, can no more use bare prejudice to deprive a disfavored minority of the right to be treated equally under the law than can the state itself.⁴¹

Amici do not believe that there is any legitimate justification for denying our gay and lesbian Californians the right to marry to the same extent that our heterosexual fellow-residents may do so. But if there is such a justification, as a matter of law, to say nothing of common decency and simple fairness, it cannot be “because it has always been that way, and the majority wants it to remain so.”

B. The creation of domestic partnerships does not cure the constitutional infirmity caused by the State’s denial of marriage equality for gay and lesbian Californians.

To bolster the assertion that denying gay and lesbian Californians the right to marry is not based on societal prejudice, the State, as well as the Court of Appeal, note that the Legislature has created a new legal status—domestic partnership—that grants to gay and lesbian couples “substantially all” of the statutory rights accorded to heterosexual married couples. The state’s denial of the marriage right to gays and lesbians cannot be based on prejudice, they argue, because the state has allowed them to have their own legal status that is nearly the same as that of their married heterosexual counterparts.

⁴¹ *Cleburne*, supra, 473 U.S. 448–449, 105 S.Ct. at 3258–59

This argument includes its own rebuttal. The state acknowledges that marriage and domestic partnership are not equal, even if they are “substantially” or “nearly” so. As a matter of logic alone, the state’s provision of domestic partnership cannot prove an absence of prejudice when the state itself concedes that domestic partnership and marriage are not truly equal.

Even if the state had not conceded this lack of real equality, it could not effectively deny it. First, there is no apparent explanation why the state would create two identical institutions and call them both by different names; the only logical conclusion is that the two institutions are not, in fact, the same. Second, a fair evaluation of marriage and domestic partnership shows that even the state’s claim of near-equality between those institutions is false. For marriage is a fundamental right—it is not something that state government has created and can grant or withhold at its sole and unfettered discretion. It is a right that one has merely by virtue of being human. Domestic partnership, by contrast, is a bare statutory construct, by which the Legislature “allows” gay and lesbian Californians to participate in an analogue to “real” marriage, but that the Legislature may repeal as it sees fit.

Such a statutory solution is insufficient to dissolve the stain of prejudice by which the denial of marriage equality is so deeply marked.

1. Marriage is an institution that is unique, and that necessarily cannot be equaled by a parallel institution.

All parties to this litigation, and all who have sought to participate as amici,

agree on one thing: marriage is not, and has never been, simply a bundle of statutory rights. As this Court wrote nearly 60 years ago in *Perez v. Sharp*, marriage is “something more than a civil contract subject to regulation by the state; it is a fundamental right of free [peoples].”⁴² The United States Supreme Court echoed this sentiment three decades later in *Loving v. Virginia*, when it said that marriage “has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free [peoples].”⁴³ The Court of Appeal, below, recognized marriage’s unique status, calling it, variously, “. . . the most individually fulfilling relationship that one can enjoy in the course of a lifetime,”⁴⁴ and a “revered public institution”⁴⁵ of “extraordinary symbolic significance,”⁴⁶ that is “essential to the . . . pursuit of happiness.”⁴⁷ In calling marriage the most individually-fulfilling relationship that an individual can enjoy in the course of a lifetime, the Court of Appeal was simply echoing a well-settled

⁴² *Perez v. Sharp* (1948) 32 Cal.2d 711, 714

⁴³ *Loving v. Virginia* (1976) 388 U.S. 1, 12, 87 S.Ct. 1817

⁴⁴ *In re Marriage Cases, supra*, 49 Cal.Rptr.3d 675, 700

⁴⁵ *In re Marriage Cases*, 49 Cal.Rptr.3d at 715

⁴⁶ *In re Marriage Cases*, 49 Cal.Rptr.3d at 722

⁴⁷ *In re Marriage Cases*, 49 Cal.Rptr.3d at 699

idea that had been stated innumerable times by countless courts before it.⁴⁸ Thus, one cannot doubt the accuracy of the Court of Appeal's conclusion that "[m]arriage is more than a 'law,' of course; it is a social institution of profound importance to the citizens of this state."⁴⁹

Domestic partnership, by contrast, is "just a law." And there is no equalizing of the bundle of statutory rights granted by that law to those conferred by marriage that will change that fact. Domestic partnership is not a "revered public institution" of "extraordinary symbolic significance" that is "essential to the orderly pursuit of happiness by free peoples."

Nor is it intended to be. As this Court has noted, by enacting the Domestic Partner Act, "the Legislature has granted [gay and lesbian couples] legal recognition *comparable* to marriage both procedurally and in terms of the substantive rights and obligations granted to and imposed upon the partners"⁵⁰ And as this Court has also noted, the Legislature enacted the domestic-partner law "to help California move *closer* to fulfilling the promises of inalienable rights,

⁴⁸ See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817; *Elden v. Sheldon* (1988) 46 Cal.3d 267, 274–275, 250 Cal.Rptr. at 258-59

⁴⁹ *In re Marriage Cases*, 49 Cal.Rptr.3d at 723

⁵⁰ *Keobke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 845, 31 Cal.Rptr.3d 565, 579

liberty, and equality contained in Sections 1 and 7 of Article 1 of the California Constitution”⁵¹

Amici recognize that the Legislature has done these things, and that it has done so to further the worthy goal of recognizing and strengthening gay and lesbian California families. But it is insufficient merely to move *toward* the goal of true equality, to move “closer” to the goal of realizing the promise of actual equality for all Californians and all California families. For equality before the law is not a mere aspiration; it is a constitutional guarantee. It is a right held by all Californians that cannot, without doing violence to that guarantee, be delayed or parceled out bit by bit through legislative gradualism. Our state constitution guarantees not near-equality, but equality itself.

The creation of domestic partnership for gay and lesbian Californians as a substitute for marriage, which continues to be reserved only for heterosexuals, falls short of this guarantee. In contrast to domestic partnership, which all parties agree is nothing more than a specific set of enumerated statutory rights, marriage is a great deal more. Marriage is a whole that is greater than the sum of its statutory parts. It is an institution that not only settles rights relating to ownership of debts and property, inheritance, taxes, hospital visitation rights, and innumerable other practical things, but also intangibly imbues the union of two

⁵¹ *Keobke v. Bernardo Heights Country Club*, 36 Cal. 4th at 838, 31 Cal.Rptr. 3d at 573 (emphasis added)

people with dignity, societal respect, and the imprimatur of society at large in a way that is unique to that institution. It is as a result of these intangible aspects of marriage that the institution has inspired such lofty rhetoric about its being “essential to the ordered pursuit of happiness” in a free society and “the most individually fulfilling relationship that one can enjoy in the course of a lifetime”⁵²

The judges and justices who wrote those things were not contemplating avoidance of a new tax basis upon the death of a partner; they were contemplating the intangible. It is this intangible—this whole that is greater than the sum of its parts, and not the parts themselves—that is marriage’s essence. And it is the right to that essence that is fundamental to humankind.

One who doubts this need look no further than one’s own understanding of marriage as it now exists for heterosexual Californians. It is unnecessary to ask those who are fortunate enough under current law to be married now whether it would be acceptable to them if the state were to legislatively alter their status as married persons and make them domestic partners instead. One knows the answer: it is “no.” Likewise those young couples who are now planning to marry and looking forward to a lifetime together bound by marriage, or those who hope in the future to find a love profound enough to be worthy of marriage’s lifetime

⁵² *Loving v. Virginia* (1967) 388 U.S. 1, 12, 87 S.Ct. 1817; *Elden v. Sheldon*, supra, 46 Cal. 3d 267, 274-275, 250 Cal. Rptr. 254

commitment. Marriage is something special. It is the closest that our secular society comes to the creation of a state-sanctioned sacrament.

Domestic partnership is simply not of that character. Of course those to whom the law makes marriage available, and who desire that unique status conferred in our society by marriage alone, would not passively allow the state to deprive them of it in favor of the bare statutory status that is conferred by domestic partnership.

But more important than this thought experiment is the law. As a matter of constitutional law, the state could not deprive married persons of their status as married persons, nor declare that couples cannot marry in the future. For this Court, and the United States Supreme Court, have made clear that marriage is a fundamental right of humankind. It is not something that the state can allow or disallow at its caprice.

The same is not true of domestic partnership. This fact alone illustrates not only that marriage and domestic partnership are not equal, but that their inequality is profound. And this profound inequality is passed from our marriage laws to our people. Preserving the revered institution of marriage only for the heterosexual majority and permitting only the lesser counterpart of domestic partnership to the state's gay and lesbian minority stamps that minority with a state-sanctioned badge of inequality.

Amici believe that there is only one way to remove that stamp, and that is to remove the barrier to gays' and lesbians' access to marriage. It cannot be done

through half measures and legislatively-created systems designed to edge toward—but not actually achieve—true equality before the law.

Our recent history shows how dangerous to the idea of true equality half-measures necessarily are, and how cruel. Toward the end of the twentieth century, the courts of this state had made significant progress toward eliminating legally-sanctioned bias against gay and lesbian Californians, but they had not eliminated it. Because legally-sanctioned bias continued to linger, as recently as 1985, the Court of Appeal was unable to accept even the basic idea that gay and lesbian couples could form a family. In considering a claim that it was impermissibly discriminatory for the state to grant insurance benefits to family members of married heterosexual state employees but not to the families of gay and lesbian employees who were unmarried only because the law forbade it, the Court wrote:

Plaintiffs argue that the [state] policy is disproportionate by providing benefits to the families of heterosexual state employees and never to “families” of homosexual employees The distinction Plaintiffs argue for here is one between heterosexual families and homosexual “families.” We are unable to establish the nature of a homosexual “family” on the basis of any natural, intrinsic, or legal foundation.⁵³

The Court of Appeal’s decision, in that opinion, to use quotation marks when referring to gay and lesbian families spoke more eloquently than the words that the Court employed to reach its result. Gay and lesbian families were not entitled to

⁵³ *Hinman v. Dept. of Personnel Administration* (1985)167 Cal.App.3d 516, 213

Cal.Rptr. 410

be treated the same as heterosexual families because, in the Court's view, they were not the same; to the Court, they were not families at all. They were at most a mere mimicry of "real" families headed by a heterosexual couple. They were at best a pale shadow of what a family is supposed to be.

And this idea of gay and lesbian families as somehow imitation families, and not the real thing, continues. In its opening brief to this Court, the Proposition 22 Legal Defense and Education Fund mirrors the Court of Appeal's 1985 use of scare quotes to show contempt for the basic idea that gay and lesbian Californians can form real families, or in any event real marriages. Throughout the brief, the Fund refers to heterosexual marriages (without quotation marks) and gay and lesbian "marriages," even when those marriages are valid in the jurisdictions in which they are solemnized.⁵⁴

Amici do not doubt that our state, as well as our courts, have made great strides toward eliminating this sort of bias, which has for so long prevented us as Californians from making real for our gay and lesbian fellow-citizens the promise of true equality under the law. And we recognize the Legislature's enactment of the Domestic Partner Act as an important step in the direction of such equality.

⁵⁴ Proposition 22 Legal Defense and Education Fund Opening Brief, pp 3, 30, 31, 32; See also generally, Proposition 22 Legal Defense and Education Fund Answer to Petitioners' Opening Briefs on the Substantive Issues.

But we recognize also that it is not enough merely to stride toward the equality that our constitution demands and that, by virtue of its inclusion in our constitution, we have proclaimed to be among our fundamental values. Rather, we must achieve that goal. By depriving our gay and lesbian fellow-Californians of the right to marry, and instead “allowing” them only the lesser possibility of domestic partnership, the state itself has put metaphorical quotation marks around our gay and lesbian families. Those quotation marks are no less damaging for being metaphorical than were the real ones that the Court of Appeal employed 22 years ago.

By declaring that gay and lesbian Californians have the right to marry to the same extent as their heterosexual counterparts, this Court would eliminate those metaphorical quotation marks, and declare finally that all Californians, gay and straight alike, are equal before the law. It is evident to us that common decency and basic fairness alone require this result. Even those who oppose this equality must recognize that it is the result that our constitutional guarantee of equal protection requires.

Conclusion

All Californians are entitled to the equal protection of the law. If the law treats some Californians differently than others, the equal-protection guarantee requires that the State justify that different treatment. The justification must, at a minimum be rational; there must be some legitimate goal that the different

treatment is intended to advance, and the different treatment must actually advance it. Under the equal-protection clauses of the United States and California constitutions, the mere desire to disadvantage a politically-unpopular group can never be a legitimate governmental goal, so a differential treatment under the law based on such a desire can never be rational. It cannot be constitutional.

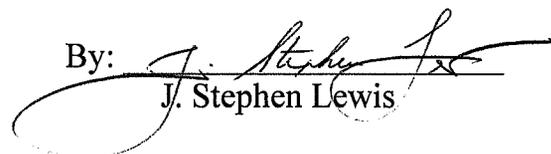
The State of California's laws treat gay and lesbian Californians differently from their heterosexual counterparts. Under those laws, heterosexual California couples may marry. Gay and lesbian California couples may not. Gay and lesbian couples historically have been denied the right to marry because they were feared and despised by the majority. They continue to be denied the marriage right because animosity towards them continues still. Thus, gay and lesbian Californians are treated differently under the law from their heterosexual counterparts out of a bare desire to harm them as a politically-unpopular group.

Because the different treatment of gays and lesbians with respect to the marriage right results solely from a desire to harm them as a politically-unpopular group, that different treatment is irrational as a matter of constitutional law. Because the different treatment is irrational, it is unconstitutional. The state statutes mandating that different treatment must therefore be struck down.

Dated: September 24, 2007

Respectfully submitted

By:


J. Stephen Lewis

