IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re MARRIAGE CASES **Judicial Council Coordination Proceeding No. 4365**	**Case No. S147999**

APPLICATION FOR PERMISSION TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, CALIFORNIA CATHOLIC CONFERENCE, NATIONAL ASSOCIATION OF EVANGELICALS, AND UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA IN SUPPORT OF RESPONDENT STATE OF CALIFORNIA

First Appellate District Nos. A110449, A110450, A110451, A110463, A110651, A110652
San Francisco County Superior Court Nos. CGC-04-429539, CGC-04-504038, CGC-04-429548, CPF-04-503943, CGC-04-428794
Los Angeles County Superior Court No. BS-088506
The Honorable Richard A. Kramer, Judge

KENNETH W. STARR
State Bar No. 58382
24569 Via De Casa
Malibu, CA 90265
Telephone: (310) 506-4611
Facsimile: (310) 506-4266

ALEXANDER DUSHKU
State Bar No. 166166
KIRTON & McCONKIE
60 East South Temple, Suite 1800
Salt Lake City, Utah 84145-0120
Telephone: (801) 328-3600
Facsimile: (801) 321-4893

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

CALIFORNIA CASES

OTHER CASES

FEDERAL STATUTES

CONSTITUTIONAL PROVISIONS

CALIFORNIA STATUTES

OTHER STATUTES

OTHER AUTHORITIES

APPLICATION FOR PERMISSION TO FILE AMICI CURIAE BRIEFAND STATEMENT OF INTEREST OF AMICI CURIAE

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Pursuant to California Rules of Court, Rule 8.200(c), amici curiae The Church of Jesus Christ of Latter-day Saints, California Catholic Conference, National Association of Evangelicals, and Union of Orthodox Jewish Congregations of America respectfully request permission to file the accompanying brief in support of Respondent State of California. The brief will assist the Court by setting forth the uniquely important perspective of four major faith communities with respect to marriage. Amici have a profound interest in the established definition of marriage and in the outcome of this case:

The Church of Jesus Christ of Latter-day Saints is a Christian denomination with approximately 800,000 members in California. Marriage and the family are central to the Church's doctrine and beliefs. The Church teaches that marriage between man and woman is ordained of God and that the traditional family is the foundation of society. (See *The Family: A Proclamation to the World*, The First Presidency and Council of the Twelve Apostles of The Church of Jesus Christ of Latter-day Saints (September 23, 1995), available at http://www.lds.org/library/display/

0,4945,161-1-11-1,00.html ["The family is ordained of God. Marriage between man and woman is essential to His eternal plan. Children are entitled to birth within the bonds of matrimony, and to be reared by a father and a mother who honor marital vows with complete fidelity."].) The Church believes that marriage and family supply the crucial relationships through which parents and children learn to live basic moral norms and acquire public and private virtue. The Church opposes changing the traditional male-female definition of marriage because of the harm such a change will cause to marriage and the family.

California Catholic Conference ("Conference") is the official public policy arm of the Roman Catholic Church in California. There are over ten million Catholics in California, representing approximately 29% of the population. The mission of the Conference is to advocate for the Catholic Church's public policy agenda statewide and to facilitate common pastoral efforts in the Catholic community. The Conference speaks on behalf of California's two Catholic archdioceses, ten dioceses, the Cardinal Archbishop of Los Angeles, the Archbishop of San Francisco, the Bishops of Sacramento, Santa Rosa, Stockton, Fresno, Oakland, San Jose, Monterey, San Bernardino, Orange, and San Diego, and California's auxiliary bishops regarding public policy matters concerning the Catholic Church in California. To this end, the Conference represents the interests of the Catholic Church and its bishops before the California Legislature, the

executive agencies of the State of California, and the courts throughout California.

The Conference has a keen interest in the present case. The Catholic Church teaches that the well-being of the individual person and of human society is closely bound up with the healthy state of conjugal and family life as reflected in the marriage between one man and one woman, a covenant that Catholic people believe has been raised by Christ the Lord to the dignity of a sacrament. (See *Gaudiem et Spes*, 47, § 1, Vatican Council II: The Conciliar and Post Conciliar Documents, New Revised Edition (A. Flannery, ed., 1996), 47 § 1 [cited in *Catechism of the Catholic Church* § 1603].) The Catholic Church and the Catholic faith community oppose any policy or law that would undermine the fundamental importance of marriage as the bedrock upon which a just and moral human culture is built. *Id.* To this end, the Conference is vitally interested in the outcome of these proceedings.

National Association of Evangelicals ("NAE") is the largest representative body for evangelical Christians in the United States, representing, networking and mobilizing our 56 member denominations and their combined 45,000 churches. In addition to their networks of churches, NAE membership also consists of several hundred para-church ministries, educational institutions, regional associations and local independent churches. All told the NAE serves as the premier voice for

over 30 million evangelical Christians in America. As a national organization, representing congregations and constituents throughout the country and including the State of California, the NAE has a vested interested in legislative and legal matters pertaining to evangelicals.

Matters of marriage and the family unit are of utmost importance to evangelical Christians and are the impetus for the NAE's involvement in this brief. The primary social unit in every society around the world is the family. It is the foundation on which stability and security for each of its members is built. The NAE believes that, despite the many changes in contemporary society, the family in which mother and father share equally in the raising of their children provides the ideal environment in which healthy, holistic development can take place. The NAE is firmly convinced that the strengthening and encouragement of the institution of heterosexual marriage is vitally important to the maintenance of secure family life, and that this, in turn, is crucial to stability in society as a whole. The NAE further affirms its absolute conviction that the marriage of one man with one woman is a sacred union ordained by God. The permanence and quality of this relationship provide the basis for the essential stability required by the family.

The **Union of Orthodox Jewish Congregations of America** (the "U.O.J.C.A.") is a non-profit organization representing nearly 1,000 Jewish congregations throughout the United States, with approximately 50 affiliated congregations in the State of California. It is the largest Orthodox Jewish umbrella organization in this nation. Through its Institute for Public Affairs, the U.O.J.C.A. researches and advocates legal and public policy positions on behalf of the Orthodox Jewish community. The U.O.J.C.A. has filed, or joined in filing, briefs with state and federal courts in many of the important cases which affect the Jewish community and American society at large. Regarding the marriage cases before this Court, the Jewish tradition has always recognized the sanctity and special nature of the institution of marriage, and that only the relationship between a man and a woman can be considered marriage. Moreover, Judaism teaches that the institution of marriage is central to the formation of a healthy society and the raising of children.

Because this Court's decision will have a significant effect on marriage, the family, and the foregoing interests, amici respectfully request leave to file the attached brief.

Respectfully submitted,

KENNETH W. STARR
State Bar No. 58382
24569 Via De Casa
Malibu, CA 90265
Telephone: (310) 506-4611
Facsimile: (310) 506-4266

ALEXANDER DUSHKU
State Bar No. 166166
KIRTON & McCONKIE
60 East South Temple, Suite 1800
Salt Lake City, Utah 84145-0120
Telephone: (801) 328-3600
Facsimile: (801) 321-4893

By:_____
KENNETH W. STARR
Attorneys for Amici Curiae

September 25, 2007

AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENT STATE OF CALIFORNIA

The voices of literally millions of Californians are represented in the broadly ecumenical gathering of faith communities who join in this submission. The theological differences among the amici are important. But those differing perspectives come together in support of a fundamental proposition of law: The question now before this Court is a profoundly important issue of public policy that should be entrusted for resolution to the vigorous policy debate that reflects, at its very best, the American experiment in self-government, including California's tradition of governance by the people.

Resolution of the pending constitutional challenge is to be found not in legal doctrines developed in and drawn from clearly distinguishable jurisprudential settings. The proper resolution is found, rather, in judicial voices both past and present that counsel courts to keep the marketplace of ideas open so as to encourage the democratic conversation to unfold – a conversation in which all Californians, and their elective representatives, can fully participate.

Over one hundred years ago, Justice Oliver Wendell Holmes, Jr. taught the nation that the federal Constitution represents, at bottom, a unifying document under which individuals and groups of dramatically different policy views can carry on the democratic process. Fully applicable to California's Constitution, Justice Holmes wrote:

> [The] Constitution . . . is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States. . . . I think that the word "liberty," in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless

> it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.

(*Lochner v. New York* (1905) 198 U.S. 45, 75-76 (Holmes, J., dissenting).)

Justice Stephen G. Breyer recently emphasized these themes: "[T]he Constitution [is] centrally focused upon active liberty, upon the right of individuals to participate in democratic self-government." (Breyer, Active Liberty: Interpreting Our Democratic Constitution (2005), p. 21.) In his view, "courts should take greater account of the Constitution's democratic nature when they interpret constitutional and statutory texts." (*Id.* at 5.) Judicial restraint – *i.e*, "judicial modesty in constitutional decision-making" – is essential. (*Id.* at 37; *see also id.* at 17.)

Nowhere is judicial deference to democratic self-government more appropriate than in California. Here, the people have zealously retained their sovereign right to set public policy. The California Constitution places unique emphasis on democratic participation in policymaking. That emphasis represents a constitutional lens through which this Court should view its role in adjudicating these cases.

More specifically, on no subject is judicial restraint more warranted than in the present challenge to the time-honored definition of marriage. "[T]he structure of society itself largely depends upon the institution of marriage." (*Marvin v. Marvin* (1976) 18 Cal. 3d 660, 684.) Like generations of Californians, when penning those words in 1976, this Court understood "marriage" to be the union of a man and a woman. It understood that marriage is a social "institution," not merely a private arrangement between two people. And it understood that what is at stake in marriage is no less than the wellbeing "of society itself."

This Court was right in 1976. Its words remain true today. Male-female marriage is the life-blood of community, society, and the state. We

rely on this honored institution for the procreation and proper formation of the next generation. Social science demonstrates, and amici's own long experience confirms, that a child fares best when raised by caring biological parents who have the deepest stake in his or her wellbeing and who can provide both male and female role models.

These amici have a powerful interest in the institution of marriage.[1] We are deeply concerned about the happiness and welfare of our members, especially our member children. Through millions of hours of counseling and ministry, we have seen at close range the enormous benefits that traditional male-female marriage imparts. We have also witnessed the substantial adverse consequences for children that often flow from alternative household arrangements.

---

[1] Some have sought to dismiss the perspectives of faith communities as improper because they are informed by religious beliefs. As the Statement of Interest demonstrates, these amici do indeed assign profound religious meanings to marriage – meanings shared by millions of people in California. In a diverse, representative democracy, it is appropriate that religious viewpoints be heard in the debate over public policy; faith communities have every right to express their views in the public square. (*Walz v. Tax Commission of City of New York* (1970) 397 U.S. 664, 670 ["Of course, churches as much as secular bodies and private citizens have [the] right [to take positions on public issues]."].)

However, amici's arguments are not about religious beliefs. On the contrary, our submission is based on historical and sociological facts about what marriage has always been across time and cultures (and why), and on venerable legal doctrines that counsel against courts removing fundamental policy decisions from the democratic process. Our arguments are based, in short, on public reasons and political values implicit in our political culture. (See Somerville, *What About Children?*, *in* Divorcing Marriage: Unveiling the Dangers in Canada's New Social Experiment (2004), pp. 70-71 ["One strategy used by same-sex marriage advocates is to label all people who oppose same-sex marriage as doing so for religious or moral reasons in order to dismiss them and their arguments as irrelevant to public policy. [Further,] good secular reasons to oppose same-sex marriage are re-characterized as religious or as based on personal morality and, therefore, as not applicable at a society level."].)

The plaintiffs who advocate same-sex marriage (hereafter "plaintiffs") seek to replace the male-female definition of marriage with a genderless (any two people) definition. That fundamental change will have profound consequences. It will transform the official meaning and purpose of marriage from an age-old institution centered on uniting men and women for the bearing and rearing of children to a new institution centered on affirming adult relationship choices. Lost will be the traditional meaning that male-female marriage is a special institution that society highly values because of the children it nearly always generates and because it provides those children with the mother and father they need for optimal development. Indeed, as a matter of law there would be no such thing as male-female marriage, only marriage as the union of any two people regardless of gender. Since no same-sex marriage can produce children from both spouses, the close cultural linkage between the institution of marriage and the begetting and raising of children will be weakened. Whatever the choices of individual couples, children will no longer be central to the social meaning and purpose of marriage. What plaintiffs advocate is in fact an enormous change in California's most important social institution.

As members of California's political community, plaintiffs are fully entitled to their views. But so are millions of other Californians, including these amici, who respectfully disagree. California's marriage debate should not be decided by the judiciary merely because, like nearly all social issues, plaintiffs can couch their policy position in terms of constitutional rights.

Our submission urges judicial respect for the deeply-rooted, multi-generational judgment of the people of California about the best way to organize the institution of marriage to secure its essential social benefits. That judgment is as old as California's Constitution itself, with a pedigree stretching back millennia. Under no plausible interpretation of the

California Constitution can it be argued that the people intended for the judiciary to decide the fundamental definition of marriage, much less overturn it.

If there is to be a foundational change in the definition of marriage, it should come from the people of California. The democratic dialogue about this issue is lively and ongoing, both among the people and within their representative institutions. In a State known for generously extending broad legal rights to homosexuals, the California judiciary has no cause to interrupt that exquisitely sensitive conversation about the future of marriage.

ARGUMENT

I. THIS COURT SHOULD RESPECT THE RIGHT OF THE PEOPLE TO DEFINE THE INSTITUTION OF MARRIAGE.

California's definition of marriage as the union of a man and a woman is entitled to profound judicial respect. California law reflects a deep cultural and democratic judgment about the nature and role of the institution of marriage. That judgment predates California itself. It has been repeatedly reaffirmed by California's democratic process since statehood. Unlike racist laws against interracial marriage, that judgment reflects no animosity toward gays and lesbians. The traditional definition seeks to address biological and social realities that uniquely pertain to intimate male-female relationships and the children they produce. Even in jurisdictions around the world known for being highly solicitous of gays and lesbians, the democratic judgment of nearly all such jurisdictions remains that marriage should be reserved exclusively to male-female couples, with the legitimate needs of homosexuals being addressed through other protections and institutions. Judicial deference to the people's democratic judgment on this issue is appropriate.

A. Marriage Is Society's Most Important Institution and Not Merely a Vehicle for Advancing the Interests of Adults.

The Marriage Cases involve a question best understood not as a narrow individual rights claim but rather as an enormously important public policy question about a social institution at the very heart of our society. Fundamentally, these cases are a dispute over whether to change the basic definition of the institution of marriage and, if so, whether the judiciary should be the instrument of that change.

1. In all cultures throughout history, marriage has been a man-woman institution centered on procreation and child rearing.

Defenders of the established gender-based (man-woman) definition of marriage and advocates for creating a genderless (any two people) definition embrace radically different understandings about the basic nature and function of marriage. We begin, therefore, with a review of what marriage has always been as a matter of historical fact.

Marriage is a social institution. The starting point is the recognition that marriage is what sociologists call a *social institution* – a socially structured way of living that orders relationships according to public purposes and meanings. "At least since the beginning of recorded history, in all the flourishing varieties of human cultures documented by anthropologists, marriage has been a universal human institution." (Doherty, et al., Why Marriage Matters: Twenty-One Conclusions from the Social Sciences, Institute for American Values (2002), pp. 8-9].) Numerous courts and scholars have recognized the institutional nature of marriage. (See, e.g., *Williams v. North Carolina* (1942) 317 U.S. 287, 303 ["[T]he marriage relation [is] an institution more basic in our civilization than any other."]; *DeBurgh v. DeBurgh* (1952) 39 Cal. 2d 858 ["In a divorce proceeding the court must consider not merely the rights and

wrongs of the parties as in contract litigation, but the public interest in the institution of marriage."]; *Marvin*, *supra*, 18 Cal. 3d at 684 ["[T]he structure of society itself largely depends upon the institution of marriage."]; *In re Marriage of Sasson* (1982) 129 Cal. App. 3d 140, 144 [noting that petitioner's argument "ignores the nature of the institution of marriage"].)

However, the significance of marriage as a social institution is less understood. Although facilitating many private ends, marriage's institutional nature means that it is not merely a private arrangement. It exists to serve broad public and social purposes. The father of modern social anthropology, A. R. Radcliffe-Brown, noted that social institutions are "the ordering by society of the interactions of persons in social relationships." (Radcliffe-Brown, Structure and Function in Primitive Society (1952), p. 10-11.) In social institutions, "the conduct of persons in their interactions with others is controlled by norms, rules, or patterns." (*Id.*) As a consequence, "a person [in a social institution] knows that he [or she] is expected to behave according to these norms and that the other person should do the same." (*Id.*)

Through such rules, norms, and expectations – some legal, others cultural – social institutions become constituted by a web of public meaning. Social institutions, and the language we use to describe them, in large measure define relationships and how we understand them.

> "[L]anguage – or more precisely, normative vocabulary – is one of the key cultural resources supporting and regulating any [social] institution. Nothing is more essential to the integrity and strength of an institution than a common set of understandings, a shared body of opinions, about the meaning and purpose of the institution. And, conversely, nothing is more damaging to the integrity of an institution than an attack on this common set if understandings with the consequent fracturing of meaning."

(Whitehead, *The Experts' Story of Marriage* 7 [A Council on Families in America Working Paper for the Marriage in America Symposium, Working Paper No. WP14, 1992], quoted in Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman* (2004) 2 U. St. Thomas L. J. 33, 52-53.) "Finally, and perhaps most importantly, social institutions exist in order to solve basic problems and meet core needs." (Blankenhorn, The Future of Marriage (2007), p. 61.)

Marriage has always been a male-female institution centered on children. Setting aside for a moment what the institution of marriage *ought* to be, the fact is that throughout history and in all or virtually all cultures marriage has been an institution whose public function and meaning have centered on creating enduring male-female unions for the bearing and rearing of children. Whatever other functions and meanings marriage may have been bent to serve (property inheritance, political alliances, etc), across time and cultures that has always been its core purpose. After surveying the findings of numerous respected anthropologists, family scholar David Blankenhorn summarizes the research as follows:

> In all or nearly all human societies, marriage is socially approved sexual intercourse between a woman and a man, conceived both as a personal relationship and as an institution, primarily such that any children resulting from the union are – and are understood by the society to be – emotionally, morally, practically, and legally affiliated with both of the parents. [¶] ***[Marriage] reflects one idea that does not change: For every child, a mother and a father***.

(Blankenhorn, *supra*, p. 91 (emphasis added).) Doherty, et al. likewise conclude:

> Marriage exists in virtually every known human society. . . . As a virtually universal human idea, marriage is about the reproduction of children, families, and society. . . . [M]arriage across societies is a publicly acknowledged and supported sexual union which creates kinship obligations and sharing of

> resources between men, women, and the children that their sexual union may produce.

(Doherty, et al., *supra*, p. 8-9.)

This cross-cultural, historical understanding of marriage is silent about the various roles men and woman may assume within marriage. As an institution, marriage cares nothing about who does the dishes or cuts the grass or controls the money. What it has always profoundly cared about, however, is the uniting of men and women to procreate and care for the next generation. To be sure, that is not all marriage has been about. Especially in modern cultures, people have placed great weight on companionship, romance, and mutual economic support. Individuals assign myriad private purposes and meanings to marriage. But regulating the sexual union of men and women for the bearing and optimal rearing of children has always been the primary *public* purpose and meaning of marriage. (See *Hernandez v. Robles* (N.Y.A.D. 2005) 805 N.Y.S. 2d 354, 360 [male-female marriage based on understanding "that the optimal situation for child rearing is having both biological parents present in a committed, socially esteemed relationship"; "Marriage laws are not primarily about adult needs for official recognition and support, but about the well-being of children and society"], *affm'd* (N.Y. 2006) 855 N.E. 2d 1.)

2. Same-sex marriage proponents advocate a new definition of marriage as a private institution centered on accommodating intimate adult relationships.

A fundamental assertion, often unspoken, of same-sex-marriage supporters is that the public purpose and meaning of the institution of marriage should not center on making and raising children but rather on accommodating and facilitating intimate adult relationships and diverse family arrangements. This historically novel, almost privatized (although

publicly celebrated) conception of marriage has gained enormous currency in recent years among media, academic and legal elites.

The *Economist* editorializes that "the real nature of marriage" is a commitment "between two people to take on special obligations to one another." (*Economist*, "The Case for Gay Marriage," February 26, 2004.) An amicus brief to the New Jersey Supreme Court by academics opines that marriages are essentially "committed, interdependent partnerships between consenting adults" and thus marriage is the state's "formal mechanism for recognizing adult partnership." (Brief of the Professors of the History of Marriage, Families, and the Law as Amici Curiae In Support Of Plaintiffs-Appellants, pp. 1-2, 15, *Lewis v. Harris* (N.J. 2006) 908 A. 2d 196 (No. 58389).)

Taking this privatized understanding to its logical conclusion, the Law Commission of Canada recommended that government stop defining and shaping "marriage" as a public institution and instead focus on facilitating and supporting "close personal adult relationships," in whatever form they may take: "The state's objectives underlying contemporary regulation of marriage relate essentially to the facilitation of private ordering: providing an orderly framework in which people can express their commitment to each other, receive public recognition and support, and voluntarily assume a range of legal rights and obligations." (Law Commission of Canada, Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships (2001), pp. 129, xviii.)

So too, supporters of same-sex marriage in the present cases advocate a definition largely divorced from the traditional understanding of marriage as a child-centered institution. (See, e.g., Respondents' Opening Brief on the Merits (Brief of Rymer et al.), p. 20 ["Marriage is the status conferred by the government to signify that two people are in a relationship worthy of the state's highest recognition and strongest protection."].) To be

sure, they include children in their discussions, but in their vision of marriage the bearing and rearing of children is not the central focus. Because none of these definitions accounts for marriage's historical *institutional* focus on procreation and ensuring that each child has a mother and a father, they are fundamentally flawed.[2]

3. Redefining marriage to include any two adults in a close relationship would fundamentally alter the meaning of marriage.

We in no wise question the sincerity of plaintiffs' desire to have their relationships recognized as marriages. There is an understandable desire to join a venerable institution and then carry on as if nothing had changed. But it is not so easy. What plaintiffs advocate is a redefinition of the institution of marriage. The impact of such a redefinition would sweep far beyond the parties in these cases. It would fundamentally alter the meaning and many of the public purposes of marriage. Professor Daniel Cere of McGill University (and director of the Institute for the Study of Marriage, Law, and Culture) explains:

> Meaning is not nominal or incidental to the life of social institutions; it constitutes their life. This helps to account for the highly charged nature of conflicts over the core public meanings and purposes of institutions like marriage. In this sense, the politics of definitional discourse is not just a quibble over words. Definitions matter. They constitute and

[2] A recent statement regarding marriage and the law by 101 legal and family scholars noted the intellectual poverty of such conceptions of marriage: "[T]he basic understanding of marriage underlying much of the current same-sex marriage discourse is seriously flawed . . . . It is adult-centric, turning on the rights of adults to make choices. It does not take institutional effects of law seriously, failing to treat with intellectual seriousness any potential consequences that changing the basic legal definition of marriage may have for the children of society. In many cases it directly or indirectly seeks to disconnect marriage from its historic connection to procreation." (Marriage and the Law: A Statement of Principles, Institute for American Values (2006), p. 18.)

> define authoritative public knowledge. . . . Changing the public meaning of an institution changes the institution. [The change] inevitably shapes the social understandings, the practices, the goods, and the social selves sustained and supported by that institution.

(Cere, "The Conjugal Tradition in Postmodernity: The Closure of Public Discourse?" (December 2003) [unpublished paper presented at the Re-visioning Marriage in Postmodern Culture Conference, Toronto], pp. 4-5, *quoted in* Stewart, *Judicial Redefinition of Marriage* (2004) 21 Can. J. Fam. L. 11, 76-77 (footnotes omitted).)

In its recent decision holding that the New Jersey Constitution requires equal benefits and privileges for same-sex couples but not the name "marriage," the New Jersey Supreme Court acknowledged the profound change in social meaning that would follow alteration of marriage's foundational definition:

> We cannot escape the reality that the shared societal meaning of marriage – passed down through the common law into our statutory law – has always been the union of a man and a woman. To alter that meaning would render a profound change in the public consciousness of a social institution of ancient origin.

(*Lewis v. Harris* (N.J. 2006) 908 A. 2d 196, 222; see also *Goodridge v. Department of Public Health* (2003) 798 N.E. 2d 941, 981 (Sosman, J., dissenting) ["[I]t is surely pertinent to the inquiry to recognize that this proffered change affects not just a load-bearing wall of our social structure but the very cornerstone of that structure."].)

More precisely, expanding "the category of marriage to include all [two-person] close relationships (same-sex or opposite-sex) serves as the leverage issue to advance a complete redefinition of the public meaning of marriage. *The proposed redefinition of marriage as 'a union of two*

persons' distills marriage down to its pure close relationship essence." (Cere, *supra*, p. 2 (emphasis added).)

This fact is widely acknowledged even by proponents of same-sex marriage. Many prominent genderless-definition supporters advocate that position as a means of changing the meaning and purpose of marriage from a public institution centered on two-parent childrearing to a state-facilitated private relationship whose structure and meaning vary according to individual preferences and needs. The potential implications of such a change are far-reaching. Many of these same persons openly advocate an end to the two-person requirement as the next logical step after same-sex marriage.[3]

---

[3] See, e.g., Stacey, In the Name of the Family: Rethinking Family Values in the Postmodern Age (1996), pp. 122-23, 126-27 [Ms. Stacey is a NYU professor of sociology, a prominent theorist/advocate for same-sex marriage, and a frequently quoted expert on marriage issues. She writes: "If we begin to value the meaning and quality of intimate bonds over their customary forms, there are few limits to the kinds of marriage and kinship patterns people might wish to devise. . . . 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 [*i.e.*, two-person] limitations of Western marriage and seek some of the benefits of extended family life through small-group marriages . . . ."]; Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples* (1996) 447 Mich. L. Rev. 95 [Mr. Chambers is a professor at the University of Michigan and prominent proponent of same-sex marriage. Among the reasons he favors same-sex marriage is that it would likely "make society receptive to further evolution of the law," specifically: "If the deeply entrenched paradigm we are challenging is the romantically linked man-woman couple, we should respect the similar claims made against the hegemony of the two-person unit and against the romantic foundations of marriage."]; see also Willis, *Can Marriage be Saved? A Forum* (July 5, 2004) Nation, pp. 16-17 ["For starters, if homosexual marriage is O`K, why no group marriage[?]."].

B. California's Definition Of Marriage Represents The Deeply-Rooted, Multi-Generational Judgment Of The People Of California.

The fundamental change plaintiffs advocate stands in stark opposition to the people's longstanding judgment about how marriage should be structured.

1. In the Western tradition, the heterosexual nature of marriage was a firmly-established cultural and social reality long before government took an active interest in the institution:

> For nearly two millennia, the Western legal tradition defined marriage as a heterosexual, monogamous union, designed for the procreation and nurture of children, the mutual help and companionship of husband and wife, and the mutual protection of both parties from sexual sin and instability. This definition of marriage has been woven deeply into the fabric of Western canon law, civil law, and common law and is still reflected today in thousands of discrete American state and federal laws.

(Witte, *The Tradition of Traditional Marriage*, in Marriage and Same-Sex Unions: A Debate (2003), p. 47.)

Most of the Western tradition concerning marriage arose not from governmental arrangements but from existing social and religious practices. European political entities later adopted and codified those practices as government extended its jurisdiction to more areas of life. "Indeed, it was not until 1753, with the passage of Lord Hardwicke's Marriage Act, that the British state became a significant player in the joining together of men and women as husbands and wives." (DeCoste, *Courting Leviathan: Limited Government and Social Freedom in Reference re Same-Sex Marriage* (2005) 42 Alberta L. Rev. 4, 18 (citations omitted).)

The original thirteen colonies inherited the universal male-female definition of marriage from the European tradition and in particular from

English law.[4] After Independence, each of the States retained the established definition, as did every State that joined the Union.[5]

2. At its founding, California quite naturally adopted the settled understanding of marriage. The institution's male-female nature was an assumed part of the California Republic's original 1849 Constitution. Although that document did not expressly define marriage as a male-female union, it did expressly protect property ownership by married women. (See Grodin, et al., The California State Constitution: A Reference Guide (1993), p. 6.) The debate surrounding this provision includes numerous gender-specific references demonstrating that the Framers understood marriage in male-female terms. (See Browne, Report of the Debates in the Convention of California on the Formation of the State Constitution, in September and October, 1849 (1850), p. 257-67.)

California's current statutory definition had its genesis in the 1872 Civil Code, which provided in part: "Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be

---

[4] See Kindregan, *Same-Sex Marriage: The Cultural Wars and the Lessons of Legal History* (2004) 38 Fam. L. Q. 427, 430 ["Even though many colonies were established by religious dissenters and ecclesiastical courts based on the Church of England model were rare, the colonies, nonetheless, imported most of the substantive law of marriage created by the English Church and its ecclesiastical courts. Thus, the civil law reflected the religious English view of marriage as a permanent monogamous union of one man and one woman."].

[5] See Friedman, Law in America: A Short History (2002), p. 32 ["The colonies won independence after a long war; but unlike say the French or the Russian revolutions, there was no sharp legal break with the past. The common law system (American style) remained intact."].

followed by a solemnization . . . or by a mutual assumption of marital rights, duties or obligations." (Cal. Civ. Code § 55 (1872).)[6]

Although not phrased in expressly heterosexual terms, the term "marriage" was understood by all to mean the union of a man and a woman. Other provisions relating to marriage used gender-specific terms indicative of this universal understanding. (See e.g., Cal. Civ. Code § 56 (1872) ["male" and "female"]; Cal. Civ. Code § 57 (1872) ["husband and wife"]; Cal. Civ. Code § 57 (1872) ["brothers and sisters"]; Cal. Const., Art XX, § 8 (1879) ["husband or wife"].) Court decisions from that era likewise confirm this baseline understanding of marriage and emphasize, in particular, its procreative aspects. (See, e.g., *Baker v. Baker* (1859) 13 Cal. 87, 103 ["the first purpose of matrimony, by the laws of nature and society, is procreation"]; *Sharon v. Sharon* (1888) 75 Cal. 1, 33 ["the procreation of children under the shield and sanction of the law" is one of the "two principal ends of marriage"] (citation and quotation marks omitted).) There is no evidence that during California's founding period the notion of legally-sanctioned, same-sex marriage even existed in the United States.

For decades, California's marriage law remained largely unchanged. (Cf. Kern's Cal. Civ. Code § 55 (1906); Standard Cal. Civ. Code § 55 (1951).) Greater precision in defining marriage was unnecessary given the cultural and legal understanding that marriage involved only opposite-sex couples. (See Schneider and Brinig, An Invitation to Family Law (1996), p. 40 ["Until the 1970s, courts and legislatures assumed that 'marriage' necessarily described a relationship between a man and a woman."]. Thus, when the Family Law Act of 1969 was enacted, the Legislature retained

---

[6] The words "or by mutual assumption of marital rights, duties or obligations" were removed in 1895 to end statutory sanction of common law marriage. (See Cal. Civ. Code § 4100 (West Ann. 1970) [Historical Note].)

essentially the same marriage definition enacted in 1872. (See Standard Cal. Civ. Code § 4100 (1969) ["Marriage is a personal relation arising out of a civil contract, to which the consent of the parties capable of making that contract is necessary. . . ."].)

3. By the 1970s, however, the previously unheard-of concept of gay marriage had become a subject of discussion and debate. (See, e.g., *Baker v. Nelson* (Minn. 1972) 191 N.W. 2d 185, 185-186 [denying constitutional challenge to bar on same-sex marriage], *dismissed for lack of substantial federal question* (1973) 409 U.S. 810; Note, *The Legality of Homosexual Marriage* (1973) 82 Yale L. J. 573.) As the Superior Court summarized, the Legislature responded by adding "between a man and a woman" to the marriage definition so as to make pellucidly clear that California law did not permit same-sex marriages:

> Family Code Section 300 was enacted in 1992. It replaced former Civil Code section 4100, which prior to 1977 defined marriage as "a personal relation arising out of a civil contract, to which the consent of the parties capable of making it is necessary." A 1977 amendment to section 4100 changed this definition to add that marriage is the union between a man and a woman. . . . The legislative history to what is now Family Code section 300 indicates an intention to clarify that each such party capable of consent had to consent to marry a member of the opposite sex rather than of the same sex. Notwithstanding any such perceived ambiguity, marriage in California before Family Code section 300 and the 1977 amendment to former Civil Code section 4100 was limited to opposite-sex couples . . . .

(*Coordination Proceeding*, *Special Title [Rule 1550(c)]*, *Marriage Cases* (Cal. Superior. 2005) 2005 WL 583129, *5 [hereafter "*Marriage Cases*"].) The clarifying phrase "between a man and a woman" brings California's

law into textual harmony with the gender-specific definitions employed in the overwhelming majority of States.[7]

As the same-sex marriage debate intensified in the late 1990s, California again revisited the definitional question. After vigorous discussion and debate, on March 7, 2000, the people of California passed by a large margin Proposition 22 (now codified as Family Code § 308.5), which provides that "[o]nly marriage between a man and a woman is valid or recognized in California."[8]

This elaborate history culminated, in short, in the people of California coming to a judgment, consistently affirmed for more than a century, that the male-female norm in marriage is best for society. Even

---

[7] *See* Ala. Code § 30-1-19 (2000); Alaska Stat. Ann. § 25.05.013 (1998); Ariz. Rev. Stat. Ann. § 25-101 (West 2000); Ark. Code Ann. § 9-11-107, -109, -208 (1987); Colo. Rev. Stat. § 14-2-104 (2000); Del. Code Ann. tit 13, § 101 (1975); Fla Stat. Ann. § 741.212 (West 2000); Ga. Code § 19-3-3.1 (1982); Haw. Rev. Stat. § 572-3 (1999); Idaho Code § 32-209 (Michie 1996); 750 Ill. Comp. Stat. Ann. § 5/212 (West 2000); Ind. Code § 31-11-1-1 (2003); Iowa Code § 595.2 (1998); Kan. Stat. Ann. § 23-101 (1999); Ky. Rev. Stat. § 402.00 (2000); La Civ. Code Ann. Art. 89 (West 2000); Me. Rev. Stat. Ann. tit. 19-A, § 701 (West 2000); Mich. Comp. Laws Ann. § 551.1 (West 2000); Mich Comp. Laws Ann. § 551.271 (West 2000); Minn Stat. Ann. § 517.01; Miss. Code Ann. § 93-1-1; Mo. Rev. Stat. § 415.022 (2000); Mont. Code Ann. § 40-1-401; N.C. Gen. Stat. § 51-1.2 (West 2000); N.D. Cent. Code § 14-03-01 (1960); 2003 Ohio S.B. 65; 43 Okla. St. Ann. § 3.1 (West 2000); 23 Pa. Consol. Stat. Ann. § 1704 (West 2000); S.C. Code Ann. § 20-1-15 (West 2000); S.D. Codified Laws § 25-1-1 (1968); Tenn. Code Ann. § 36-3-113 (1955); Texas Family Code § 6.204 (2004); Utah Code Ann. § 30-1-4 (1953); Va. Code § 20-45.2 (West 2000); 15 Vt. Stat. § 1201(4) (2000); Wash. Rev. Code § 26.04.020 (2000); W. Va. Code § 48-2-603 (2000).

[8] Proposition 22 prevailed by a 23-point margin. Statewide, 4,618,673 votes were cast in favor of the proposition, comprising 61.4% of the total vote. Opponents garnered 2,909,370 votes, for 38.6% of the vote. (See California Secretary of State – Elections & Voter Information, *Votes for and Against March 7, 2000, Statewide Ballot Measures*, available at http://www.ss.ca.gov/elections/sov/2000_primary/sum_measures.pdf.)

though California has had numerous opportunities to revisit that norm through its democratic institutions, including in the context of significant changes to California family law (such as the introduction of no-fault divorce), the State has retained the traditional definition.

This cannot be brushed aside as a moment of democratic passion. *Viewed broadly and over time, California law reflects the considered, multi-generational judgment of the people of California and their elected representatives that the male-female definition of marriage should be preserved, protected, and upheld as the social ideal best suited to secure the benefits of marriage*.

C. California Marriage Law Reflects No Hostility Toward Gays And Lesbians.

If California's limitation of marriage to heterosexual couples were nothing more than an atavistic device to suppress constitutional rights, then despite the great weight of tradition the courts would have occasion to intervene, much as they did in striking down anti-miscegenation laws. But there is no evidence of that. Any effort to portray California's historical understanding of marriage as rooted in bigotry would be deeply inaccurate and profoundly unfair. The institution of male-female marriage has its own venerable pedigree intended from time immemorial to address both biological and social realities.

In particular, California's current definition of marriage bears no resemblance to anti-miscegenation laws roundly condemned in *Perez v. Lippold* (1948) 32 Cal. 2d 711, and *Loving v. Virginia* (1967) 388 U.S. 1. The judicial focus in those landmark cases was the lack of any legitimate purpose for prohibiting interracial marriage. The reason undergirding this racist limitation was to perpetuate an invidious regime of white superiority. In *Perez*, this Court presciently held that anti-miscegenation laws "violate the equal protection of the laws clause of the United States Constitution by

impairing the right of individuals to marry on the basis of race alone and by arbitrarily and unreasonably discriminating against certain racial groups." (*Perez*, 32 Cal. 2d at 731.) Likewise, the *Loving* Court concluded that the challenged law rested "solely upon distinctions drawn according to race" and that there was "patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification." (*Loving*, 388 U.S. at 11.)

Perez and *Loving* prevented the hijacking of marriage laws to advance invidious purposes bearing no relation to marriage's core function. Indeed, anti-miscegenation laws represented relatively recent overlays on the traditional definition. "[U]nder the common law of England, difference in race was not a disability rendering parties incapable of contracting marriage." (Kovach, *Miscegenation Statutes and the 14th Amendment* (1949) 1 W. Res. L. Rev. 89.) At their epicenter, anti-miscegenation laws sought to change the baseline understanding of marriage as the union of a man and a woman, regardless of race or ethnicity, to foster a regime of white supremacy.

In stark contrast, California's male-female marriage definition has never been infected with any invidious purpose. Ironically, here it is the advocates of same-sex marriage who press for changing the baseline definition to advance both personal interests and a social agenda having little to do with marriage's core social function. Based on legitimate biological and sociological concerns, California's longstanding consensus that marriage should be limited to opposite-sex couples reflects no animosity toward any category of persons.

D. California's Democratic Judgment Is Consistent with the Judgment of Both the American People and the Vast Majority of Other Countries.

This policy judgment is consistent with that of the people in every other State, with the possible exception of Massachusetts. Not a single State has altered the traditional definition of marriage through the democratic process. The will of the American people has been consistently in favor of retaining traditional marriage.

In 1996, Congress passed – and President Clinton signed into law – the federal Defense of Marriage Act, 1 U.S.C. § 7, 28 U.S.C. § 1738, which prohibits the federal government from recognizing anything other than the traditional male-female union as marriage. The vote was overwhelmingly in favor, passing by 85-14 in the Senate and 342-67 in the House of Representatives.[9]

When the Supreme Court of Hawaii discovered a right to same-sex marriage in its state constitution, the people of that State overwhelmingly voted to amend their constitution to affirm traditional marriage.[10] The same occurred in Alaska following a similar holding by a state trial court.[11] In recent years, numerous other States, including California, have clarified

---

[9] U.S. Senate Roll Call Votes 104th Congress - 2nd Session, *A Bill To Define And Protect The Institution Of Marriage*, available at http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=104&session=2&vote=00280**;** U.S. House of Representatives Role Call Votes 104th Congress**,** Final Vote Results For Roll Call 316 (*Defense of Marriage Act*), available at http://clerk.house.gov/evs/1996/roll316.xml**.**

[10] *Baehr v. Lewin* (Haw. 1993) 852 P. 2d 44; Haw. Const., Art. I, § 23; see Coolidge, *The Hawaii Marriage Amendment: Its Origins, Meaning and Constitutionality* (2000) 22 Haw. L. Rev. 19.

[11] *Brause v. Bureau of Vital Statistics* (Alaska Super. Ct. Feb. 27, 1998) 1998 WL 88743; Alaska Const., Art. I, § 25; see Clarkson, et al., *The Alaska Marriage Amendment: The People's Choice on the Last Frontier* (1999) 16 Alaska L. Rev. 213.

their marriage statutes or amended their constitutions to preserve the traditional definition.[12]

In Vermont, the state supreme court found that same-sex couples have a right to equal benefits under the state constitution. (*Baker v. State* (Vt. 1999) 744 A. 2d 864) Several months later, "'town meetings' held in Vermont yielded unanimous votes (in fifty of fifty towns) rejecting same-sex marriage . . . ." (Wardle, *Is Marriage Obsolete?* (2003) 10 Mich. J. of Gender & L. 189, 201-02.) The Vermont Legislature responded by creating civil unions rather than same-sex marriage. (15 Vt. Stat. Ann. § 1201.) The New Jersey Legislature recently did the same following a similar decision by its supreme court. (N.J. Stat. Ann. §26:8A-2**.)**

---

[12] **Amendments**: Alabama Const., Amdt. 774; Alaska Const., Art. I, § 25; Arkansas Const., Amdt. 83; Colorado Const., Art. II, § 31; Georgia Const., Art I, § 4 par. 1; Haw. Const., Art. I, § 23; Idaho Const., Art. III, § 28; Kansas Const., Art. 15, § 16; Kentucky Const., § 233A; Louisiana Const., Art. XII, § 15; Michigan Const., Art. I, § 25; Mississippi Const., § 263-A; Missouri Const., Art. I, § 33; Montana Const., Art. 13, § 7; Neb. Const., Art. I, § 29; Nevada Const., Art. I, § 21; North Dakota Const., Art. XI, § 28; Ohio Const., Art. XV, § 11; Oklahoma Const., Art. 2, § 35; Oregon Const., Art. XV, § 5a; South Carolina Const., Art. XVII, § 15; South Dakota Const., Art. XXI, § 9; Tennessee Const., Art. XI, § 18; Texas Const., Art. I, § 32; Utah Const., Art. I, § 29; Virginia Const., Art. I, § 15-A; Wisconsin Const., Art. XIII, § 13. **Statutes**: Ala. Code § 30-1-19; Alaska Stat. § 25.05.013; Ariz. Rev. Stat. Ann. § 25-101; Ark. Code Ann. §§ 9-11- 107, 9-11-109, 9-11-208; Cal. Fam. Code § 308.5; Colo. Rev. Stat. § 14-2-104; Del. Code Ann. tit. 13, § 101; Fla. Stat. § 741.212; Ga. Code Ann. § 19-3-3.1; Haw. Rev. Stat. § 572-3; Idaho Code Ann. § 32-209; 750 Ill. Comp. Stat. 5/212; Ind. Code § 31- 11-1-1; Iowa Code § 595.2; Kan. Stat. Ann. § 23-101; Ky. Rev. Stat. Ann. § 402.00; La. Civ. Code Ann. Art. 89; Me. Rev. Stat. Ann. tit. 19-A, § 701; Mich. Comp. Laws §§ 551.1, 551.271; Minn. Stat. § 517.01; Miss. Code Ann. § 93-1-1; Mo. Rev. Stat. § 415.022; Mont. Code Ann. § 40-1-401; N.H. Rev. Stat. Ann. §§ 457:1 to 3; N.C. Gen. Stat. § 51-1.2; N.D. Cent. Code § 14-03-01; Ohio Rev. Code Ann. § 3101(c)(1); Okla. Stat. tit. 43, § 3.1; Pa. Cons. Stat. § 1704; S.C. Code Ann. § 20-1-15; S.D. Codified Laws § 25-1-1; Tenn. Code Ann. § 36-3-113; Tex. Fam. Code Ann. § 6.204; Utah Code Ann. § 30-1-4; Va. Code Ann. § 20-45.2; Wash. Rev. Code § 26.04.020; W. Va. Code § 48-2-603.

In Massachusetts, where the state constitution is unusually difficult to amend, a deeply divided high court discovered a right to same-sex marriage in the Massachusetts Constitution. (*Goodridge v. Department of Public Health* (2003) 798 N.E. 2d 941.) In a subsequent advisory opinion, the court rejected civil unions for same-sex couples, which forced the legislature to enact same-sex marriage. (*Opinion of Justices to the Senate* (Mass. 2004) 802 N.E. 2d 565, 571.) The people of Massachusetts have not been allowed to vote on a constitutional amendment addressing the issue.[13]

A few American States, including California, have sought to achieve accommodation by granting civil union or domestic partnership status to same-sex couples, while still preserving the historical understanding of marriage as a male-female union.[14]

No one can seriously accuse the people of California of being benighted in their judgments on this issue. Notably, the judgment of contemporary California is shared by virtually all other countries in the world. Despite widespread support for gay rights in the Western democracies, only a handful of countries – Canada, Belgium, the Netherlands, and Spain – have adopted same-sex marriage.[15] Instead, like California, most Western democracies have created civil union or domestic

---

[13] See Sacchetti, *Gay-Union Foes Vow To Target Legislators*, Boston Globe, Jul. 24, 2007), at B1.

[14] Cal. Fam. Code § 297; Conn. Gen. Stat. Ann. § 46b-38aa; N.H. Rev. Stat. § 457-A:1; N.J. Stat. Ann. § 26:8A-2; Or. Laws ch. 99, 2007; 22 Maine Rev. Stat. § 2710; Wash. Laws ch. 156, 2007; Haw. Rev. Stat. § 572C-2; 15 Vt. Stat. Ann. § 1201.

[15] International Marriage & Relationship Recognition Laws, Human Rights Campaign, available at http://www.hrc.org/issues/5495.htm [listing countries and status of laws]. For a more technical listing with citations to the countries' legal codes, see International Survey of Legal Recognition of Same-Sex Couples, Marriage Law Foundation, available at http://www.marriagelawfoundation.org/mlf/publications/International.pdf.

partnership regimes for same-sex couples rather than abandoning the traditional purpose and meaning of marriage.[16]

In the developing world, only South Africa has extended marriage to homosexual couples. However, same-sex couples still cannot marry under the traditional marriage law – separate laws exist for traditional marriage and genderless marriage.[17]

Accordingly, California's judgment about how best to accommodate same-sex unions – *i.e.*, legal protections through a domestic partnership regime rather than marriage – is far more accommodating than the approach of most States and is consistent with the approach of much of Western Europe.

* * * *

The deeply-rooted traditions that constitute a nation or state are also part of its "constitution" in an important sense. The age-old definition of marriage has a constitutional quality that merits judicial respect and deference. Of course, that definition is subject to the democratic process. But the judiciary should not be the (inherently non-democratic) instrument that discards the repeatedly-reaffirmed, democratic judgment about this foundational institution.

II. JUDICIAL DEFERENCE TO THE PEOPLE'S CONSIDERED JUDGMENT ABOUT THE DEFINITION OF MARRIAGE IS CONSISTENT WITH OUR HIGHEST CONSTITUTIONAL TRADITIONS.

As with many controversies, it is possible to characterize the same-sex marriage debate as a question of rights. Plaintiffs advocating same-sex marriage seek so to portray it so the judiciary can intervene. But the language of rights, so essential when dealing with government oppression and invidious discrimination, is unhelpful in this context. How the

[16] See *supra* note 15.
[17] See *supra* note 15 [See Marriage Law Foundation document].

institution of marriage should be defined – what it should mean and what public purposes it should serve – is not at its core an issue of individual rights. Instead, it is a profound public policy issue rightly entrusted to the democratic process.[18]

A. The Judiciary Is Ill-Suited to Make Basic Public Policy Decisions.

The marriage debate turns on conflicting social and moral values and competing visions of how society should be ordered. Courts are not the right forum for this far-reaching discussion. As Professor Bickel explained, the judiciary is inherently ill-equipped to make such defining public policy choices:

> The judicial process is too principle-prone and principle-bound – it has to be, there is no other justification or explanation for the role it plays. It is also too remote from conditions, and deals, case by case, with too narrow a slice of reality. It is not accessible to all the varied interests that are in play in any decision of great consequence. It is, very properly, independent. It is passive. It has difficulty controlling the stages by which it approaches a problem. It rushes forward too fast, or it lags; its pace hardly ever seems

---

[18] Although strongly supportive of gay marriage, the Law Commission of New Zealand recognized this precise point early on, noting that phrasing the issue as one of "discrimination" or "rights" fails to properly account for the essential public policy question at the heart of the debate:

> The argument for change is better approached directly than cluttered by an inquiry as to whether a particular situation is embraced by some generalised statutory [*i.e.*, Human Rights Act] formula. To pose the question of whether non-recognition can be said improperly to discriminate against same-sex couples within the meaning of the Human Rights Act is to fail to identify the real issue. The question that matters is whether there exist sound reasons for changing the law. . . . In New Zealand any legal recognition of same-sex relationships must necessarily be statutory.

(Law Commission of New Zealand, *Recognising Same-Sex Relationships* (1999), available at http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_108_277_SP4.pdf, pp. 3-4, ¶¶ 8 & 11)

> just right. For all these reasons, it is, in a vast, complex, changeable society, a most unsuitable instrument for the formation of policy.

(Bickel, The Supreme Court and the Idea of Progress (1978), p. 175.)

B. California's Constitution Places Heavy Reliance on the Active Involvement of the People in Fashioning Public Policy.

Deference to the democratic process in matters of bedrock public policy is particularly appropriate in California, where the Constitution places heavy emphasis on the reserved powers of the people and democratic decision-making.

1. The California Constitution reserves "all political power" to the people.

The California Constitution represents "the highest expression of the will of the people of the state" (*Ex Parte Braun* (1903) 141 Cal. 204, 211), and "the preeminent expression of California law enacted by the people." (*American Academy of Pediatrics v. Lundgren* (1997) 16 Cal. 4th 307, 314.) Article 2 § 1 of the Constitution declares, "*All* political power is inherent in the people." (Cal. Const., Art. II, § 1 (emphasis added).) The three branches of California's government have only as much power as the people have delegated to them under the Constitution.

Unlike the United States Constitution, which has "no mechanism for lawmaking directly by the people" (Mannheim & Howard, *A Structural Theory of the Initiative Power in California* (1998) 31 Loy. L.A. L. Rev. 1165, 1167), California's Constitution reserves to the people powerful means of directly exercising their political power. Indeed, California is "at the radical end of the direct democracy spectrum." (*Id.* at 1173.) The people have reserved to themselves the right to legislate directly through the initiative process by simple majority vote. (Cal. Const., Art. II, §§ 8 & 10.) They can "approve or reject" legislation, in whole or part, through the

referendum process and recall their elected officials mid-term. (*Id.* §§ 9 & 13.) By these and other means, the people have constitutionally placed themselves at the center of policymaking.

This constitutional emphasis on the people's right to directly decide policy issues is an interpretive lens through which this Court should view its role in the marriage debate. It is not the function of the judiciary to create new constitutional rights or to expand existing rights beyond what the people intended. Courts have no authority to create a new constitutional right and thereby limit an arena where the people have decided to govern themselves through the ordinary democratic process. All constitutional change, including the creation of new rights, must come from the people. The people and the legislature, to the extent the people have delegated power to it, are "the creative element in the government." (*Nougues v. Gouglass* (1857) 7 Cal. 65, 70.)

Hence, this Court takes especial care when asked to recognize a previously unrecognized right "lest the liberty protected by [constitutional provisions] be subtly transformed into the policy preferences of the members of this Court." (*Dawn D. v. Superior Court* (1998) 17 Cal. 4th 932, 939 (internal quotation marks omitted).) This Court's function is not to determine whether a constitutional right should exist, but whether it does in fact exist because the people previously established it. The Court's role is "to determine and effectuate the intent of those who enacted the constitutional provision at issue. . . . [T]heir intent governs." (*Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal. 4th 205, 212.)

The Court of Appeal recognized this foundational principle when it wrote that "[c]ourts simply do not have the power to create new rights. . . ." (*In re Marriage Cases* (Cal. App. 2006) 49 Cal. Rptr. 3d 675, 685.) The judiciary's role is solely to interpret the will of the people as expressed in the Constitution and statutes, striking down an act of the people only when

it conflicts with a more fundamental declaration of the people's will in their Constitution. In the words of Justice Mosk, the role of the judiciary "is to expound the law, not to make it." (*Kopp v. Fair Political Practices Comm'n* (1995) 11 Cal. 4th 607, 673.)

2. California courts and members of this Court have repeatedly emphasized the importance of deferring to democratic bodies in matters of public policy.

California courts have repeatedly emphasized the importance of allowing democratic bodies to create and implement public policy. "The determination of public policy of states resides, first, with the people as expressed in their Constitution and, second, with the representatives of the people − the state Legislature." (*Jensen v. Traders & General Ins. Co*. (1959) 52 Cal. 2d 786, 794.) The "determination of policy is peculiarly a legislative function under the [California] Constitution." (*Sher v. Leiderman* (1986) 181 Cal. App. 3d 867, 880.) Courts defer to legislative bodies precisely "to avoid judicial policymaking." (*Green v. Ralee Engineering Co.* (1998) 19 Cal. 4th 66, 76.)

Members of this present Court have similarly emphasized the importance of democratic decision-making in matters of public policy.[19]

---

[19] See, e.g., *Connecticut Indem. Co. v. Superior Court* (2000) 23 Cal. 4th 807, 814 (George, C.J.) ["It is a well-settled principle that the legislative branch is entitled to deference from the courts because of the constitutional separation of powers."] (quotation marks omitted); *People v. Bunn* (2002) 27 Cal. 4th 1, 14-15 (Baxter, J.) ["This essential function [of the legislature] embraces the far-reaching power to weigh competing interests and determine social policy."]; *Davis v. City of Berkeley* (1990) 51 Cal. 3d 242 (Kennard, J.) ["The Legislature's interpretation of uncertain constitutional terms, as reflected in subsequently enacted legislation, is entitled to great deference by the courts."]; *People v. Mendoza* (2000) 23 Cal. 4th 896, 939-40 (Werdegar, J., dissenting) [in case involving "complex policy concerns," majority erred by not deferring to the Legislature, even if "the Legislature's resolution of this problem is not necessarily the one I would have chosen"]; *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co*.

3. Deference to the democratic process is most important when fundamental issues of public policy are at stake.

These judicial endorsements of democratic decision-making pertain not just to less weighty issues, with major policy decisions cast as questions of constitutional rights to be resolved through the judicial process. Democratic institutions are well-suited to address even the most important policy issues.

Structural arrangements in the democratic process such as the separation of powers between the executive and legislative branches; a bicameral Legislature designed to slow and refine the will of the people; the broad perspective legislation can take; the unencumbered fact-finding in which the Legislature can engage; the give-and-take of democratic compromise; the varied life experiences of elected representatives; the frequency and staggered nature of legislative elections; open public debate; the ability of the people to petition their representatives and ultimately to legislate directly; in short, the deliberative and flexible nature of the entire democratic process – these features, taken together, make California's democratic institutions the best venue for resolving vital questions of public

---

(1999) 20 Cal. 4th 163, 185 (Chin, J.) ["'[P]ublic policy' as a concept is notoriously resistant to precise definition, and courts should venture into this area, if at all, with great care and due deference to the judgment of the legislative branch, lest they mistake their own predilections for public policy which deserves recognition at law."] (internal quotation marks and ellipses omitted); *Professional Engineers in California Government v. Kempton* (2007) 40 Cal. 4th 1016, 1042-43 (Moreno, J.) ["Our role as a reviewing court is to simply ascertain and give effect to the electorate's intent . . . . We do not, of course, pass upon the wisdom, expediency, or policy of enactments by the voters any more than we would enactments by the Legislature."] (internal quotation marks omitted); *People v. Ford* (Cal. App. 2004) 2004 WL 1410620, *7 (Corrigan, J.) ["[T]he courts have a longstanding tradition of deferring to state legislatures in making and implementing such important policy decisions [as criminal sentencing]."] (quotation marks omitted).

policy. How to define marriage is no exception to the Holmesian ideal of governance by means of the democratic process.

It is the will of the people of California – expressed through generations of legislation, directly by an initiative, and in a deep social consensus – that marriage be defined solely as the union of a man and a woman. This fundamental policy decision merits great deference. Judicial respect for the considered judgment of the people on this vital issue is consistent with both our deepest traditions and the very structure of California constitutional law. The changes to the institution of marriage and the public acceptance plaintiffs seek can legitimately come only from the people through their democratic institutions.

III. STRICT SCRUTINY DOES NOT APPLY.

As the State has explained in its briefing, California's marriage definition readily satisfies rational basis scrutiny under California's equal protection clause.[20] The vital state interests identified below – and in the briefs of the State and the other traditional marriage parties and amici – are far more than sufficient to pass muster under that deferential standard. The Court of Appeal's measured conclusions in this respect are correct. (*In re Marriage Cases*, *supra*, 49 Cal. Rptr. 3d at 718-26.)

Plaintiffs invoke strict scrutiny. With respect to judicial review of laws defining and governing marriage, there is no justification for imposing such a high standard. Three points underscore this conclusion.

---

[20] See Answer Brief of State of California and the Attorney General to Opening Briefs on the Merits ("AG Brief"), pp. 16-54; Answer Brief of Governor Arnold Schwarzenegger and State Registrar of Vital Statistics Teresita Trinidad on the Merits, pp. 22-32.

A. There Has Been No Failure Of The Democratic Process Requiring Judicial Intervention.

Plaintiffs rely heavily on *Perez* and *Loving*. The cases are inapposite. In contrast to the context of those cases, the gay and lesbian community is not legally unprotected, politically powerless, or excluded from the democratic conversation.

The Legislature has enacted a host of laws specifically protecting and advancing the wellbeing of gays and lesbians.[21] Municipalities have enacted similar provisions. Under California's sweeping Domestic Partnership Act, same-sex couples can now obtain all rights that California provides to married couples. (Cal. Fam. Code §§ 297 & 297.5.) Nothing approaching this vast array of legal protections and benefits, nor the political and legislative goodwill that produced them, existed for beleaguered racial minorities at the time of *Perez* and *Loving*.

Indeed, both politically and socially, homosexuals in this State constitute a powerful and well-represented group. As the foregoing list

---

[21] See, e.g., Cal. Civ. Code § 51 [Unruh Civil Rights Act – access to business establishments]; Cal. Gov. Code § 12920 & 12921 [employment and housing]; Cal. Gov. Code § 12931 [government assistance to communities in resolving disputes based on categories such as sexual orientation]; Cal. Gov. Code § 12940 [unlawful employment practices]; Cal. Gov. Code § 12944 [discrimination by licensing boards]; Cal. Gov. Code § 12955 [discrimination in housing and land use practices]; Cal. Ins. Code § 10140 [insurance discrimination]; Cal. Health & Saf. Code § 1365.5 [health care discrimination]; Cal. Lab Code § 4600.6 [contracts in health care industry]; Cal. Health & Saf. Code § 1586.7 [discrimination in adult day care centers]; Cal. Wel. & Inst. Code § 16013 [discrimination against persons caring for foster children]; Cal. Wel. & Inst. Code § 16001.9 [discrimination against children in foster care]; Cal. Gov. Code § 11135 [discrimination in government programs]; Cal. Pub. Contract Code § 6108 [discrimination by government contractors]; Cal. Code Civ. Proc. § 231.5 [barring peremptory challenges based on sexual orientation]; Cal. Ed. Code §§ 200 & 220 [equal educational rights]; Cal. Penal Code § 422.55 [hate crimes]; Cal. Fam. Code §§ 297 & 297.5 [domestic partnership rights equal to marriage rights].

confirms, the Legislature has long been highly solicitous of gay rights. Such solicitude has only increased in recent years. (See Buchanan, *Gays and Lesbians Gain New Rights As 8 Laws Take Effect Monday*, S.F. Chronicle, Dec. 29, 2006, p. B7 ["The eight [new laws passed by the Legislature], involving issues ranging from tax filings to court proceedings to protections from discrimination, will be the most pro-gay measures enacted at one time anywhere in the country . . . ."].) Most recently, the Legislature again approved a gay-marriage bill, the first legislature in the nation to do so without judicial compulsion. (See Official California Legislative Information, *Complete Bill History* (A.B. No. 43 – Gender-Neutral Marriage), available at http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0001-0050/ab_43_bill_20070912_history.html.) Given the Governor's probable veto and the bar enacted by Proposition 22, this is a remarkable demonstration of political power.

Moreover, gays and lesbians now hold positions of authority throughout California's political, social, legal, and business establishments. Gay rights enjoy broad support in both political parties, and intense support within the State's dominant political party. Influential media and entertainment elites likewise strongly favor the gay-rights agenda.

As the Attorney General demonstrates, in no sense can it be said that gays and lesbians have been "relegated to such a position of political powerlessness as to command [strict scrutiny's] extraordinary protection from the majoritarian political process." (*San Antonio Independent School Dist. v. Rodriguez* (1973) 411 U.S. 1, 28; see AG Brief, *supra*, pp. 25-38.) Maryland's highest court recently reached the same conclusion. (*Conaway v. Deane* (Md. Sept. 18, 2007) – A. 2d –, 2007 WL 2702132, p. *20 ["In spite of the unequal treatment [they have] suffered . . . , we are not persuaded that gay, lesbian, and bisexual persons are so politically powerless that they are entitled to 'extraordinary protection from the

majoritarian political process.' To the contrary, it appears that, at least in Maryland, advocacy to eliminate discrimination against gay, lesbian, and bisexual persons based on their sexual orientation has met with growing successes in the legislative and executive branches of government."].) In short, California's democratic process is highly sensitive to the rights and needs of homosexuals.

B. Unlike Other Rights Protected By Strict Scrutiny, The Right To Marry Is Elaborately Defined And Heavily Regulated For The Benefit Of Society.

The right to marry is no ordinary right to be free from government intrusion. In contrast to other rights, an entire code is devoted to defining and regulating the institution of marriage. In addition to specifying that marriage must be between a man and a woman, the form of marriage is highly regulated. Only two people can marry, depriving at least some bisexuals of their preference for both male and female partners. (See Fam. Code §§ 300 & 308.5 ["a man and a woman"]; Cal. Fam. Code § 2201 [banning bigamous and polygamous marriages].) No matter how committed and regardless of age or fertility, incestuous marriages (including marriages of half siblings and between uncles/aunts and nieces/nephews) are "void from the beginning" and punishable by imprisonment. (Cal. Fam. Code § 2200; Cal. Penal Code § 285.) Yet, there is no prohibition on first-cousin marriages, despite social taboos and the contrary position of many States. A 16-year old girl has broad rights of free speech in the public square and can make the grave decision to have an abortion without her parent's consent,[22] but until she reaches the age of 18 she cannot marry without her parent's permission *plus* a court order, and she may still be required under law to participate in premarital counseling before doing so. (Cal. Fam. Code §§ 301-04.)

[22] *Am. Acad. of Pediatrics v. Lungren* (1997) 16 Cal. 4th 307, 337.

Unlike the private ordering of personal relationships, couples cannot merely declare themselves married or draw up their own terms of marriage. They must first obtain official state permission – a marriage license. (*Id.* § 300.) The State monitors the clarity of a person's intentions, denying a marriage license to an intoxicated person. (*Id.* § 352.) A marriage must be solemnized and the marriage license authenticated and returned to the county recorder. (*Id.* § 306.) Only certain statutorily authorized persons can perform marriages. (*Id.* § 400 & 402.) The law assumes that a husband and wife will be sexually intimate and thus failure to consummate a marriage is a ground for annulment based on fraud. (*Rathburn v. Rathburn* (1956) 138 Cal. App. 2d 568, 573-574.) Except as otherwise provided by law, a husband and wife cannot alter their legal relations with each other by contract. (Cal. Fam. Code § 1620.)

Nor can a couple terminate a marriage whenever they wish no matter how good or urgent their reasons. Unlike other intimate relationships that are terminable at will, marriages are dissolved only by the death of a spouse or a judicial decree of dissolution or nullity; until then the parties remain subject to the legal obligations of marriage regardless of personal desires. (*Id.* § 310.)

Those obligations are substantial. Broad legal duties of mutual respect, fidelity, and support are imposed. (*Id.* §§ 720, 4300.) By operation of law, spouses owe each other fiduciary duties, precluding each from acting solely in his or her best interest. (*Id.* § 721(b).) Each spouse has the right to access records kept by the other concerning various transactions. (*Id.* § 721.) Spouses have an equal interest in certain property acquired during the marriage. (*Id.*) Absent an exemption, neither spouse may be excluded from the other's dwelling. (*Id.* § 753.) The regulatory examples are legion.

The salient point is that government is heavily involved in defining and limiting the right to marry for the benefit and protection of society. Nothing analogous exists for other fundamental constitutional rights. The First Amendment would never countenance an analogous speech, religion, or press code. The rights of intimate association and privacy would surely preclude the government from similarly defining, ordering, and regulating other personal relationships.

If strict scrutiny is applied to the opposite-sex requirement of marriage because it burdens the right to marry, then it should logically apply to numerous other requirements, duties, and limitations that likewise impose burdens. But to do so would dismantle the institution. There are numerous examples. Can a blanket age requirement of 18 withstand such scrutiny when there are 17 year olds with far more intelligence and maturity than many in their 20s? Dozens of other States and countries bar cousin marriages. Would California be precluded from doing so in the future because couples with much higher genetic risks are still allowed to marry?

The current two-person definition of marriage does not fully accommodate the sexual orientation of bisexuals. If the male-female definition of marriage is not intrinsic to its social meaning and function – if marriage is foremost about facilitating the needs of intimate adult relationships as plaintiffs' arguments imply – on what basis could the two-person limitation survive strict scrutiny? Indeed, as noted above, many scholars who support a genderless definition of marriage also support, for essentially the same reasons, allowing multiple-spouse or even group marriages as a way of accommodating the diversity of adult relationships and family arrangements. *Even if plaintiffs advocate strict scrutiny only insofar as the marriage laws adversely impact persons who have historically suffered discrimination on account of their sexual orientation, that identical reasoning would apply to limitations on marriage that*

adversely impact bisexuals or others who may claim their orientation requires multiple partners.

Except where a legal requirement is being used as a tool of oppression, as occurred in the case of race, the institution of marriage and its many limitations, requirements, and duties should be analyzed deferentially and as a whole. It should not be broken down into pieces, each of which must then survive strict scrutiny, lest the judiciary become the perpetual overseer of California's marriage policy.

C. Given Vitally Important Child Welfare Concerns, This Issue Should Not Be Removed from the Ordinary Democratic Process.

Because parenting by same-sex couples is relatively new, social science has not determined exactly how it differs from parenting by two biological parents. That said, study after study has indicated that children benefit most from parenting by both biological parents in a stable, relatively conflict-free home environment. (See discussion, *infra*, at 37-40.)

Given the important child welfare issues at stake, this is not an area of the law that courts should take upon themselves to supervise under rigid constitutional standards like strict scrutiny. The political branches have much greater fact-finding abilities and flexibility to address family issues. Locking the debate into the constitutional box of strict scrutiny – to be overseen by courts in cases focused not on broad public policy but on the narrow facts and interests of private litigants – would prevent the people and the Legislature from responding to new facts and making optimal policy decisions. This Court does not have to be convinced by amici's child-welfare arguments to recognize that, at a minimum, real uncertainty exists about the impacts of same-sex parenting over the long run and that, accordingly, it is prudent to leave the issue to the normal political process rather than constitutionalizing it under the strict scrutiny test. (See

Goodridge, *supra*, 798 N.E. 2d at 998-1005 (Cordy, J., dissenting) [noting scientific uncertainty regarding long-term effects of same-sex parenting and the need for legislative flexibility and judicial deference].)[23]

IV. THE STATE HAS POWERFUL INTERESTS IN SUPPORTING TRADITIONAL MALE-FEMALE MARRIAGES AND TWO-PARENT FAMILIES.

The social benefits that male-female marriages and two-parent families provide are critical for the well-being of society and its children. California has compelling interests in maintaining the current opposite-sex definition of marriage.

A. Procreation And Child Rearing Ideally Occur Within A Stable Male-Female Marriage.

Each child, whether or not born of a marital union, has a father and a mother. Procreation within a stable male-female marriage gives a child a uniquely full human context that accounts for both his biology and the deeper intentions and commitments of his parents. The male-female norm/ideal in marriage and parenting provides irreplaceable benefits to children.

1. Consistent with amici's multi-generational experience, social science confirms the commonsense understanding that stable male-female marriages provide the optimal environment for the personal and social development of children:

> [R]esearch clearly demonstrates that family structure matters for children, and the family structure that helps children the

[23] See, e.g., Lerner & Nagai, No Basis: What the Studies Don't Tell Us About Same-Sex Parenting, Marriage Law Project (2001) [criticizing forty-nine studies on same-sex parenting as suffering from flaws in formulation of hypotheses, use of experimental controls, use of measurements, sampling and statistical testing, and finding false negatives]; Stacey, *(How) Does the Sexual Orientation of Parents Matter?* (2001) 66 Am. Soc. Rev. 159, 159-166 [highlighting problems with sampling pools, lack of longitudinal studies, and political hypotheses].

> most is a family headed by two biological parents in a low-conflict 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.

(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), available at http://www.childtrends.org/files/MarriageRB602.pdf.; see also Manning & Lamb, *Adolescent Well-Being In Cohabiting, Married, And Single-Parent Families* (2003) 65 Journal of Marriage & the Family 876, 890 ["Adolescents in married, two-biological-parent families generally fare better than children in any of the family types examined here, including single-mother, cohabiting stepfather, and married stepfather families. The advantage of marriage appears to exist primarily when the child is the biological offspring of both parents."], and Brief Amici Curiae of James Q. Wilson, et al., Legal and Family Scholars in Support of the Appellees, at p. 41-43 [detailing extensive research regarding adverse effects on children of single-parent and stepparent families].)

Social science indicates that a principal way male-female marriage "protects child well-being . . . is by increasing the likelihood that the child's own mother and father will stay together in a harmonious household." (Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman* (2004) 2 U. St. Thomas L. J. 33, 50-51.) That is important because "[c]hildren raised outside of intact marriages are at greater risk for a large number of serious personal and social problems." (Gallagher, *What is Marriage For? The Public Purposes of Marriage Law* (2002) 62 La. L. Rev. 773, 782.) Amici's extensive

experience in counseling and observing their members confirms each of these points.

Our experience also confirms the observations of Justice Robert Cordy in the Massachusetts same-sex marriage case regarding the essential role marriage plays in channeling heterosexual procreation into an institution that legally binds fathers and mothers to their offspring and thereby serves the best interests of children:

> Paramount among its many important functions, the institution of marriage has systematically provided for the regulation of heterosexual behavior, brought order to the resulting procreation, and ensured a stable family structure in which children will be reared, educated, and socialized. . . . . The institution of marriage provides the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other. The partners in a marriage are expected to engage in exclusive sexual relations, with children the probable result and paternity presumed. Whereas the relationship between mother and child is demonstratively and predictably created and recognizable through the biological process of pregnancy and childbirth, there is no corresponding process for creating a relationship between father and child. . . . The institution of marriage fills this void by formally binding the husband-father to his wife and child, and imposing on him the responsibilities of fatherhood. The alternative, a society without the institution of marriage, in which heterosexual intercourse, procreation, and child care are largely disconnected processes, would be chaotic.

(*Goodridge*, *supra*, 798 N.E. 2d at 995-996 (Cordy, J., dissenting) (citations omitted).)

2. Both social science and amici's own experience indicate that male-female marriage gives a child the strength and developmental advantages that come from being loved and nurtured by both a mother and a father. "Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a

woman are like." (*Hernandez v. Robles* (N.Y. 2006) 855 N.E. 2d 1, 7.) "Men and women are not fungible in relation to child rearing. They have distinct contributions to make." (Andersen, *Children, Parents, and Nonparents: Protected Interests and Legal Standards*, 1998 B.Y.U. L. Rev. 935, 998.)

While the critical role of mothers in child development has never been doubted, the importance of fathers is now much better understood. A large and growing body of research demonstrates that the contributions of fathers are critical to children's formation and well being.[24] One study indicated that father absence was associated with early sexual behavior of girls, even when other factors (such as stress and poverty) were accounted for. (Ellis, et. al, *Does Father Absence Place Daughters at Special Risk for Early Sexual Activity and Teenage Pregnancy?* (May/June 2003) 74 Child Development, p. 801.) Another study found that "[d]aughters whose fathers gave them little time and attention were more likely to seek out early sexual attention from male peers." (Bowling, et al., *Father-Daughter Relationships and Adolescent Female Sexuality: Paternal Qualities Associated with Responsible Sexual Behavior* (2000) 3 Journal of HIV/AIDS Prevention & Education for Adolescents & Children, pp. 5, 13.)

Traditional marriage also provides children with male and female role models and vital training in bridging the gender divide. Marriage sets a pattern for cooperation between the sexes. Amici's direct experience

---

[24] See, e.g., Wilcox, et al., *Why Marriage Matters: Twenty-Six Conclusions from the Social Sciences*, Institute for American Values, 2nd ed. (2005); Harper and McLanahan, *Father Absence and Youth Incarceration* (2004) 14(3) J. Res. On Adolescence 369, 385-86 [Compared with all other family forms, "[y]outh who never had a father in the household had the highest incarceration odds."]; Menestrel, *What Do Fathers Contribute to Children's Well-Being?* (May 1999) Child Trends Research Brief; Johnson, *Father Presence Matters*, National Center On Fathers And Families Brief (1997).

confirms the important role that male-female marriage plays in helping young men and women to both appreciate and respect each other.

B. Limiting Marriage To Male-Female Couples Furthers Powerful State Interests.

In light of the foregoing, the State has a profound interest in stable male-female marriages where children can be reared with a strong connection to their biological parents. Society and this State reap the rich benefits of children raised in two-parent families and, conversely, pay the price when children are not.

1. The Brief Amici Curiae of James Q. Wilson, et al. (at 41-43) details some of the overwhelming evidence that single and especially fatherless parenting puts children at significantly higher risks of poverty, suicide, mental illness, physical illness, infant mortality, lower educational achievement, juvenile delinquency, adult criminality, unwed teen parenthood, lower life expectancy, and reduced intimacy with parents. The statistical connection between numerous social pathologies and children who were not raised in stable homes with their biological parents is both daunting and sobering.[25]

For these amici, such effects are not impersonal statistics. We have witnessed them and their consequences up close. Our faith communities are intimately familiar with the personal tragedies so often associated with unwed parenting and family breakdown. We have seen functionally

[25] A recent statement by seventy prominent scholars summarized the research as follows: "[C]hildren raised in single-parent families without the benefit of a married mother and father are two to three times more likely to experience serious negative life outcomes such as imprisonment, depression, teenage pregnancy, and high school failure, compared to children from intact, married families—even after controlling for socioeconomic factors that might distort the relationship between family structure and child well-being." (Marriage and the Public Good: Ten Principles, The Witherspoon Institute (2006), p. 25.)

fatherless boys, bereft of proper adult male role models and companionship, acting in violence, joining gangs, and engaging in other destructive social and sexual behaviors. We have cared for and mourned with victims left in their destructive wake. And we have ministered to those boys in prisons where too many are consigned to live out their ruined lives.

From deep experience, we know of the depression and sense of abandonment that children, even as adults, often experience when denied full childhood association with their fathers and mothers. We see the ravaging personal and social effects of drug abuse and chronic alcoholism, sexual dysfunction, homelessness, prostitution, and associated crimes – all of which are highly correlated with broken marriages.

The inescapable truth is that romantic male-female relationships often result in children, that children need their mothers *and* fathers, and that society needs mothers *and* fathers to raise their children. That, in a nutshell, is why society needs the institution of male-female marriage.

2. In this respect as in so many others, the law plays an important educational function. (See generally Glendon, Abortion and Divorce in Western Law: American Failures, European Challenges (1987), pp. 7-8 ["[L]aw is not just an ingenious collection of devices to avoid or adjust disputes and to advance this or that interest, but also a way that society makes sense of things."].) When defining a fundamental social institution, a primary purpose of the law is to teach and inculcate beneficial patterns of behavior.

In the case of marriage, the law encourages socially optimal behavior by creating a legal institution that supports and confirms the people's deep cultural understanding – and the sociological and pastoral truth – that stable male-female marital unions are best for children. This channeling function benefits all of society, even though some choose not to participate.

> Generally the channeling function does not specifically require people to use these social institutions, although it may offer incentives and disincentives for their use. Primarily, rather, it is their very presence, the social currency they have, and the governmental support they receive which combine to make it seem reasonable and even natural for people to use them. Thus people can be said to be channeled into them.

(Schneider, The Channeling Function in Family Law (1992) 20 Hofstra Law Review 495, 498.)

Redefining marriage to mean the union of any two persons regardless of gender would necessarily alter the law's current emphasis on procreation and child welfare, refocusing it on affirming and facilitating adult relationship choices. A gender-neutral marriage definition would unavoidably change the message, meaning, and function of marriage by altering its underlying rationale and structure.[26]

3. Replacing the male-female definition of marriage with a genderless definition would diminish marriage's high social status. Marriage is nourished and supported by a deeply ingrained social consensus that creates a web of meanings, practices and expectations. The push for same-sex marriage threatens that consensus.

The existing social consensus reflects, in part, a powerful agreement among virtually all faith communities on the meaning and importance of marriage. More than all other institutions, faith communities foster and nourish the marriage ethic as the ideal institution for family life. Marriage is often associated with powerful religious symbolism and traditions that

---

[26] Whether or not one agrees with such changes, one cannot pretend they won't occur: "One may see these kinds of social consequences of legal change as good, or as questionable, or as both. But to argue that these kinds of cultural effects of law do not exist, and need not be taken into account when contemplating major changes in family law, is to demonstrate a fundamental lack of intellectual seriousness about the power of law in American society." (Marriage and the Law, *supra*, p. 26.)

anchor a couple's commitment to the institution. Faith communities are an essential pillar in the social infrastructure that sustains the uniquely elevated status of marriage. They give marriage spiritual meaning that fortifies the social consensus that marriage is the best venue for bearing and raising children. Notably, while marriages can be celebrated by various secular functionaries, the overwhelming majority of people choose to be married by a religious official. (See Alvare, *The Turn Toward the Self in the Law of Marriage & Family: Same-Sex Marriage and Its Predecessors* (2005) 16 Stan L. & Pol'y Rev. 135, 195.) Even for many people who are not religious, the religious imprimatur on marriage is highly valued culturally. In effect, the State and religious institutions informally cooperate in maintaining and fostering a social institution vital to vouchsafing both secular and religious interests.

However, broad religious support for the *civil* institution of marriage exists only because the current legal definition of marriage corresponds to the definition of most faith communities. The creation of a genderless definition would fracture the centuries-old consensus about the meaning of marriage, spawning deep tensions between civil and religious understandings of that institution. What is now a point of social unity would inexorably become a point of social conflict, to the great detriment of marriage.

* * * *

For all these reasons, society has the most compelling interests in preserving the time-honored definition and meaning of marriage so as to keep the focus of marriage where society needs it most: on legally uniting men and women so that the children they bear will have the best chance of being nurtured by both parents. Now more than ever, society should assiduously attend to the welfare of its children.

CONCLUSION

Plaintiffs ask this Court to alter the basic definition of marriage and thereby change our shared understanding of this vital social institution. That would be a momentous change, one with serious consequences for married couples, children, and families. With deepest respect for this Court, when it comes to the definition of marriage the stakes are simply too high for the issue to be decided by a handful of judges, no matter how able or learned. As a matter of democratic legitimacy and judicial prudence, any such change should come from the people and their legislative representatives.

The people of California and their political institutions are fully engaged in a democratic conversation about the nature and meaning of marriage. In the best of the American democratic tradition, "we the people" are talking, deliberating, deciding. Whatever the outcome, the conversation about this basic social institution should be allowed to continue without a profoundly divisive, judicial short-circuiting of the democratic process.

The established definition of marriage is constitutional. The decision below should be affirmed.

Respectfully submitted,

KENNETH W. STARR
State Bar No. 58382
24569 Via De Casa
Malibu, CA 90265
Telephone: (310) 506-4611
Facsimile: (310) 506-4266

ALEXANDER DUSHKU
State Bar No. 166166
KIRTON & McCONKIE
60 East South Temple, Suite 1800
Salt Lake City, Utah 84145-0120
Telephone: (801) 328-3600
Facsimile: (801) 321-4893

By: _____
KENNETH W. STARR
Attorneys for Amici Curiae

DATED: September 25, 2007

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 13,835 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 26, 2007.

KENNETH W. STARR
State Bar No. 58382
24569 Via De Casa
Malibu, CA 90265
Telephone: (310) 506-4611
Facsimile: (310) 506-4266

ALEXANDER DUSHKU
State Bar No. 166166
KIRTON & McCONKIE
60 East South Temple, Suite 1800
Salt Lake City, Utah 84145-0120
Telephone: (801) 328-3600
Facsimile: (801) 321-4893

By: _____
ALEXANDER DUSHKU

Attorneys for Amici Curiae