Case No. S 147999

IN THE SUPREME COURT OF CALIFORNIA

In re MARRIAGE CASES
Judicial Council Coordination Proceeding No. 4365

After a Decision of the Court of Appeal
First Appellate District, Division Three
Of Consolidated Cases A110449, A110450, A110451,
A110463, A110651 and A110652
San Francisco Superior Court Case Nos. 504038, JCCP 4365
Honorable Richard A. Kramer, Judge

ANSWER TO PETITIONS FOR REVIEW

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INTRODUCTION

In a well-reasoned opinion on the merits of this case, the Court of Appeal properly declined the Plaintiffs' request to recognize a new fundamental right of "same-sex marriage." *In re Marriage Cases* (2006) 143 Cal.App.4th 873, 889. "Courts simply do not have the authority to create new rights, especially when doing so involves changing the definition of so fundamental an institution as marriage." *Id.* "The role of the judiciary is not to rewrite legislation to satisfy the court's rather than the Legislature's sense of balance and order." *Id.* "Judges are not 'knight[s]-errant, roaming at will in pursuit of [their] own ideal of beauty or of goodness.'" *Id.* at 889-890 (citing *People v. Carter* (1997) 58 Cal.App.4th 128, 134). "In other words, judges are not free to rewrite statutes to say what they would like, or what they believe to be better social policy." *In re Marriage Cases*, 143 Cal.App.4th at 890. The Court of Appeal properly defined its role as deciding legal issues based upon precedent and the appellate record rather than as establishing new social policy. *Id.* As the court said, the six consolidated cases, when distilled, rested on the single question of "who gets to define marriage in our democratic society." *Id.* The majority properly answered that the power "rests in the people and their elected representatives, and courts may not appropriate to themselves the power to change the definition of such a basic social

institution." *Id.* Utilizing that restrained and reasoned analytical framework, the Court of Appeal properly concluded that "California's historical definition of marriage does not deprive individuals of a vested fundamental right or discriminate against a suspect class," and, utilizing the rational basis test, correctly concluded that the marriage statutes are constitutional. *Id.*

Obviously disappointed by the Court of Appeal's rejection of their efforts to redefine marriage, the Plaintiffs are now asking this Court to assume the role of social engineer and to override the expressed will of the people of California that marriage is to continue to be defined as the union of one man and one woman. This Court should decline that invitation and permit the Court of Appeal's opinion to stand.

Alternatively, if this Court should agree to review the lower court's decision, then the Court should also review the Court of Appeal's erroneous procedural ruling that the actions filed by Campaign for California Families and Proposition 22 Legal Defense and Education Fund Campaign should be dismissed for lack of justiciability.

Campaign for California Families ("Campaign") is the Plaintiff in Court of Appeal Case No. A110652, *Campaign for California Families v. Newsom,* which was consolidated on appeal with Case Numbers A110449 (*City and County of San Francisco v. State*), A110450 (*Tyler v. State*), A110451(*Woo*

v. Lockyer), A110463 (*Clinton v. State*) and A110651(*Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco*). Cases A110449, A110450, A110451, A110463, A110651 and A110652 were all decided at the trial court level by Judge Richard Kramer as part of Judicial Coordination Proceeding No. 4365 in accordance with an order by Chief Justice George. The Campaign is submitting this single Answer to the Petitions for Review filed by the City and County of San Francisco ("CCSF"), Tyler Plaintiffs, Equality California, Woo[1] Plaintiffs and Clinton Plaintiffs.

LEGAL ARGUMENT

I. THIS COURT SHOULD DENY REVIEW OF THE COURT OF APPEAL'S SUBSTANTIVE RULING THAT THE MARRIAGE STATUTES ARE CONSTITUTIONAL.

In their Petitions for Review, the Plaintiff groups present what appears to be eleven potential issues for review. In fact, the issues can be distilled into two simple questions: 1. Do the courts have the power to redefine marriage? and 2. Does the longstanding statutory definition of marriage as the union of one man and one woman somehow violate the California Constitution? The Court of Appeal applied legal and historical precedent to correctly answer

[1] According to the Petition for Review filed in Case No. A110451, Plaintiffs Lancy Woo and Cristy Chung are not continuing as parties and did not join the Petition. However, for ease of reference and consistency with the underlying case names, the Campaign will refer to the Plaintiffs in Case No. A110451 as the "Woo Plaintiffs."

"No" to both questions. The appellate court's conclusion that "courts may not appropriate to themselves the power to change the definition of such a basic institution" as marriage is consistent with the precedents of this Court, the United States Supreme Court, and the high courts of other states. *See In re Marriage Cases*, (2006) 143 Cal.App. 4th 873, 890.[2]

In addition, the Court of Appeal's ruling is consistent with "one of the fundamental principles of our constitutional system of government . . that a statute, once duly enacted 'is presumed to be constitutional. Unconstitutionality must be clearly shown, and any doubts will be resolved in favor of its validity.'" *Lockyer v. City and County of San Francisco*, (2004) 33 Cal.4th 1055, 1086 (citations omitted). After a thorough examination of the various constitutional claims raised by the plaintiffs, the Court of Appeal

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[2] The sole exception to the rule that the courts should not redefine marriage is the Massachusetts Supreme Judicial Court's bare 4-3 majority ruling in *Goodridge v. Department of Public Health*, (Mass. 2003) 798 N.E.2d 941. However, the *Goodridge* majority opinion was not based upon solid legal analysis, as the majority could not articulate a legitimate legal basis for redefining marriage, but merely set forth a number of philosophical statements such as marriage is about "encouraging stable relationships over transient ones,""identif[ying] individuals," "provid[ing] for the orderly distribution of property," "ensur[ing] that children and adults are cared for and supported whenever possible from private rather than public funds," and "track[ing] important epidemiological and demographic data." *Id.* at 954. Furthermore, the *Goodridge* majority ruling misapplied the rational basis test by placing the burden on the state to prove that the statute is valid. The Court of Appeal here, by contrast, correctly applied the rational basis test to arrive at its conclusion.

found no clear showing of unconstitutionality, and therefore properly applied the presumption that the marriage statutes are constitutional. That proper application of the presumption of constitutionality coupled with the fact that the Court of Appeal's decision is in accord with existing precedents means that there is no lack of uniformity nor unsettled questions of law that need to be reviewed by this Court.

A. The Court of Appeal Correctly Concluded That Marriage Is A Creature Of Statute That the Court Is Not Free To Redefine.

In their Petition for Review, the Tyler Plaintiffs claim that the Court of Appeal erred when it stated that "civil marriage in California is based entirely on statutory law." *See id.* at 907. The Tyler Plaintiffs base their claim of error on a few sentences from *Perez v. Sharp*, (1948) 32 Cal.2d 711, 715, in which this Court commented on the fundamental nature of the right to marry in the context of an anti-miscegenation statute. Nothing in the *Perez* decision, however, contradicted the conclusion that civil marriage is regulated by statute. In fact, this Court confirmed that the regulation of marriage is considered a proper function of the state, and in particular, the Legislature. *Id.* at 713.

Furthermore, only one year later this Court affirmed that "[u]nquestionably, the legislature has full control of the subject of marriage and may fix the conditions under which the marital status may be created or

terminated, as well as the effect of an attempted creation of that status." *McClure v. Donovan,* (1949) 33 Cal.2d 717, 728. As recently as 2004 this Court cited *McClure* for the proposition that "[i]t is well settled in California that 'the Legislature has full control of the subject of marriage and may fix the conditions under which the marital status may be created or terminated.'" *Lockyer v. City and County of San Francisco*, (2004) 33 Cal.4th 1055, 1074. "The regulation of marriage and divorce is solely within the province of the Legislature, except as the same may be restricted by the Constitution." *Id.* This Court has exercised those constitutional restrictions against the Legislature when the statute in question dealt not with the contractual aspects of the union of a man and a woman, but with personal characteristics wholly unrelated to the fundamental nature of marriage as the union of a man and woman. *See, e.g., Perez,* 32 Cal.2d at 715 (overturning a law that forbade marriages between white people and people of certain other races).

By contrast, in this case, the plaintiffs are not seeking to overturn a statute that imposes restrictions that are unrelated to the fundamental nature of marriage, but are seeking to wrest away from the Legislature and electorate the very subject matter over which the Constitution has given them control. Consequently, the Court of Appeal correctly concluded that the judiciary is not free to rewrite the marriage statutes to satisfy the court's sense of balance or

to say what the parties or the court believes is better social policy. *See In re Marriage Cases*, (2006) 143 Cal.App. 4th 873, 890.

The Court of Appeal's conclusion is also in keeping with the conclusion of the high courts of New York and Washington, which earlier this year rejected similar challenges to the marriage statutes in their states. In *Hernandez v. Robles*, (2006) 7 N.Y.3d 338, 361, the New York Court of Appeals held that "any expansion of the traditional definition of marriage should come from the Legislature.""We do not predict what people will think generations from now, but we believe the present generation should have a chance to decide the issue through its elected representatives."*Id*. at 366. Similarly, the Washington Supreme Court said that "while same-sex marriage may be the law at a future time, it will be because the people declare it to be, not because five members of this court have dictated it." *Andersen v. King County*, (Wash. 2006) 138 P.3d 963, 969. Consistent with these statements, the Court of Appeal in this case stated that:

> The six cases before us ultimately distill to the question of who gets to defined marriage in our democratic society. We believe this power rests in the people and their elected representatives, and courts may not appropriate to themselves the power to change the definition of such a basic social institution.

In re Marriage Cases, 143 Cal.App.4th at 890. Since that statement conforms to the precedents of this Court and sister courts, there is no basis for review.

B. The Court of Appeal Correctly Concluded That California's Marriage Statutes Do Not Violate The Equal Protection Clause.

All of the Plaintiffs seek review of the Court of Appeal's finding that the marriage laws do not violate equal protection. Some of the Plaintiffs claim that the Court of Appeal should have defined the right to marry as the "right to marry the person of one's choice," which would make any restriction on marriage unconstitutional. However, the Court of Appeal correctly applied precedents of this Court and the United States Supreme Court when it held that marriage in California is defined as the union of one man and one woman. The Court of Appeal also properly applied precedent to arrive at the conclusion that the right being sought by Plaintiffs is the right to same-sex marriage, and that no such fundamental right has been found in either the state or federal constitutions.

Plaintiffs also seek review of the Court of Appeal's conclusion that defining marriage as the union of one man and one woman does not discriminate on the basis of sex or impermissibly discriminate on the basis of sexual orientation. However, as is true with the Court of Appeal's other holdings, its findings that the marriage laws do not impermissibly discriminate on the basis of sex or sexual orientation are firmly grounded in precedent. That being the case, there is no error nor any conflict that requires review by this

Court.

1. The Court of Appeal Properly Defined the Existing Fundamental Right to Marry and Differentiated It from Petitioners' Desired Fundamental Right to Same-Sex Marriage.

CCSF, the Tyler Plaintiffs and the Clinton Plaintiffs argue that the Court of Appeal erred when it held that the fundamental right to marry is defined as the union of one man and one woman. These plaintiffs claim that the Court of Appeal should have defined the fundamental right to marry as the right to marry whomever one chooses, which, of course, would render any restriction on marriage unconstitutional. Plaintiffs' proposition not only defies logic, but also lacks legal precedent and therefore does not warrant review by this Court.

Plaintiffs rely upon a statement made by this Court in *Perez v. Sharp*, (1948) 32 Cal.2d 711, 715, that the fundamental right to marry "includes the right to marry the person of one's choice" for the proposition that marriage cannot be defined as the union of one man and one woman. As the Court of Appeal pointed out, however, the legal and factual context of *Perez* and the ensuing developments over the past 50+ years do not support Plaintiffs' proposition. *Perez* was decided in 1948 when the law defined marriage only as a "personal relation arising out of a civil contract to which the consent of parties capable of making it is necessary." *See* former Civil Code § 55, enacted

in 1852 and former Civil Code § 4100 enacted in 1969, which was later renamed Family Code § 300, cited in *In re Marriage Cases*, (2006) 143 Cal.App. 4th 873, 897. The question addressed in *Perez* was not whether the "parties" could be anything but a man and a woman, but whether they could be restricted by race, something which has nothing to do with the concept of marriage as it was historically defined as the union of one man and one woman.

Prior to and at the time that *Perez* was decided, and for some time thereafter, the statute was uniformly interpreted as a "civil contract" between one man and one woman. *See In re Marriage Cases* 143 Cal.App. 4th at 897. In 1977, the Legislature made explicit what was implicit and passed Assembly Bill No. 607, which "sought to specify that marriage is a relationship between a man and a woman." *Id.* Since then Family Code § 300 has defined marriage as "a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary." *See id.* Furthermore, in 2000 voters passed Proposition 22, which was codified as Family Code § 308.5: "Only marriage between a man and a woman is valid or recognized in California." As the Third District Court of Appeal said in *Knight v. Superior Court*, (2005) 128 Cal. App.4th 14, 26, Proposition 22 was designed to reserve marriage in California as an institution

exclusively for opposite-sex couples. "Without submitting the matter to the voters, the Legislature cannot change this absolute refusal to recognize marriages between persons of the same-sex." *Id.* at 24. After reviewing these post-*Perez* developments, the Court of Appeal rightly determined that marriage is not defined, as Plaintiffs wish, as the right to marry whomsoever one chooses regardless of sex, but as the union of one man and one woman. *In re Marriage Cases*, 143 Cal. App.4th at 899.

With that legal and historical context in mind, the Court of Appeal also determined that the right being sought by Plaintiffs was not the fundamental right to marry, but the right to "same-sex marriage." *Id.* at 909.

> Considering the importance of judicial restraint in this area, we must agree with appellants that, carefully described, the right at issue in these cases is the right to same-sex marriage, not simply marriage. Just as the United States Supreme Court determined the right before it in [*Washington v.*] *Glucksberg* [(1997) 521 U.S. 702,722-723] was the right to assisted suicide and not a more generic 'right to die' or right to control the manner of one's death, we must be as precise as possible about the right being asserted by the parties before us. As discussed, the term "marriage" has traditionally been understood to describe only opposite-sex unions. Respondents, who are as free as anyone to enter such opposite-sex marriages, seek clearly something different here.

Id. That "something different" is the right to "same-sex" marriage, a right that "has never existed before," which by definition means that it cannot be a "fundamental right." *Id.* at 911. The Court of Appeal followed the United

States Supreme Court's directive to "'exercise the utmost care' in conferring fundamental-right status on a newly asserted interest lest we transform the liberty protected by due process into judicial policy preferences rather than principles born of public debate and legislative action." *Washington v. Glucksberg*, 521 U.S. at 720. The Court of Appeal found, as did the high courts in New York and Washington, that "the right to marry someone of the same sex . . . is not 'deeply rooted'; it has not even been asserted until relatively recent times." *In re Marriage Cases,* 143 Cal.App.4th at 913, *see also, Hernandez v. Robles*, (2006) 7 N.Y. 3d 338, 362; *Andersen v. King County*, (Wash. 2006) 138 P.3d 963, 979. The Court of Appeal correctly found that to suddenly create a right of "same -sex marriage" would not be merely recognizing an existing right, but wholly redefining marriage – something beyond the authority of the judicial branch. *In re Marriage Cases*, 143 Cal.App.4th at 913.

The Court of Appeal also correctly found that the fact that recognition of a right to "same-sex marriage" would wholly redefine the institution sets Plaintiffs' claims apart from those asserted in *Perez v. Sharp,* (1948) 32 Cal.2d 711, *Lawrence v. Texas*, (2003) 539 U.S. 558, and *Loving v. Virginia,* (1967) 388 U.S. 1. *See In re Marriage Cases*, 143 Cal.App. 4th at 911-912. As the New York Court of Appeals said in response to similar claims, "Plaintiffs do

not, as the petitioners in *Lawrence* did, seek protection against state intrusion on intimate, private activity. They seek from the courts access to a State-conferred benefit that the Legislature has rationally limited to opposite-sex couples." *Hernandez v. Robles,* 7 N.Y. 3d at 363. Cases such as *Perez, Loving, Zablocki v. Redhail*, (1978) 434 U.S. 374 (striking prohibition of marriage for "deadbeat dads") and *Turner v. Safley*, (1987) 482 U.S. 78 (striking prohibition of marriage for prisoners) "did not change the fact that the fundamental right to marriage is anchored in the tradition of marriage as the union of one man and one woman. *Andersen v. v. King County*, 138 P.3d at 979. The Court of Appeal correctly found that the courts do not have the authority to pull up the anchor set in place by the Legislature and the electorate.

The Court of Appeal thoughtfully, thoroughly and reasonably applied longstanding precedents of this Court and the United States Supreme Court, as well as more recent precedents from sister state courts. The court's findings that marriage is defined as the union of one man and one woman (as opposed to the union of a person and whomever else they please) and that "same-sex marriage" is not a fundamental right are firmly rooted in precedent and need not be reviewed by this Court.

2. The Court of Appeal Correctly Found That the Marriage Laws Do Not Impermissibly Discriminate on the Basis of Sex.

The Court of Appeal also correctly applied the precedents of this Court, the United States Supreme Court and other state courts when it held that defining marriage as the union of one man and one woman does not impermissibly discriminate on the basis of sex. The Court of Appeal noted that the requirement that a spouse be of the opposite sex applies regardless of the applicant's sex. *In re Marriage Cases*, (2006) 143 Cal. App. 4th 873, 914. The Court of Appeal relied upon this Court's holding in *Hi-Voltage Wire Works, Inc. v. City of San Jose*, (2000) 24 Cal.4th 537, 559-560 that "discriminate" means "to make distinctions in treatment; show partiality or prejudice," for its finding that a law that merely mentions sex cannot be labeled "discriminatory" when it does not disadvantage either the male or the female. *In re Marriage Cases*, 143 Cal.App. 4th at 914. Similarly, this Court's invalidation of the statute that created a conclusive presumption of dependency for widows but not widowers in *Arp v. Workers' Comp. Appeals Bd.,* (1977) 19 Cal.3d 395, 398-399 and invalidation of a statute that prevented women but not men from working as bartenders in *Sail'er Inn, Inc. v. Kirby*, (1971) 5 Cal.3d 1,6 support the Court of Appeal's holding that sex discrimination cases involve statutes that single out men or women for unequal treatment. As this Court said in

Koire v. Metro Car Wash, (1985) 40 Cal.3d 24, 37, "Public policy in California mandates the equal treatment of men and women."

As the Court of Appeal pointed out, all of the leading sex discrimination decisions from the United States Supreme Court have also involved statutes that singled out men or women as a class for unequal treatment. *See In re Marriage Cases*, 143 Cal. App.4th at 914 (citing *United States v. Virginia*, (1996) 518 U.S. 515 (striking down law that excluded women from attending Virginia Military Institute); *Mississippi Univ. For Women v. Hogan*, (1982) 458 U.S. 718, 719 (striking down policy that prevented men from attending state-sponsored nursing school); *Craig v. Boren,* (1976) 429 U.S.190, 191-192 (striking down a law that permitted women to purchase low-alcohol beer at an earlier age than men)). Based upon its examination of the precedents of this Court and the United States Supreme Court, the Court of Appeal correctly held that "[w]e are aware of no controlling authority imposing strict constitutional scrutiny on a law that merely mentions sex, without treating either group differently." *In re Marriage Cases*, 143 Cal.App. 4th at 915.

Other state courts have reached the same conclusion when rejecting similar claims that defining marriage as the union of one man and one woman discriminates on the basis of sex. In *Andersen v. King County*, (Wash. 2006)

138 P.3d 963, 988, the Washington Supreme Court found that "Men and women are treated identically under DOMA [Washington's Defense of Marriage Act which defines marriage as the union of one man and one woman]; neither may marry a person of the same sex. DOMA therefore does not make any 'classification by sex,' and it does not discriminate on account of sex." As the Court of Appeal said here, the Washington Supreme Court explained that the basic principle behind equal protection (in that case in the form of an equal rights amendment) is that both sexes be treated equally under the law. *Id.* at 989. Similarly, the Vermont Supreme Court held that the Vermont marriage laws do not discriminate on the basis of sex because they "do not single out men or women as a class for disparate treatment, but rather prohibit men and women equally from marrying a person of the same sex." *Baker v. State*, (1999) 170 Vt. 194, 215 n.13.

Plaintiffs ask this Court to review the Court of Appeal's finding that defining marriage as the union of one man and one woman does not constitute impermissible sex discrimination, but do not provide any precedents that contradict the appellate court's findings. Since the Court of Appeal properly relied upon precedents established by this Court, the United States Supreme Court and other state courts, there are no grounds for review by this Court.

3. The Court of Appeal Correctly Found That any Disparate Impact that the Marriage Laws might have on Homosexuals Would Not Trigger Strict Scrutiny.

The Court of Appeal correctly found that the mere fact that defining marriage as the union of one man and one woman might have a disparate effect on homosexuals does not create an equal protection violation. *In re Marriage Cases*, 143 Cal.App.4th at 918. The Court of Appeal properly stated that finding a disparate impact is only the first step in a two step process of determining whether a legislative classification violates equal protection. *Id.* at 919. The second step requires determining whether the legislation impinges upon a fundamental right or whether it affects a "suspect class." *Id. See also, Sail'er Inn Inc. v. Kirby*, (1971) 5 Cal.3d 1, 17. Since the Court of Appeal had found that Plaintiffs were seeking to exercise an alleged "right to same-sex marriage," which was not a fundamental right, it then went on to consider whether sexual orientation was a "suspect class" for equal protection purposes. *In re Marriage Cases*, 143 Cal.App. 4th at 919.

The Court of Appeal correctly found that there is no precedent classifying sexual orientation as a suspect class and an insufficient factual record here from which to make a finding. *Id.* at 922-923. Even the Supreme Court case of *Lawrence v. Texas*, (2003) 539 U.S. 558*,* 578 which overturned

laws criminalizing sodomy, did not classify homosexuals as a suspect class. "[T]he Supreme Court has never ruled that sexual orientation is a suspect classification for equal protection purposes." *Citizens for Equal Protection v. Bruning*, (8th Cir. 2006) 455 F.3d 859, 865. All of the federal courts of appeal that have considered the issue have held that homosexuals are not a suspect class.[3] In addition, even the two state courts that held that homosexuals had a right to either civil unions or marriage did not find that they constituted a suspect class. *See Baker v. State*, (1999) 170 Vt. 194 (under the state constitution's common benefits clause, plaintiffs seeking same-sex marriage are entitled to benefits and obligations like those accompanying marriage); *Goodridge v. Department of Public Health*, (Mass. 2003) 798 N.E. 2d 941(finding that denying marriage to same-sex couples violates equal protection under the rational basis test). Consequently, the Court of Appeal correctly concluded that no federal or state court has determined that sexual orientation is a suspect classification. *In re Marriage Cases*, 143 Cal.App. 4th

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[3] *See Lofton v. Sec'y of Dep't. of Children and Family Servs.*, (11th Cir. 2004) 358 F.3d 804; *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, (6th Cir.1997) 128 F.3d 289; *Thomasson v. Perry*, (4th Cir.1996) 80 F.3d 915; *Steffan v. Perry,* (D.C. Cir.1994) 41 F.3d 677; *High Tech Gays v. Defense Indus. Sec. Clearance Office*, (9th Cir.1990) 895 F.2d 563; *Woodward v. United States,* (Fed. Cir.1989) 871 F.2d 1068; *Town of Ball v. Rapides Parish Police Jury*, (5th Cir.1984) 746 F.2d 1049; *Rich v. Sec'y of the Army*, (10th Cir.1984) 735 F.2d 1220; *Able v. United States*, (2d Cir.1998) 155 F.3d 628; *Richenberg v. Perry*, (8th Cir.1996) 97 F.3d 256.

at 921-922.

Utilizing the three-part test for suspect classification that this Court set forth in *Sail'er Inn*, the Court of Appeal also correctly concluded that the factual record is insufficient to make a determination of suspect classification. *In re Marriage Cases*, 143 Cal.App. 4th at 922-923 (citing *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 18). "Lacking guidance from our Supreme Court or decisions from our sister Courts of Appeal, and lacking even a finding from the trial court on the issue, we decline to forge new ground in this case by declaring sexual orientation to be a suspect classification for purposes of equal protection analysis." *Id.* at 923. Having found no fundamental right or suspect classification, the Court of Appeal correctly utilized the rational basis test to determine whether the definition of marriage as the union of one man and one woman is constitutional. *Id. See also, Sail'er Inn*, 5 Cal.3d at 18-19.

Plaintiffs concede that the Court of Appeal was right when it concluded that courts have not established that sexual orientation is a suspect classification under the California Constitution. (Woo Plaintiffs' and Equality California's Petition for Review, p. 8; Clinton Plaintiffs' Petition for Review, p. 5). Nevertheless, they seek review of the Court of Appeals' decision in hopes that this Court will make new law on the subject. Since there is no historical or legal precedent for such a finding, and no error on the part of the

Court of Appeal, there is no reason to accept the Plaintiffs' invitation. This is particularly true in light of the fact that the evidentiary record necessary for such a finding is incomplete. As CCSF said in its Petition for Review, the trial court did not hold an evidentiary hearing because it decided the case on issues of law and did not reach the sexual orientation discrimination claim. (CCSF Petition for Review, p. 11 n.6). In fact CCSF said that a remand for a trial on the suspect classification factors would be warranted should this Court accept review and decide remaining issues in favor of the State. (CCSF Petition, p. 13, n. 9).

The Plaintiffs' concessions that the Court of Appeal rightly found that there is no precedent for a determination that sexual orientation is a suspect class demonstrates that the Court of Appeal did not err when it found that sexual orientation should not be subject to strict scrutiny. Consequently, this Court need not review that portion of the decision.

C. The Court of Appeal Correctly Held That The Marriage Statutes Do Not Violate The Right To Privacy.

The Court of Appeal thoroughly and accurately applied this Court's precedents related to the right to privacy when it concluded that defining marriage as the union of one man and one woman does not violate Cal. Const. art I, § 1. *In re Marriage Cases*, 143 Cal.App. 4th at 923-924. As this Court

held in *Hill v. NCAA*, (1994) 7 Cal.4th 1, 35,

> Legally recognized privacy interests are generally of two classes: (1) interests in precluding the dissemination or misuse or sensitive and confidential information ('informational privacy'); and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion or interference ('autonomy privacy').

In this case, Plaintiffs argue that defining marriage as the union of one man and one woman infringes upon the latter right, or more precisely, the right of intimate associations. Plaintiffs claim that the right of intimate relations between members of the same sex addressed in *Lawrence v. Texas*, (2003) 539 U.S. 558 means that there is a right to "same-sex marriage" that must be protected.

The Court of Appeal correctly concluded that protecting consenting adults from government intrusion into their private sexual relations does not translate into a right to "same-sex marriage." "The existence of a protected right of privacy in having intimate relations with a same-sex partner does not mean the right to marry, as it has traditionally been understood, must be expanded to encompass a constitutionally protected privacy interest in same-sex marriage." *In re Marriage Cases*, 143 Cal.App. 4th at 924-925. The Court of Appeal properly held that the right to "autonomy privacy"represents a limitation on the government's ability to interfere with an individual's personal decisions or conduct, not an expansion of rights as sought by Plaintiffs. *Id.* at

926 (citing *Hill v. NCAA*, 7 Cal.4th at 40-41 and *American Acad. of Pediatrics v. Lungren*, (1997) 16 Cal.4th 301, 332-334)**.** "The right to be let alone from government interference is the polar opposite of insistence that the government acknowledge and regulate a particular relationship, and afford it rights and benefits that have historically been reserved for others." *In re Marriage Cases*, 143 Cal.App. 4th at 926.

As this Court held in *Hill v. NCAA*, 7 Cal.4th at 37, "not every act which has some impact on personal privacy invokes the protection of [our Constitution] . . . .[A] court should not play the trump card of unconstitutionality to protect absolutely every assertion of individual privacy." The right of privacy added to the California Constitution "did not purport to create any unbridled right of personal freedom of action," but was designed to safeguard certain intimate and personal decisions from government intrusion via regulation. *Id.* at 36. The Court of Appeal properly applied these directives to Plaintiffs' claims when it concluded that the right to marry a same-sex partner is not a legally protected privacy interest. *See In re Marriage Cases*, 143 Cal. App. 4th at 926.

Plaintiffs' only grounds for review of the Court of Appeal's conclusion is that they believe that marriage is defined as the right to marry whomsoever one chooses so that "same-sex marriage" is an established privacy interest. As

discussed more fully above, Plaintiffs are operating from a flawed premise which is unsupportable under any legal or historical precedents. Therefore, there are no grounds for this Court to review the Court of Appeal's conclusion that defining marriage as the union of one man and one woman does not violate the right of privacy.

D. The Court of Appeal Correctly Held That The Marriage Statutes Do Not Violate The Right Of Free Expression.

Similarly, there are no grounds for review of the Court of Appeal's conclusion that defining marriage as the union of one man and one woman does not violate the right of free expression. *In re Marriage Cases*, 143 Cal.App. 4th at 927. As it did with the right to privacy, the Court of Appeal distinguished the recognized right of free expression and association from the rights being sought by Plaintiffs.

> The laws do not proscribe any form of intimate conduct between same-sex partners. Nor do they prevent same-sex couples from associating with each other or from publicly expressing their mutual commitment through some form of ceremony. Indeed, California provides formal recognition to same-sex relationships in the Domestic Partner Act (Fam. Code § 297 et seq.)

Id. Plaintiffs, like other Californians, are free to associate and enter into relationships with individuals of either sex. As the Court of Appeal noted, that is not what Plaintiffs are seeking. Instead, Plaintiffs are seeking the right to have a particular mode of expressive conduct, marriage, made available to all.

Id. The Court of Appeal correctly held that there is no support for such an expansion of rights. *Id.*

E. The Court Of Appeal Correctly Concluded That The Marriage Statutes Are Rationally Related To Legitimate State Interests.

Having concluded that there was no fundamental right or suspect classification involved, the Court of Appeal properly applied the rational basis test to Plaintiffs' claims and correctly found that defining marriage as the union of one man and one woman satisfies the test. As the Court of Appeal correctly stated, rational basis review,

> manifests restraint by the judiciary in relation to the discretionary act of a co-equal branch of government; in so doing it invests legislation involving such differentiated treatment with a presumption of constitutionality and requires merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose.

D'Amico v. Board of Medical Examiners, (1974) 11 Cal.3d 1, 16. So long as there is "any reasonably conceivable state of facts that could provide a rational basis for the classification," a challenged statute will survive rational basis review. *Warden v. State Bar,* (1999) 21 Cal.4th 628, 644. "A legislative choice is not subject to courtroom factfinding and may be based on rational speculation *unsupported by evidence or empirical data.*" *Id.* at 650 (emphasis added). In other words, it does not matter whether Plaintiffs, the court or other parties believe that the stated interest is advisable or even whether the asserted

interest was the actual motivation for the legislation." *Id.* So long as the stated interest is not a "fictitious purpose that could not have been within the contemplation of the legislature," but is a reasonably conceivable justification for the law it will withstand rational basis review. *Id.* The Court of Appeal correctly found that defining marriage as the union of one man and one woman is rationally related to a number of state interests, including providing an institutional basis for defining rights and responsibilities, a mechanism for defining social roles and promoting family stability. *In re Marriage Cases*, 143 Cal.App.4th at 930-931.[4]

The Court of Appeal exercised proper judicial restraint when it said that its role as evaluator of constitutionality was limited to determining that there was a rational reason for defining marriage as the union of one man and one woman. "The court's role is not to look at interests served by an institution to see if it makes sense to expand the institution. That is policymaking." *Id.* at 928. "Of course, we agree marriage has extraordinary symbolic significance. This is all the more reason why a court should not impose drastic changes on the institution in the absence of a clear constitutional violation." *Id.* at 933.

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[4] The Court of Appeal noted that other interests were advanced for the definition of marriage as the union of one man and one woman, but that it did not need to consider those reasons since it had found at least some plausible legitimate state interests. *In re Marriage Cases*, 143 Cal. App. 4th at 938.

Plaintiffs do not dispute that the Court of Appeal found legitimate state interests for defining marriage as the union of one man and one woman, but claim that this Court should review the decision because it does not comport with their preferred definition of marriage as the right to marry whomsoever one chooses. Plaintiffs further claim that review is necessary because defining marriage as the union of one man and one woman serves no other function than to exclude homosexuals from marriage. (Clinton Plaintiffs Petition, p. 23). Underlying Plaintiffs' requests for review is their disagreement with the Court of Appeal's holding that rational basis, instead of strict scrutiny, should apply. Since the Court of Appeal's holding comports with this Court's and the United States Supreme Court's legal precedents, Plaintiffs' mere disagreement with the Court of Appeal's conclusion does not justify review.

II. IF THIS COURT GRANTS REVIEW, THEN IT SHOULD REVIEW THE COURT OF APPEAL'S RULING THAT THE CAMPAIGN LACKED STANDING TO PROCEED AS A PARTY.

If this Court should grant Plaintiffs' Petitions, then the Campaign requests that the Court also review the Court of Appeal's holding that the Campaign lacks standing to pursue its claims. The Campaign joins with the Proposition 22 Legal Defense and Education Fund in asking this Court to review the Court of Appeal's ruling that the claims raised by the Campaign and the Fund are not justiciable.

This Court should grant review of the Court of Appeal's ruling regarding standing because the Court of Appeal disregarded the Campaign's injunctive relief claims and thereby dismissed them without justification. This Court should grant review because the Court of Appeal's ruling is in conflict with this Court's broad application of the standing rules in cases brought under Code of Civil Procedure §§ 526a. Finally, the Court of Appeal misapplied Section 526a and Code of Civil Procedure §1060 when it ruled that the Campaign's claims did not present an actual controversy .

A. This Court Should Grant Review Because The Court 0f Appeal's Standing Analysis Is Fatally Flawed.

The Court of Appeal based its ruling that the Campaign's claims were not justiciable upon an erroneous description of the nature and scope of the Campaign's claims. The Court of Appeal accepted without question CCSF's misstatement that the writ of mandate issued by this Court in *Lockyer v. City and County of San Francisco*, (2004) 33 Cal.4th 1055, to which the Campaign was not a party[5], somehow granted the Campaign all of the mandamus, injunctive and declaratory relief it sought. In fact, as the trial court determined, the *Lockyer* writ did not dispose of the Campaign's injunctive and declaratory

[5] The Campaign submitted an Amicus Curiae Brief in the *Lockyer* case but did not participate as a party, and therefore did not have its claims adjudicated.

relief claims, which were intertwined with CCSF's claims that the marriage laws are unconstitutional. (*See* RT: 118, 399; CT:344).

In *Lockyer*, this Court recognized that CCSF's actions of issuing marriage licenses and performing marriage ceremonies for same-sex couples were really an attempt to obtain a judicial determination of the constitutionality of the marriage laws. 33 Cal.4th at 1104-1105. This Court ruled that CCSF could not seek a judicial declaration regarding constitutionality by having officials refuse to perform their ministerial duties. *Id.* This Court specifically said that it was not addressing the constitutional question. *Id.* Meanwhile, CCSF had already filed its separate action specifically seeking a ruling that defining marriage as the union of one man and one woman was unconstitutional.

The Campaign's action, which was filed in response to CCSF's attempt at "civil disobedience" and before the *Lockyer* case, sought mandamus, preliminary and permanent injunctive relief and declaratory relief against CCSF's officials' actions. Since the actions by San Francisco officials were CCSF's initial means of questioning the constitutionality of the marriage laws, the Campaign's requests for mandamus, injunctive and declaratory relief necessarily involved the question of the constitutionality of the marriage laws. Therefore, this Court's granting of a writ of mandate halting the issuance of

marriage licenses without a determination of whether the marriage laws are constitutional in *Lockyer* did not grant the Campaign all of the relief it requested.

The trial court properly recognized this when it denied CCSF's motion to dismiss the Campaign's Complaint and ruled that the Campaign's and Fund's claims remained viable. (RT: 118; CT:344). The trial court concluded that the Campaign's complaint adequately stated claims for declaratory relief concerning the constitutionality of the marriage laws. (RT: 118; CT:344). The trial court also stated that the motion to dismiss did not have merit because of the remaining question "regarding the permanency of an order against Mayor Newsom," referring to the claims for injunctive relief. (RT: 399). The trial court therefore determined that the Campaign and the Fund had justiciable claims for injunctive **and** declaratory relief, not merely declaratory relief.

However, when the Court of Appeal addressed CCSF's renewed arguments that the Campaign's claims are not justiciable, it inexplicably described the Campaign's action as a "pure declaratory relief claim" and referenced only allegations of the Complaint related to declaratory relief. *In re Marriage Cases*, 143 Cal.App. 4th at 894. The Court of Appeal completely ignored the Campaign's claims for injunctive relief, saying only that this Court's writ of mandate in *Lockyer* meant that the Campaign no longer had a

mandamus claim, but only a claim for declaratory relief. *Id.* at 896. The Court of Appeal did not even mention, let alone review, the injunctive relief claim left intact by the trial court.

Omitting the injunctive relief claim means that any analysis of the Campaigns' standing under Code of Civil Procedure § 526s is necessarily incomplete and fatally flawed. As this Court explained in *Blair v. Pitchess*, (1971) 5 Cal.3d 258, 267, Section 526a "authorizes actions by a resident taxpayer against officers of a county, town, city, or city and county to **obtain an injunction** restraining and preventing the illegal expenditure of public funds." (emphasis added). That is precisely what the Campaign sought in this case, and what the trial court determined should remain viable. Any analysis of standing or justiciability under Section 526a must necessarily address the Campaign's request for injunctive relief. The Court of Appeal's failure to do so is error, which requires review by this Court.

B. This Court Should Grant Review Of The Court Of Appeal's Ruling On Justiciability Because The Court Of Appeal Significantly Departed From This Court's Precedents Regarding Code Of Civil Procedure Section 526a.

In *Blair*, this Court explained that Code of Civil Procedure § 526a was enacted to "enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the

standing requirement." 5 Cal.3d at 267-298. Therefore, "California courts have consistently construed section 526a liberally to achieve this remedial purpose." *Id.* at 268. "In this state we have been very liberal in the application of the rule permitting taxpayers to bring a suit to prevent the illegal conduct of city officials, and no showing of special damage to the particular taxpayer has been held necessary." *Id*. at 268 (citing *Crowe v. Boyle* (1920) 184 Cal. 117, 152). The liberal application of Section 526a has meant that parties have been found to have standing even if they are nonresidents and regardless of whether they can assert a personal harm arising from the challenged conduct. *Blair*, 5 Cal.3d at 268. The types of claims permitted under Section 526a have been similarly broadly construed to include not merely illegal expenditures, but recovering illegally spent funds on behalf of the governmental entity, and, as in the case with the Campaign's claims, to restrain implementation of an ordinance or statute. *See id.*; *Lundberg v. Alameda County*, (1956) 46 Cal.2d 644.

The Court of Appeal's ruling contradicts this well-established precedent, and therefore must be reviewed by this Court. Instead of construing Section 526a liberally as this Court requires, the Court of Appeal applied the narrowest construction possible. The Court of Appeal held that actions under Section 526a can only be maintained if there are allegations of illegal spending. *In re Marriage Cases* (2006) 143 Cal. App. 4th 873, 895-896. The

Court of Appeal then went on to claim that there are no such allegations on the part of the Campaign so the claim is no longer justiciable. *Id.* Similarly, the Court of Appeal improperly applied a narrow reading of standing under Section 526a to find that the Campaign did not have standing because it could not allege a personal harm resulting from CCSF's conduct. *Id.* at 895. As this Court held in *Crowe v. Boyle* (1920) 184 Cal. 117, 152, and affirmed in *Blair v. Pitchess*, (1971) 5 Cal.3d 258, 267, no such showing of personal harm is required under Section 526a.

The Court of Appeal's contravention of this Court's precedents is compounded by its failure to recognize the Campaign's injunctive relief claims brought under Section 526a. These compounded errors demonstrate that this Court should review the Court of Appeal's ruling.

C. This Court Should Grant Review Of The Court Of Appeal's Ruling On Justiciability Because The Court Of Appeal Failed To Follow This Court's Precedents Regarding Actions Under Code Of Civil Procedure Section 1060.

The Court of Appeal also failed to follow this Court's precedents when it ruled that the Campaign did not have a justiciable claim under Code of Civil Procedure §1060. The Court of Appeal recognized that this Court has held that the validity or construction of a statute is recognized as a proper subject for declaratory relief. *In re Marriage Cases*, 143 Cal.App.4th at 894 (citing *City*

of Cotati v. Cashman, (2002) 29 Cal.4th 69, 79). However, the Court of Appeal nevertheless found that the Campaign did not have standing to challenge CCSF's construction of the marriage laws because there was no "actual controversy." *In re Marriage Cases*, 143 Cal.App. 4th at 894.

That finding by the Court of Appeal directly contradicts this Court's finding in *Blair v. Pitchess*, (1971) 5 Cal.3d 258, 269. In *Blair*, the defendants similarly claimed that there was no true case or controversy. *See id.* This Court disagreed and held that if an action meets the requirements of Code of Civil Procedure §526a then it presents a true case or controversy as a matter of law. *Id.*

> As we noted before, the primary purpose of section 526a was to give a large body of citizens standing to challenge governmental actions. If we were to hold that such suits did not present a true case or controversy unless the plaintiff and the defendant each had a special, personal interest in the outcome, we would drastically curtail their usefulness as a check on illegal government activity.

Id. The Court of Appeal's dismissal of the Campaign's declaratory relief claims contravenes this clear precedent.

In addition, the Court of Appeal's contention that there is no actual case or controversy is a further demonstration of the Court of Appeal's failure to recognize the nature and scope of the Campaign's claims. As discussed above, the Campaign's claims are intertwined with CCSF's claims regarding the

constitutionality of the marriage laws. CCSF argues that they are not, while the Campaign states that they are. Since that question is ongoing – indeed it is the subject matter before this Court – there is an actual controversy. The Court of Appeal's determination to the contrary should be reviewed and overturned by this Court.

CONCLUSION

The Court of Appeal's ruling on the merits of the case correctly applied factual and legal precedents to arrive at the conclusion that California laws defining marriage as the union of a man and a woman is constitutional. Therefore, Petitioners' Petitions for Review should be denied.

Alternatively, if this Court grants review, the Campaign requests that it also review the Court of Appeal's ruling that the Campaign's claims should be dismissed for lack of justiciability.

Dated: December 1, 2006

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Answer to Petitions for Rehearing has been prepared using proportionately double-spaced 13 point Times New Roman font. According to the "word count" feature of WordPerfect, which was used to prepare this document, the total number of words including footnotes but excluding the Table of Contents, Table of Authorities and this Certificate, is 8,354 words.

I declare under penalty of perjury under the laws of the State of California that this statement is true and correct.

Executed on December 1, 2006 at Lynchburg, Virginia.

_____

Mary E. McAlister

PROOF OF SERVICE

I, Mary E. McAlister, declare that I am over the age of eighteen and am not a party to this action. My business address is 100 Mountain View Road, Suite 2775, Lynchburg, Virginia 24502.

On December 1, 2006, I served the above Answer to Petitions for Review on the interested parties in this action in the manner indicated below:

X By Mail: I am readily familiar with the business practice for collection and processing correspondence for mailing with the United States Postal Service. I know that the correspondence was deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelopes were sealed, and with postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices, in the United States mail in Lynchburg Virginia (as indicated on the Service List).

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct; that this declaration is executed on December 1, 2006, in Lynchburg, Virginia.

_____

Mary E. McAlister

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