Case No. S_____

IN THE SUPREME COURT OF CALIFORNIA

In re MARRIAGE CASES
Judicial Council Coordination Proceeding No. 4365
No. A110450

ROBIN TYLER, et al.,
Petitioners and Respondents,
v.
THE STATE OF CALIFORNIA, et al.,
Respondents and Appellants.

After a Decision of the Court of Appeal
First Appellate District, Division Three
Consolidated on Appeal with
Case Nos. A110449, A110451, A110463, A110651, A110652
San Francisco Superior Court Case Nos. BC088506, JCCP4365
Honorable Richard A. Kramer, Judge

PETITION FOR REVIEW

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STATEMENT OF ISSUES PRESENTED

1. Does California's statutory ban on marriage between two persons of the same sex violate the California Constitution by denying equal protection of the laws, including on the bases of sexual orientation and sex, and by denying the right to due process, privacy, and freedom of expression?

2. Should courts apply strict scrutiny under the California Constitution to laws that discriminate based on sexual orientation?

WHY REVIEW SHOULD BE GRANTED[1]

This case presents some of the most pressing constitutional questions of our day — essential questions about the rights of lesbian and gay couples and their children, the state's favored legal status of marriage, and the meaning of our state Constitution's most cherished guarantees of equal protection, due process, privacy, and free expression. If allowed to stand, the First Appellate District's resolution of those questions will be detrimental to the interests of hundreds of thousands of lesbian and gay people residing in California and their families, as well as to others who seek to invoke the basic principles of equality, dignity, and liberty safeguarded by our state's Constitution.

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[1] This Petition for Review is filed in *Tyler v. State of California*, Court of Appeal Case No. A110450, on behalf of Equality California (hereinafter, "Petitioner"). Petitioner Equality California is simultaneously filing a Petition for Review (along with twenty-three other petitioners) in another of the consolidated marriage appeals, *Woo v. Lockyer*, Court of Appeal Case No. A110451, in which Equality California was party in San Francisco Superior Court and a respondent in the Court of Appeal. With the exception of this footnote and the Factual and Procedural Background sections, the Petitions for Review in Nos. A110450 and A110451 are identical in substance.

In ruling that lesbian and gay couples may be excluded from marriage, the First Appellate District held that the California Constitution is not offended by the maintenance of a dual system of family law under which lesbian and gay couples and their children are relegated to a legal status (domestic partnership) separate from and lesser than the status that protects heterosexual couples and their children (marriage). The First Appellate District also held that government discrimination based on sexual orientation is subject only to an "extremely deferential" standard of review, despite an acknowledged history of invidious discrimination against lesbian and gay people, and despite California's well-settled public policy that sexual orientation is irrelevant not only to a person's ability to participate in society and in family life, but to government decision-making in general. The First Appellate District further held that statutes that classify based on gender are not subject to strict scrutiny under the California equal protection clause if they apply equally to both men and women as groups. In addition, the First Appellate District held that the government may restrict the exercise of important constitutional rights, even those deemed fundamental and protected by the due process and privacy guarantees of the California Constitution, based on nothing more than a history of exclusion and bald deference to the majority's desire to retain a right or privilege exclusively for itself.

All of those holdings depart significantly from established constitutional tests and weaken the protections of core provisions of our state charter. This Court should grant review to safeguard the vitality and integrity of our state constitutional law and to prevent courts from applying the First Appellate District's analyses in other contexts, to the disadvantage not only of lesbian and gay people, but also of other vulnerable groups.

In a long line of judicial decisions and in a recent string of statutes, California's courts and Legislature repeatedly have emphasized that lesbian

and gay people are entitled under the California Constitution to equal protection of the law. That promise, however, rings hollow to lesbian and gay couples and their children when the law assigns their families to a separate legal status that indisputably is second-class and inferior to marriage.

This Court should not permit another generation of lesbian and gay youth in California to grow up unable to dream of "obtain[ing] the public validation that only marriage can give." (*Lockyer v. City & County of San Francisco* (2004) 33 Cal.4th 1055, 1132 (conc. and dis. opn. of Kennard, J.).) Nor should this Court permit California statutory law to continue to tell not only lesbian and gay people, but also their neighbors, employers, friends, relatives, and government actors that sexual orientation is a valid basis for distinguishing between families. By doing so, the state *invites* discrimination based on a characteristic that the Legislature and the courts have otherwise emphasized has no bearing on the ability of Californians to contribute to society or to form loving and lasting family relationships.

During the last sixty years, the California Supreme Court has led this nation in enunciating what is encompassed in constitutional guarantees of equal protection, due process, privacy, and free expression. In 1948, this Court was the first high court in the country's history to recognize that laws banning marriage between persons of different races are unconstitutional. (See *Perez v. Sharp* (1948) 32 Cal.2d 711.) Nineteen years passed before another appellate court in this nation agreed — the United States Supreme Court, with a former California Governor sitting as Chief Justice. (See *Loving v. Virginia* (1967) 388 U.S. 1.) Similarly, California's Legislature and courts have been beacons to the rest of the United States in ensuring that constitutional guarantees apply equally to all people regardless of their sexual orientation or gender.

Contrary to the suggestion of the First Appellate District, the courts do not step ahead of the public by giving full effect to the Constitution's central guarantees of equal protection, due process, privacy and free expression. Rather, the Constitution sets forth a transcendent expression of public will that the courts fulfill their essential role, as part of our tripartite government structure of checks and balances, to keep legislative edicts and even popular vote in line with our state's most fundamental law.

Accordingly, hundreds of thousands of lesbian and gay Californians, as well as their children, are now depending on this Court to consider the claims that Petitioner here brings. Petitioner's claims have been considered by four state court judges, two of whom (the Superior Court judge and the dissenter at the First Appellate District) concluded that the exclusion of lesbian and gay couples from marriage violates our state Constitution. That split of opinion warrants this Court's review. Moreover, given that the Judicial Council ordered all six marriage cases pending in the state courts coordinated into a single proceeding and given that the First Appellate District consolidated the appeals from the six judgments entered by the Superior Court, no other cases are likely to present the questions framed here. The state is looking to this Court for guidance, as the First Appellate District expressly acknowledged in its decision. (Opn. at p. 45.) Indeed, the Legislature recently determined that denying same-sex couples the right to marry discriminates on the bases of sex and sexual orientation in violation of the California Constitution and voted to end the exclusion of lesbian and gay couples from marriage. Because Governor Schwarzenegger referred to the pendency of this very litigation in his message vetoing that measure, California's lesbian and gay couples now confront a potential stalemate among the three co-equal branches of California's government, making review by this Court essential.

As more fully explained below, Petitioner respectfully requests that this Court grant review of the First Appellate District's decision in order to reverse that decision and to hold that, because California's exclusion of lesbian and gay couples from marriage serves no legitimate, much less compelling, state interest, that exclusion violates the solemn guarantees of the California Constitution.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner Equality California is the leading statewide advocacy organization for lesbian, gay, bisexual, and transgender Californians and their families. (Respondent-Intervener's Appendix, Case No. A110450, p. 294 (hereinafter, "RIA").)

Plaintiffs Robin Tyler and Diane Olson, and Troy Perry and Phillip DeBlieck (collectively, the "Tyler Plaintiffs") commenced this action on February 23, 2004 in Los Angeles Superior Court. Plaintiffs' Amended Petition for Writ of Mandate or Prohibition sought relief against the State of California, including through its State Registrar of Vital Statistics, and against the County of Los Angeles that would permit same-sex couples, including the Tyler Plaintiffs, to marry. (RIA, pp. 181-183, 192.) In particular, the Tyler Plaintiffs requested that sections 300, 301, and 308.5[2]

[2] Section 308.5 codified Proposition 22, which was enacted by the voters in 2000 to ensure that California would not be required to honor marriages contracted by same-sex couples in other jurisdictions. Although the First Appellate District saw no need to decide whether section 308.5 also applies to in-state marriages, Judge Kramer's opinion concluded that section 308.5's sole "purpose as articulated to the voters was to preclude the recognition in California of same-sex marriages consummated outside of this state." (AA, pp. 117-118.) This issue was briefed at length in the Court of Appeal and is fairly presented in the first Issue Presented in this Petition. (See Respondent Intervenor Equality California's Answer Brief, Case No. A110450 (dated Nov. 21, 2005), pp. 5-12; Respondents'

of the Family Code be declared unconstitutional, and that corresponding injunctive and writ relief be issued. (*Id.* at pp. 190-192.) On February 25, 2005, the Los Angeles Superior Court granted the ex parte application of Equality California to intervene in this action in support of the relief sought by the Tyler Plaintiffs. (RIA, pp. 1-2.)[3]

This case was coordinated with five other actions before San Francisco Superior Court Judge Richard A. Kramer. (Appellants' Appendix, Case No. A110450, p. 107 (hereinafter, "AA").) Judge Kramer held a hearing in all six marriage cases on December 22 and 23, 2004. (*Id.* at pp. 108-109.) On April 13, 2005, Judge Kramer issued a Final Decision, ruling that sections 300 and 308.5 of the Family Code violate the California Constitution's equal protection guarantee because they lack a rational basis and because they discriminate based on sex and impinge on the fundamental right to marry without serving a compelling state interest. (*Id.* at pp. 107-131.) Judge Kramer issued separate judgments in the coordinated cases. (*Id.* at pp. 134-205.) In the present action, Judge Kramer entered judgment granting the Tyler Plaintiffs and Equality California declaratory relief corresponding to Judge Kramer's Final Decision (*id.* at pp. 190-192) and issued a writ of mandate to the State Registrar of Vital Statistics (*id.* at pp. 200-201).

The state defendants appealed, and the Court of Appeal, First Appellate District, Division Three, ordered all six marriage cases consolidated for purposes of decision on appeal. (Opn. at p. 7.) On October 5, 2006, the Court of Appeal issued an opinion in all six appeals,

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Corrected Answer Brief, Case No. A110451 (dated Nov. 10, 2005), pp. 17-18, 19, fn. 10.)

[3] On October 27, 2004, Equality California filed a First Amended Complaint in Intervention, naming the State Registrar of Vital Statistics and the Attorney General as additional defendants and respondents in their official capacities. (RIA, pp. 292-302.)

which included an unqualified reversal of the Superior Court's judgment in this case. In its opinion, certified for publication, the Court of Appeal held that sections 300 and 308.5 of the Family Code do not violate the equal protection, due process, privacy, or free expression guarantees of the California Constitution.[4] Presiding Justice J. Anthony Kline dissented, arguing that the statutory ban on marriage by same-sex couples violates the California Constitution's equal protection, due process, and privacy provisions.

On October 19, 2006, Equality California filed a petition for rehearing. On Monday, November 6, 2006, the Court of Appeal issued an order denying the petition for rehearing and modifying its opinion without affecting the judgment. The Court of Appeal's opinion became final on Saturday, November 4, 2006.

LEGAL DISCUSSION

I. This Court Should Grant Review To Clarify How To Determine Whether A Classification Is Suspect And To Decide Whether Laws That Discriminate Based On Sexual Orientation Require Strict Scrutiny.

Although the First Appellate District correctly concluded that California's statutory exclusion of same-sex couples from marriage

[4] In two of the consolidated appeals, Nos. A110651 and A110652, the Court of Appeal affirmed the Superior Court's dismissal of the actions brought by Proposition 22 Legal Defense and Education Fund and the Campaign for California Families. The Court of Appeal ruled that those parties lacked standing. Petitioner Equality California does not seek review of the Court of Appeal's rulings regarding lack of justiciability in those two cases.

discriminates on the basis of sexual orientation (opn. at pp. 38-40),[5] it mistakenly held that the marriage exclusion could withstand constitutional challenge if there were any rational basis supporting it. The First Appellate District's conclusion rested on that court's erroneous pronouncement – the first of its kind by a California appellate court – that laws that discriminate based on sexual orientation are subject only to the lowest level of review under the California equal protection clause. That holding departed from this Court's established approach for determining whether a classification should be treated as suspect. Because the First Appellate District's holding will be binding on all trial courts throughout the state absent this Court's review, it is essential that this Court grant review. The level of scrutiny applicable to sexual orientation discrimination is a general question of statewide importance that applies not only to the marriage issue presented in these cases, but to all governmental actions that discriminate against lesbian and gay people. Moreover, how to determine whether to apply strict scrutiny to laws that discriminate against a class of people is a basic constitutional question affecting not only lesbian and gay people, but also other vulnerable groups who seek constitutional protection from discriminatory government action.

Although this Court has not articulated whether laws that discriminate based on sexual orientation are subject to strict scrutiny under the California Constitution, both this Court and other California courts routinely have struck down such laws under the state equal protection clause. (See, e.g., *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co*. (1979) 24 Cal.3d 458, 474-475; *Citizens for Responsible Behavior v. Superior*

[5] The First Appellate District described the marriage exclusion as having a disparate impact on lesbian and gay couples. Petitioner contends that the statutory marriage exclusion also facially discriminates on the basis of sexual orientation.

Court (1991) 1 Cal.App.4th 1013, 1025-1026.) In analyzing the marriage statutes, however, the First Appellate District incorrectly held that it was required to apply only rational basis review because of the lack of an express statement by this Court or by other California Courts of Appeal that laws discriminating based on sexual orientation warrant strict scrutiny. (Opn. at p. 45.)

The limited analysis that the First Appellate District offered in pronouncing sexual orientation unworthy of treatment as a suspect classification conflicts with this Court's established precedents in numerous respects and will likely cause confusion for trial courts throughout the state. The First Appellate District erroneously (1) held that several factors described by this Court as relevant to suspect classification analysis are necessary requirements rather than factors to be considered; (2) specifically held that immutability (which it suggested may be limited to the question of genetic or biological causation) is a requirement for treatment as a suspect classification; and (3) held that whether a trait is immutable is not a legal issue, but a factual question requiring an evidentiary hearing or trial court findings. This Court should grant review to confirm the continuing validity of this Court's previously enunciated analysis for deciding when strict scrutiny is required and to clarify that classifications based on sexual orientation demand such scrutiny.

A. The First Appellate District Announced An Approach To Suspect Class Analysis That Conflicts With This Court's Precedents And That Will Cause Confusion Among State Courts.

In determining whether laws that classify on a particular basis should be subject to strict scrutiny under the California Constitution, this Court has considered a number of factors designed to identify

classifications that are likely to be based on invidious rather than legitimate bases. "The determination of whether a suspect class exists focuses on whether '[t]he system of alleged discrimination and the class it defines have [any] of the traditional indicia of suspectness: [such as a class] saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" (*Bowens v. Superior Court* (1991) 1 Cal.4th 36, 42 (citation omitted) (bracketed modifications in original).) Contrary to the First Appellate District's overly rigid approach, this Court has treated these factors as considerations, rather than mechanically treating each as an absolute requirement. Thus, a group need not manifest all of these factors in order for laws affecting the group to warrant strict scrutiny.

In particular, contrary to the First Appellate District's decision, this Court has never held that only classifications based on immutable traits can be deemed suspect. Indeed, in the Court's most recent discussion of the "indicia for suspectness," the Court did not mention immutability. (See *Bowens*, *supra,* 1 Cal.4th at 42; see also, e.g., *Serrano v. Priest* (1976) 18 Cal.3d 728 [holding school district wealth to be a suspect classification under the state equal protection clause without any reference to immutability].) When this Court has referred to immutability as a relevant factor, it has done so only in passing, with little or no discussion, and has focused its analysis on other factors with a more direct bearing on whether the discrimination at issue is invidious. (See, e.g., *Sail'er Inn v. Kirby* (1971) 5 Cal.3d 1, 18 ["What differentiates sex from nonsuspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classifications is that the characteristic frequently bears no relation to ability to perform or contribute to society."].) Similarly, the United States Supreme Court has "never held that only classes with immutable

traits can be deemed suspect." (*Watkins v. U.S. Army* (9th Cir. 1989) 875 F.2d 699, 725 (conc. opn. of Norris, J.) (citations omitted).) Thus, the First Appellate District was wrong to treat immutability as a necessary or talismanic factor in determining whether strict scrutiny applies to a particular form of discrimination. The First Appellate District's error in this regard will cause confusion not only with respect to sexual orientation, but perhaps even with regard to some classifications that the courts previously have treated as suspect.

Moreover, even if immutability were a necessary criterion, the First Appellate District acknowledged that there is no consensus on what such a requirement would encompass – that is, whether immutability is limited to traits that are "genetic" or "biological." (See opn. at p. 44, fn. 27; *id.* at p. 6 (conc. opn. of Parrilli, J.) ["[I]f being gay or lesbian is an immutable trait or biologically determined, then we must conclude classification based on that status which deprives such persons of legitimate rights *is* suspect."] (emphasis in original).) In many equal protection decisions, immutability does not require a genetic or biological basis; rather, immutability refers to a characteristic that is "beyond the individual's control." (*City of Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, 441; *Darces v. Woods* (1984) 35 Cal.3d 871, 892-893.) Furthermore, immutability does not mean an absolute inability to change the class trait. Children can be legitimated; aliens can become naturalized; and individuals can change their sex. Thus, the concept of immutability encompasses characteristics that an individual "should not be required to change because [they are] fundamental to . . . individual identities or consciences." (*Hernandez-Montiel v. I.N.S.* (9th Cir. 2000) 225 F.3d 1084, 1092.)

Finally, contrary to the First Appellate District's decision, whether a particular classification should be subject to strict scrutiny is a legal question, not a factual question requiring an evidentiary hearing or trial

court factual findings. (Opn. at pp. 44-45; see, e.g., *Sail'er Inn*, *supra, 5* Cal.3d 1 [deciding that sex is a suspect classification under the California Constitution as a legal, rather, than a factual matter]; *Frontiero v. Richardson* (1973) 411 U.S. 677 [same under federal Constitution]; see also *Craig v. Boren*, (1976) 429 U.S. 190, 204 ["[P]roving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause."].) If this were not so, different trial courts might well reach different conclusions about whether a particular classification is suspect based on the evidence presented in a particular case, thereby leading to inconsistent results. (Cf. *Zeitlin v. Arnebergh* (1963) 59 Cal.2d 901, 908-909 ["[Q]uestions of . . . constitutional construction and application call for court decisions; they raise issues, not of the ascertainment of historical fact, but the definition of . . . constitutional protection; the court itself must determine the law of the case for the sake of consistent interpretation of . . . [constitutional issues]."].)[6] This Court should grant review to clarify for courts throughout the state that determining whether a classification warrants strict scrutiny need not hinge on factual evidence presented at a hearing in a particular case.

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[6] Because the First Appellate District issued an unqualified reversal, if this Court does not grant review, this case will return to the superior court for a trial on the issue of immutability, as well as on any other issues on which the parties or the trial court may determine that presentation of evidence is appropriate. (See *Wiley v. County of San Diego* (1998) 19 Cal.4th 532, 545, fn. 4 [holding that an unqualified reversal "has the effect of remanding the cause for a new trial on all of the issues presented by the pleadings" and "leave[s] that case 'at large' for further proceedings as if it had never been tried"] (citations omitted).) As explained in the text, however, no such evidentiary hearing should be required on the suspect classification issue, and to avoid potential law-of-the-case problems, this Court should grant review now.

B. This Court Should Clarify That Laws That Discriminate Based On Sexual Orientation Are Subject To Strict Scrutiny.

The First Appellate District's holding that laws that discriminate based on sexual orientation are subject to the lowest level of constitutional review lacks support from this Court's precedents and, absent this Court's review, will be harmful in adjudication of all sexual orientation discrimination claims, not simply the question whether lesbian and gay couples should be permitted to marry. The First Appellate District conceded that sexual orientation is irrelevant to a person's ability to contribute to society and that lesbian and gay people have experienced a "history of legal and social disabilities," but rested its rational basis holding on a purportedly unclear factual record on whether sexual orientation is an immutable trait. (Opn. at p. 45.)

Even were immutability a requirement for strict scrutiny, however, sexual orientation would be immutable for purposes of equal protection, given that sexual orientation is a trait "so fundamental to one's identity that a person should not be required to abandon" it. (*Hernandez-Montiel*, *supra*, 225 F.3d at p. 1093 ["Sexual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them."].) Indeed, the California Constitution's due process and privacy clauses protect one's choice of sexual partner or life partner, and the state has no legitimate interest in requiring any Californian to change his or her sexual orientation. Even were this not so, immutability is not a talismanic requirement of suspect classification analysis, as discussed above. Given the importance of protecting lesbian and gay Californians from discrimination, this Court should review the

First Appellate District's plainly erroneous analysis and its conclusion that laws that discriminate based on sexual orientation are subject to "extremely deferential" review. (Opn. at p. 51.)

II. This Court Should Grant Review To Preserve Strict Scrutiny Of Sex-Based Classifications Under The California Constitution.

In contrast to a number of other states and to the federal government, California has long subjected sex-based classifications to strict scrutiny under the California Constitution. (*Sail'er Inn, supra*, 5 Cal.3d at pp. 17-19.) Prior to the First Appellate District's decision, however, no appellate court had held that the right to be free from sex discrimination under the California equal protection clause belongs only to men and women as groups, not to individuals. (Opn. at p. 34.) The implications of the First Appellate District's ruling on this issue, if permitted to stand, would create an unprecedented "equal application" loophole in California's equal protection jurisprudence.

California courts have made plain that the relevant inquiry under the California equal protection clause is whether the law treats *an individual* differently because of his or her gender. (*Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 46 [holding that "the guarantee of equal protection is an individual right"].) In the context of marriage, in particular, this Court has stressed the importance of the principle that the right of equal protection belongs to the individual. (*Perez v. Sharp*, *supra*, 32 Cal.2d 711 at p. 716.)

Despite these principles, the First Appellate District held that a law that expressly classifies based on sex does not trigger heightened scrutiny if it does not disadvantage either men or women *as a group*. (Opn. at p. 34.) In reaching this conclusion, the First Appellate District relied on a prior decision by the Third Appellate District, stating that a statute may

"mention" sex or race without triggering strict scrutiny. (Opn. at pp. 34-35 [citing *Connerly*, *supra,* 92 Cal.App.4th at p. 45].) The classification in Family Code Section 300, however, does much more than simply "mention" sex; it expressly employs sex to restrict the right to marry based on one's sex and on the sex of one's partner, specifying that a man can marry only a woman and a woman can marry only a man. (See *Connerly*, *supra*, 92 Cal.App.4th at p. 44 ["Where a statutory scheme, on its face, employs a suspect classification, the scheme is, on its face, in conflict with the core prohibition of the equal protection clause."] (citation omitted).) From an individual's perspective, this restriction is not gender-neutral. For example, Del Martin — a Petitioner in *Woo v. Lockyer*, Case No. A110451 — is prohibited from marrying the woman she has been with for more than fifty years because Del is a woman rather than a man. That the classification applies to and restricts the rights of both men and women *as such* compounds the constitutional violation; it does not remedy it. As Justice Johnson of the Vermont Supreme Court noted, if a sex-based classification did not trigger heightened scrutiny merely because it applied equally to men and woman as groups, then "a statute that required courts to give custody of male children to fathers and female children to mothers would not be sex discrimination." (*Baker v. State* (1999) 744 A.2d 864, 906, fn. 10 (conc. and dis. opn. of Johnson, J.).) Similarly, under the First Appellate District's reasoning a statute that restricted business partnerships based on sex – for example, providing that in a given field women could enter into business partnerships only with other women and men only with other men — would not constitute sex discrimination. This Court should grant review to ensure that the California Constitution's protection of the individual's right to be free from sex discrimination is not compromised by an "equal application" exception to strict scrutiny for gender classifications.

III. This Court Should Grant Review To Preserve Meaningful Rational Basis Review And To Determine Whether The Marriage Exclusion Advances Any Legitimate State Purpose.

Prior to the First Appellate District's decision, California courts had never held that rational basis review under the California Constitution is "extremely deferential."[7] (Opn. at p. 51.) Rather, this Court has made clear that, even under rational basis review, courts must find that a classification has a legitimate and "plausible" rationale and "must undertake . . . *a serious and genuine judicial inquiry* into the correspondence between the classification and the legislative goals." (*People v. Hofsheier* (2006) 37 Cal.App.4th 1185, 1200 (original italics, citation omitted); *Young v. Haines* (1986) 41 Cal.3d 883, 900 [stating rational basis review under California Constitution "is not toothless"].) If permitted to stand, the First Appellate District's overly deferential application of rational basis review will mark a significant erosion of constitutional protections not only for lesbians and gay men, but for all who depend upon rational basis review for protection against arbitrary discrimination. (See, e.g., *Del Monte v. Wilson* (1992) 1 Cal.4th 1009 [veterans]; *Newland v. Bd. of Governors* (1977) 19 Cal.3d 705 [persons with prior convictions]; *D'Amico v. Bd, of Med. Exam'rs* (1974) 11 Cal.3d 1 [persons seeking occupational licenses]; *College Area Renters & Landlord Assn. v. City of San Diego* (1996) 43 Cal.App.4th 677 [tenants]); *Adoption of Kay C.* (1991) 228 Cal.App.3d 741 [children with mental disabilities].) Indeed, review by this Court is essential to ensure that California's equal protection clause continues to provide meaningful protection to all Californians.

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[7] The only standard of judicial review this Court has termed "extremely deferential" is that applied to gubernatorial parole decisions. (See *In re Rosenkrantz* (2002) 29 Cal.4th 616, 665.)

The First Appellate District failed to require any legitimate purpose for the state's exclusion of all lesbian and gay couples from marriage. In determining whether a legislative exclusion survives rational basis review, a court must determine not only whether there is a reason to protect those persons included within the statute, but also whether there is a rational basis for the exclusion. (*Hofsheier*, *supra*, 37 Cal.App.4th at p. 1198; *In re Gary W.* (1971) 5 Cal.3d 296, 303 ["The state may not . . . arbitrarily accord privileges to . . . one class unless some rational distinction between those included in and those excluded from the class exists."].) Even under rational basis review, which permits the government to address problems in piecemeal fashion, the state must have a legitimate reason for where it draws its lines. (*Hofsheier*, *supra*, 37 Cal.4th at 1205, fn. 8 ["[W]hen the legislative body proposes to address an area of concern in less than comprehensive fashion by striking the evil where it is felt most, its decision as to where to strike must have a rational basis in light of the legislative objectives."] (citations omitted).) This is especially true when a statute targets a disfavored group. (See, e.g., *Warden v. State Bar of California* (1999) 21 Cal.4th 628, 649, fn. 13 [holding that the leeway generally extended to the legislature under rational basis does not apply where the classification targets a "class of persons characterized by some unpopular trait or affiliation"] (internal quotation marks and citation omitted).)

Despite these precedents, the First Appellate District erroneously held that the state's desire to "preserve[e] the institution of marriage in its historical opposite-sex form" is a legitimate state interest. (Opn. at p. 59.) If mere deference to past practices or to history alone were sufficient to provide a legitimate basis for differential treatment, however, disfavored groups would have no protection against even the most irrational or arbitrary treatment. As the trial court in this case held: "The State's

protracted denial of equal protection cannot be justified simply because such constitutional violation has become traditional." (AA at p. 113.)

In addition, the First Appellate District held that, while "[m]ajoritarian whims or prejudices will never be sufficient to sustain a law that deprives individuals of a fundamental right or discriminates against a suspect class," mere deference to majority will *is* a legitimate state interest under rational basis review. (Opn. at p. 61.) This Court should grant review to clarify that, under any level of scrutiny, a majority's bare desire to retain a right or privilege for itself alone is *never* a legitimate public interest. Were it otherwise, no statute could ever be invalidated under rational basis review because it always would reflect the majority's desire to preserve a particular form of discrimination, however arbitrary or unfair. (See, e.g., *City of Cleburne, supra*, 473 U.S. at p. 448 [holding that even under rational basis review, the government "may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic"].)

If the First Appellate District's toothless formulation of the rational basis test were allowed to stand, and the state henceforth were permitted to justify classifications based solely on a desire to maintain a "historical" distinction or on mere deference to the majority's desire to discriminate, there would be no meaningful limit on the state's legislative power nor any substance left of the "equal" protection guarantee — for lesbian and gay people or for other disfavored groups.

IV. This Court Should Grant Review Because Consigning Lesbian And Gay Couples To A Separate And Lesser Status Violates California's Equal Protection Clause.

Notwithstanding the tremendous advances that California's domestic

partnership laws represent, the continued relegation of lesbian and gay couples and their children to a family law status separate from marriage adversely affects their legal and social standing in far-reaching ways and deprives them of full equality. Marriage expresses the identity, values and cultural traditions of many families and, for some, has a profound spiritual significance. (*Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 843 ["The kinds of intimate relationships a person forms and the decision whether to formalize such relationships implicate deeply held personal beliefs and core values."]; *Turner v. Safley*, *supra*, 482 U.S. at p. 96 [holding that marriages "are expressions of emotional support and public commitment" and "may be an exercise of religious faith as well as an expression of personal dedication"].)

Marriage is both an intimate personal choice and a public commitment that commands respect and support from immediate and extended family members, friends, and the community at large. For many people, "the decision whether and whom to marry is among life's momentous acts of self-definition." (*Goodridge v. Dep't of Public Health* (Mass. 2003) 798 N.E.2d 941, 955.) By purposefully excluding lesbians and gay men from the personal and social validation provided only by marriage, the law cuts to the core of their dignity and full citizenship in our society. (See *Lockyer v. City and County of San Francisco*, *supra*, 33 Cal.4th at p. 1152 (conc. and dis. opn. of Kennard, J.), ["For many, marriage is the most significant and most highly treasured experience in a lifetime. Individuals in loving same-sex relationships have waited years, sometimes several decades, for a chance to wed, yearning to obtain the public validation that only marriage can give."].) As the Massachusetts Supreme Judicial Court recognized, "[t]he dissimilitude between the terms

'civil marriage' and 'civil union' is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual-couples to second-class status." (*Opinions of the Justices to the Senate* (Mass. 2004) 802 N.E.2d 565, 570.)

Indeed, because marriage has such "extraordinary symbolic significance" (opn. at p. 57), the state's exclusion of lesbian and gay couples from civil marriage is equally significant. By maintaining different family law statuses for heterosexual couples and for lesbian and gay couples, the law sends the dangerous message that it is appropriate to treat these two groups of families differently and thereby discourages the public from seeing lesbian and gay couples as deserving of equal acceptance and support. In light of such harms, the California Constitution surely would not tolerate the consignment of other groups – say, for example, infertile persons – to the separate status of domestic partnership. Nor does the Constitution sanction such treatment of lesbian and gay couples. Thus, while it is true that "the Domestic Partner Act was enacted not to perpetuate discrimination but to *remedy* it" (opn. at p. 57), it cannot fully do so, as the Legislature acknowledged when it passed a bill that would have enabled same-sex couples in California to marry. (Assem. Bill 849, vetoed by Governor, Sept. 29, 2006 (2005-2006 Reg. Sess.), § 3(f) ["California's discriminatory exclusion of same-sex couples from marriage violates the California Constitution's guarantees of due process, privacy, equal protection of the law, and free expression by arbitrarily denying equal marriage rights to lesbian, gay, and bisexual Californians."].)

The difficulty with California's dual system of family law is not simply that providing tangible equality under separate systems is difficult if not impossible, but also that, at a far more profound level, the exercise itself

is demeaning — labeling one group not merely as different, but as unworthy of equal dignity and regard as human beings. Put simply: "The history of our nation has demonstrated that separate is seldom, if ever, equal." (*Opinions of the Justices to the Senate*, *supra*, 802 N.E.2d at 569.)

In addition, as the First Appellate District recognized, domestic partnership and marriage differ in significant tangible respects. (Opn. at pp. 17-19.) In the only other appellate decision to consider the issue directly, the Third Appellate District held that the domestic partnership statutes do *not* provide lesbian and gay couples with the legal status of marriage or an equivalent legal status. (*Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 30 ["[T]he Legislature has not created a 'marriage' by another name or granted domestic partners a status equivalent to married spouses."]. Rather, the court in *Knight* found "numerous dissimilarities between the two types of unions." (*Id.* at 31 [explaining that domestic partners are not entitled to federal benefits provided to married persons;[8] have different mechanisms for forming and terminating their relationships (including not being required to undergo any solemnization to form a domestic partnership); and have different age and residence prerequisites].) The court concluded that "marriage is considered a more substantial relationship and is accorded a greater stature than a domestic partnership." (*Ibid.*)

Further, unlike marriage, domestic partnership is not a universally understood or respected legal status either within California or in other states.[9] Third parties – including governmental and private actors such as

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[8] California's exclusion of lesbian and gay couples from marriage deprives them of standing to challenge the federal Defense of Marriage Act. (*Smelt v. County of Orange* (9th Cir. 2006) 447 F.3d 673, 683, fn. 26.)

[9] Even many lesbian and gay couples within California do not

employers, hospital staff, teachers, childcare providers, police officers, and business owners – understand what it means to be married and routinely defer to spouses, especially in times of crisis. Domestic partnership, in contrast, provides far less assurance of recognition or respect for lesbian and gay couples within California. Moreover, domestic partnership lacks the transportability of legal recognition that marriage confers for purposes of travel to other jurisdictions that recognize (or might recognize) the marriages of same-sex couples, including, for instance, Massachusetts and other states that have not definitively limited marriage to heterosexual couples, as well as Canada, the Netherlands, Belgium, and Spain. (Opn. at p. 18 ["[D]omestic partners who travel or move out of California may lose many or all of the rights conveyed by the Domestic Partner Act."].)

For all of these reasons, domestic partnership does not eliminate the constitutional harms caused by the statutory exclusion of lesbian and gay couples from marriage. Rather, official disqualification from marriage marks lesbian and gay people and their families as different and unworthy of equal respect. This Court should grant review to put an end to this harmful form of discrimination.

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understand the current domestic partnership laws and may be uncertain whether they have taken the steps necessary to become registered domestic partners with the state. (See *Velez v. Smith* (2006) 142 Cal.App.4th 1154 [holding that putative spouse doctrine could not be applied to protect former same-sex partner who erroneously believed she was in a registered domestic partnership because she and her former partner had registered with the City and County of San Francisco].)

V. This Court Should Grant Review To Determine Whether The Fundamental Right To Marry The Person Of One's Choice Is Guaranteed To Lesbian And Gay People Under The California Constitution's Due Process, Privacy, And Equal Protection Provisions.

The First Appellate District's decision significantly departed from this Court's precedents relating to two overlapping constitutional provisions that support the fundamental right to marry. First, as this Court has held, the constitutional right of due process assures every individual the "freedom to join in marriage with the person of one's choice." (*Perez, supra,* 32 Cal.2d at p. 717.) Second, California's privacy clause protects each person's fundamental autonomy interest in making intimate personal decisions including the freedom to choose one's spouse. (*Conservatorship of Valerie N.* (1985) 40 Cal.3d 143, 160-61.) The First Appellate District erroneously held that it was proper to define this fundamental right to include only that portion of the population historically permitted to exercise it. (Opn. at p. 27 ["[T]he term 'marriage' has traditionally been understood to describe only opposite-sex unions. Respondents . . . clearly seek something different here."].)

If permitted to stand, the First Appellate District decision would create conflict between California's assurances of due process and privacy and its guarantee of equal protection by ignoring a long-established principle: that judicial analysis of fundamental interests and rights looks to history to determine *what* is protected, not *who* enjoys the right. That critical distinction is central to this Court's due process and privacy jurisprudence and reflects the fact that the constitutional promise of due process incorporates a commitment to the principle of equality under the law. (See, e.g., *Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 274-276 [discussing interrelationship of due process and equal protection]; *Perez v. Sharp*, *supra*, 32 Cal.2d at pp. 713-715 [same];

see also *Lawrence v. Texas* (2003) 539 U.S. 558, 575 [holding that due process and equality "are linked in important respects"].)

Historically, for example, the right to marry did not extend to persons of different races. (See, e.g., Peter Wallenstein, *Tell the Court I Love My Wife: Race, Marriage, and Law — An American History* (2002) 253-254 [showing that laws prohibiting marriage between whites and other races existed in colonial America and in many states for three centuries].) Indeed, when this Court issued its decision in *Perez*, thirty-eight states still banned interracial marriage, and six of them did so by constitutional provision. (*Perez*, *supra*, 32 Cal.2d at pp. 747-749 (dis. opn. of Shenk, J.).) Yet, this Court held that the fundamental right to marry applied to interracial couples just as it did to same-race couples. (*Id*. at p. 716-717.)

The same commitment to equality is manifest in cases about the right to privacy.[10] The California privacy clause specifically declares that '[*a*]*ll* people are by nature free and independent and have inalienable rights[, including . . . privacy.'" (Cal. Const., art. I, section 1; see also *Amer. Acad. of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 334.) Moreover, "the ballot argument accompanying the measure that added the privacy clause to [our state Constitution] expressly confirms that the constitutional right of privacy afforded by this provision was intended to apply to 'every Californian.'" (*Amer. Acad. of Pediatrics*, *supra,* 16 Cal.4th at p. 334.) In *Conservatorship of Valerie N.*, *supra*, this Court held that mentally impaired persons have the *same* right to choose or to forego sterilization as others, despite having suffered a longstanding history of

[10] Notwithstanding the majority's suggestion to the contrary (opn. at p. 49), Petitioner and other parties challenging the marriage statutes extensively briefed the privacy claim. The relevant portions of respondents' briefs are listed in the *Woo* Respondents' Petition for Rehearing in Case No. A110451 (dated Oct. 19, 2006), at pages 3-4.

governmental discrimination and even abuse with regard to this right in the past. (40 Cal.3d 143 at p. 163 ["An incompetent developmentally disabled woman has no less interest in a satisfying or fulfilling life free from the burdens of an unwanted pregnancy than does her competent sister."].) Similarly, in *Amer. Acad. of Pediatrics*, *supra*, this Court held that a minor has the same protected privacy interests in deciding whether to have an abortion as an adult, despite being denied that right historically. (16 Cal.4th at p. 337.) As in *Valerie N.*, this Court rejected the notion that historically or socially disadvantaged groups can be excluded from a fundamental right based simply on past or current practices of discrimination: "it plainly would defeat the voters' fundamental purpose in establishing a constitutional right of privacy if a defendant could defeat a constitutional claim simply by maintaining that statutory provisions or past practices that are inconsistent with the constitutionally protected right eliminate any 'reasonable expectation of privacy' with regard to the constitutionally protected right." (*Amer. Acad. of Pediatric, supra*, 16 Cal.4th at p. 339.)

There is a fundamental principle at issue in all of these cases: the notion that fundamental rights are protected for some groups and not others is antithetical to our constitutional system of equality under law. Although this Court has not articulated the precise attributes of marriage that are included in the fundamental right to marry, same-sex couples plainly have the same the same interests as heterosexual couples in those attributes of marriage that the United States Supreme Court has articulated are sufficient to warrant protection. (See *Turner*, *supra*, 482 U.S. at pp. 95-96 [holding that the protected attributes of marriage include expression of emotional support, public commitment, religious faith, personal dedication, sexual intimacy, and eligibility for government benefits].) This Court should grant review to clarify the correct approach to the analysis of fundamental rights,

including those protected by the right to privacy, and to make clear that the fundamental right to marry the person of one's choice under the California Constitution includes the right to marry a person of the same sex.

VI. This Court Should Grant Review To Determine Whether Excluding Lesbian And Gay Couples From Marriage Violates The California Constitution's Guarantee of Free Expression.

This Court also should review the First Appellate District's rejection of Petitioner's freedom of expression claim. The United States Supreme Court has emphasized as "an important and significant aspect of the marital relationship" the "expressions of emotional support and public commitment" and "the expression of personal dedication" that marriage embodies. (*Turner*, *supra,* 482 U.S. at pp. 95-96.) The First Appellate District likewise acknowledged that "marriage has extraordinary symbolic significance" (opn. at p. 57) and that "there are expressive aspects" to marriage (*id*. at p. 50). Nevertheless, with little analysis, the First Appellate District rejected Petitioner's free expression claim by stating that "[i]f the state has legitimate reasons for limiting marriage to opposite-sex couples, then the unavailability for same-sex couples of this one form of expressing commitment — when all other expressions remain available — does not rise to the level of a constitutional violation." (*Ibid*.) The First Appellate District did not explain what mode of analysis it intended to apply to Petitioner's free expression claim; however, the restriction on expression imposed by the statutory exclusion of same-sex couples cannot survive constitutional scrutiny.

If the exclusion is viewed as a restriction only of certain individuals' right to express a message of public and personal commitment, then it plainly is unconstitutional, for neither the First Appellate District nor the state has identified any compelling interest that the exclusion is narrowly

tailored to serve. (*Keenan v. Superior Court* (2002) 27 Cal.4th 413, 429 [freedom of expression "surely do[es] not vary with the identity of the speaker"] (citation omitted); *Huntley v. Public Utilities Com.* (1968) 69 Cal.2d 67, 77 [restraints on speech are not justified simply because "alternative forms of expression are available"].) Even if the exclusion is viewed simply as a regulation of conduct incidentally burdening speech — an analysis that unduly minimizes the expressive quality of marriage — the exclusion cannot survive constitutional scrutiny because the restriction is directly related to the suppression of free expression. (*United States v. O'Brien* (1968) 391 U.S. 367, 377.) In particular, the state's articulated rationale for prohibiting lesbian and gay couples from marrying is to preserve what it describes as the "traditional" meaning of marriage. That purported interest is directly related to suppressing public and interpersonal expressions of commitment by same-sex couples that would differ from the message that the state would prefer marriage to convey.

This Court therefore should grant review to guarantee lesbian and gay couples the right to express their commitment through marriage and to preserve the constitutional principle that the state cannot prohibit lesbian and gay couples' freedom of expression based on the state's illegitimate desire to reserve certain favored avenues of expression and certain messages to heterosexual couples.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant this Petition for Review.

Dated: November 14, 2006 Respectfully submitted,

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CERTIFICATE OF WORD COUNT
PURSUANT TO RULE 14(c)(1)

Pursuant to California Rule of Court 14(c)(1), counsel for Respondents hereby certifies that the number of words contained in this Petition for Rehearing, including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate, is 8,122 words, as calculated using the word count feature of the computer program used to prepare the brief.

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