

No. S147999

**IN THE SUPREME COURT OF THE STATE OF
CALIFORNIA**

In re MARRIAGE CASES

Judicial Council Coordination Proceeding No. 4365

First Appellate District No. A110463 (Consolidated on appeal with Nos. A110449,
A110450, A110451, A110651, A110652)

GREGORY CLINTON, et al.,

Plaintiffs-Petitioners, and Respondents,

v.

STATE OF CALIFORNIA, et al.,

Defendants-Respondents, and Appellants.

OPENING BRIEF ON THE MERITS

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ORDER SPECIFYING ISSUES TO BE BRIEFED

On January 5, 2007, this Court clarified its December 20, 2006, Order granting review in these six companion cases and stated that petitioners “may address in their opening briefs on the merits the issues related to whether the marriage statutes violate the California Constitution.” *California Rules of Court*, Rule 8.520 (b)(2)(A).

SUMMARY OF ARGUMENT

Gregory Clinton, PhD., Gregory Morris, Dr. Anthony Bernan, Andrew Neugenbauer, Stephanie O’Brien, Janet Levy, Joseph Faulkner, Arthur Healey, Kristen Anderson, Michele Bettega, Derrick Anderson, and Wayne Edfors, II, (“Clinton Petitioners”) are California residents seeking to participate in the fundamentally significant institution of marriage. However, as gay and lesbian couples, they are completely precluded from marrying their chosen partners by California *Family Code* sections 300 and 308.5. Now, the Clinton Petitioners assert that their exclusion from the fundamental institution of marriage violates their rights to equal protection, due process and privacy under the California Constitution.

1. California Family Code Sections 300 and 308.5 Infringe on the Clinton Petitioners’ Fundamental Right to Marry the Spouse of Their Choice

There is no dispute that all citizens have a fundamental constitutional right to marry. Perez v. Sharp, (1948) 32 Cal.2d 711, 714-715. However, in this case

the First Appellate District held that the Family Code's complete preclusion of same-gender marriage is not a violation of this fundamental right. Rather than consider Petitioners' fundamental right to marry, the court found that it was being asked to create an entirely new right to same-gender marriage. In re Marriage Cases (2006), 49 Cal. Rptr. 3d 675, 685, ("Respondents in these appeals are asking this court to recognize a new right"). On this basis, the First Appellate District found that the Clinton Petitioners' overwhelming authority protecting their fundamental right to marry from untoward state intrusion was irrelevant because all of the cases were premised on an assumption that marriage could only be between a man and a woman. Id., at p.700. However, the Clinton Petitioners will show in Discussion section I that this conclusion misapplies California decisional authority on the right to marry because at the heart of the fundamental right to marry, deeply rooted in the history and tradition of California, is the right of individuals to marry the spouse of their choice. Perez, supra, 32 Cal.2d at 715. To that end, this Court is not called to create a "new fundamental right" of same-gender marriage since the Clinton petitioners already possess a fundamental right to marry their chosen spouses.

Under California law, any statute that infringes upon an individual's fundamental constitutional rights is subject to strict judicial scrutiny. Boren v. Department of Employment Development (1976), 59 Cal.App.3d 250, 256; see also, Sail'er Inn, Inc. v. Kirby (1971) 5 Cal.3d 1, 16-20. Such statutes can only be upheld if they are narrowly tailored to serve a compelling state interest and no

reasonable alternative exists. *Id.* Because *Family Code* sections 300 and 308.5 facially implicate the Clinton petitioners' fundamental right to marry a spouse of their choice, the statutes are properly subject to strict judicial scrutiny to determine their constitutionality.

2. California *Family Code* Sections 300 and 308.5 Violate the California Constitution's Equal Protection Clause by Classifying Similarly Situated Individuals Based on Their Gender.

The First Appellate District held that *Family Code* sections 300 and 308.5 do not run afoul of California's equal protection clause because although the statutes are gender-based, they restricted the conduct of both men and women equally. *In re Marriage Cases*, *supra*, 49 Cal. Rptr. 3d at 706. However, the Clinton Petitioners will show that the weight of California decisional authority addressing restraints on marriage based on suspect classifications rejects this 'equal application' approach.

In this case, the plain language of California *Family Code* sections 300 and 308.5 create gender-based classifications completely precluding California residents marrying based solely on their gender. In fact, both sections expressly and directly reference an individuals' gender as the determining factor of whether that individual may marry his or her chosen spouse. Moreover, the gender-specific language is purposefully directed toward preventing an entire class of people from exercising their fundamental right to marry a person of their choice. Specifically, the statutory language allows a female to marry a male, but does not allow a female to marry a female. As more fully set forth in the Discussion

section II(A), such equal application of a discriminatory practice fails to cure a constitutional violation. Loving v. Commonwealth of Virginia (1967) 388 U.S. 1, 8.

Additionally, California authority holds that such gender-based classifications are “suspect” and subject to a strict judicial scrutiny. Sail’er Inn, Inc. v. Kirby (1979), 5 Cal.3d 1, 20, *see also*, Boren v. Dept. of Employment Development (1976), 59 Cal.App.3d 250, 255-256. To that end, rights protected under the equal protection clause are not group rights but personal rights guaranteed to the individual. Connerly v. State Personnel Bd. (2001) 92 Cal.App.4th 16, 35, *see also*, Missouri ex rel. Gaines v. Canada (1938) 305 U.S. 337, 351. Thus, the gender-based classifications of California *Family Code* sections 300 and 308.5 warrant this Court’s strict scrutiny because they restrict the constitutional rights of similarly situated individuals on the suspect basis of gender.

3. California Family Code Sections 300 and 308.5 Discriminate Based On an Individual’s Sexual Orientation.

As a practical matter, the First Appellate District found that *Family Code* sections 300 and 308.5 disproportionately impact the rights of gay and lesbian individuals because the statutes essentially preclude them from marrying at all. In re Marriage Cases, *supra*, 49 Cal. Rptr. 3d at 709-710. As a result, these statutes implicitly distribute rights to similarly situated individuals based solely on their sexual orientation. Id. Unfortunately, the First Appellate District declined to find

that laws applied on the basis of sexual orientation merited strict scrutiny because this class of people had never been deemed “suspect” by any decisional authority. Id., at p. 710. However, this conclusion ignored ample California case law establishing sexual orientation as a discrete classification meriting judicial protection. As more fully explored in Discussion section II(B), laws that classify on the basis of sexual orientation should be subject to strict judicial scrutiny under California law.

4. California Family Code Sections 300 and 308.5 Violate California’s Constitutional Right to Privacy

The California Constitution proclaims, “[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and *privacy*.” Cal. Const. art. I, § 1 (emphasis added). In many instances, the scope and application of the California state constitutional right to privacy is broader and more protective of privacy than its Federal counterpart. American Academy of Pediatrics v. Lungren (1997) 16 Cal.4th 307, 326. Further, under California law, the right to marry is a legally protected right under the right to privacy. Ortiz v. Los Angeles Relief Ass’n (2002) 98 Cal.App.4th 1288, 1303.

In its Opinion in this case, the First Appellate District held that *Family Code* sections 300 and 308.5 did not violate the right to privacy since there was “no authority showing the right to marry a same-sex partner has ever been

recognized as a legally protected privacy interest.” In re Marriage Cases, *supra*, 49 Cal. Rptr. 3d at 716. However, this holding was premised on the improper finding that it was first necessary to establish a new right to same-gender marriage before review could be conducted under the right to privacy. This finding is improper because all citizens of California have a fundamental right to marry, protected under the constitutional right to privacy. Accordingly, the right to marry belongs to all Californians and any impermissible infringement on that right must be addressed as a violation of a fundamental right.

California *Family Code* sections 300 and 308.5 completely preclude an entire class of people from marrying the spouse of their choice. In this sense, an incarcerated criminal has greater access to the fundamental right to marry than does a homosexual. As more fully set forth in the Discussion section III, these statutes implicate the right to privacy because they invade a fundamental right of man. To that end, in California the impairment of a constitutional liberty interest, such as the right to privacy, must meet a strict scrutiny standard. Wood v. Superior Court Bd. Of Medical Quality Assur. (1985) 166 Cal.App.3d 1138,1147.

5. California *Family Code* Sections 300 and 308.5 are Subject to Strict Judicial Review but are Unconstitutional even under Rational Basis Review

Because the First Appellate District declined to find that *Family Code* sections 300 and 308.5 violated a fundamental right, were based upon “suspect” classifications, or in violation of the right to privacy, the court applied a “rational basis” review to uphold the constitutionality of the statutes. In re Marriage Cases,

supra, 49 Cal. Rptr. 3d at 717. Under this deferential standard, the First Appellate District found that the state had a legitimate interest in preserving the traditional definition of marriage while at the same time providing rights to same-gender couples under domestic partnership laws. *Id.* at 720-721. The court also found that the state had a legitimate interest in “carrying out the expressed wishes of a majority of Californians” who, through a voter initiative, enacted *Family Code* section 308.5. *In re Marriage Cases*, *supra*, 49 Cal. Rptr. 3d at 724.

While the state does have legitimate interests in the institution of marriage, those interests do not include maintaining a practice that excludes citizens of California from exercising a fundamental right. To illustrate this distinction, the state’s legitimate interest in marriage does include affording liberty, self-determination and providing the state’s children with stable home environments. On the other hand, the state does not have a compelling or even legitimate interest in maintaining a “traditional” definition of marriage when such state action denies petitioners access to consider the fundamentally important institution of marriage.” This distinction is more fully expressed in section IV(B) of the Discussion.

FACTS AND PROCEDURAL HISTORY

The events that gave rise to this proceeding began on February 10, 2004, when San Francisco Mayor Gavin Newsom directed the County Clerk to begin issuing marriage forms and licenses to individuals without regard to their gender

or sexual orientation. Shortly thereafter, on February 13, 2004, and February 14, 2004, Petitioners Dr. Anthony Berman, Andrew Neugebauer, Stephanie O'Brien, Janet Levy, Gregory Clinton, Gregory Morris, Kristen Anderson, Michele Bettega, Derrik Anderson, Wayne Edfors II, Joseph Faulkner and Arthur Healey¹ were married to the spouses of their choice in ceremonies at San Francisco City Hall. During those ceremonies, they publicly expressed their vows to love, cherish, and support one another while maintaining a monogamous sexual relationship for the rest of their lives.

In response to these joyous events, two lawsuits were filed seeking immediate stays and writ relief to prevent the issuing of marriage licenses to same-sex couples. Those lawsuits are Thomasson v. Newsom, San Francisco Superior Court case number CGC-04-428794 (the Thomasson case), and Proposition 22 Legal Defense & Education Fund v. City and County of San Francisco, San Francisco Superior Court case number CGC-04-50394 (the Prop. 22 case). Additionally, the Attorney General filed an original petition for *writ of mandate* in this Court to stay the issuance of these marriage licenses. That case is Lockyer v. City and County of San Francisco, (2004) 33 Cal. 4th 1055.

In response to the Lockyer petition, this Court issued an order on March 11, 2004, directing San Francisco officials to show cause why a *writ of mandate* should not issue and directing them to discontinue issuing gender and sexual orientation-neutral marriage licenses. Lockyer at 1073. At the same time, this

¹ Collectively, the "Clinton petitioners."

Court also stayed the Thomasson and Prop. 22 actions, but specified that the stay “does not preclude the filing of a separate action in superior court raising a substantive constitutional challenge to the current marriage statutes.” Id. at pages 1073-1074.

In response to this order, several lawsuits were filed challenging the constitutionality of California’s gender-based statutory restraints on marriage. Those cases are City and County of San Francisco v. State of California, et al., San Francisco Superior Court case number CGC-04-429539 (the CCSF action), Lancy Woo, et al. v. Bill Lockyer, et al., San Francisco Superior Court case number CGC-04-504038 (the Woo action), Tyler, et al. v. County of Los Angeles, et al., Los Angeles Superior Court case number BS 088 506 (the Tyler action), and Clinton v. State of California, San Francisco Superior Court case number CGC-04-429-528 (the Clinton action). Thereafter, on September 8, 2004, all of these cases were consolidated as Marriage Cases, Judicial Counsel Coordination Proceeding No. 4365.

On August 12, 2004, this Court issued its ruling in Lockyer. The Court held that city officials exceeded their authority in issuing gender-neutral marriage licenses and that as a result marriages conducted between same-sex couples were void. In its decision, the Court expressly declined to address the substantive issue of whether California’s marriage-limiting statutes were constitutional. Lockyer (20040 33 Cal. 4th 1055, 1069, (“The substantive question of the constitutional validity of California’s statutory provisions limiting marriage to a union between a

man and a woman is not before our court in this proceeding, and our decision in this case is not intended, and should not be interpreted, to reflect any view on that issue”).

Thereafter, the trial court made its ruling in the consolidated proceeding on the substantive issues. In its opinion on decision, it ruled that California *Family Code* sections 300 and 308.5 were unconstitutional. Judicial Council Consolidated Proceeding No. 4365, Final Decision (April 13, 2005). Specifically, the court held that the marriage-limiting statutes violated the California constitution’s equal protection clause because they create classifications based on gender and implicate the fundamental human right to marry. Id. at pages 17-19.² While the court applied strict judicial scrutiny to the statutes on these grounds, it also found that the statutes fail the more deferential rational basis review because they did not further any legitimate state interest. Id. at p. 4. As a result, the court issued a *writ of mandate* and a judgment in favor of the consolidated plaintiffs.

Separate appeals were filed and then consolidated into one proceeding before the California Court of Appeal, First Appellate District, Division Three. In re Marriage Cases, 49 Cal. Rptr. 3d. 675. In its October 5, 2006, decision, the appeals court reversed the trial court’s holding that California *Family Code* sections 300 and 308.5 violate the California constitution. Instead, the court found

² “If a person, male or female, wishes to marry, then he or she may do so as long as the intended spouse is of a different gender. It is the gender of the intended spouse that is the sole determining factor. The marriage laws establish classifications (same gender v. opposite gender) and discriminate based on those gender-based classifications. As such, for the purpose of an equal protection analysis, the legislative scheme creates a gender-based classification.” Final Decision, page. 17.

that these statutes do not violate the equal protection, due process, privacy or free expression guarantees of the California constitution. Next, after an October 19, 2006, petition for rehearing was denied, the court's decision became final on November 4, 2006.

In response, the Clinton Petitioners filed their petition for review with this Court on November 14, 2006. That petition was granted by this Court on December 20, 2006, along with petitions for review in all six coordinated cases to address the constitutionality of these *Family Code* statutes.

DISCUSSION

I. **This Court Should Apply Strict Scrutiny to Family Code Sections 300 and 308.5 Because the Statutes Infringe On Petitioners Fundamental Right to Marriage Under California's Constitution**

A. **The Fundamental Right to Marry and Equal Protection**

The right to marry is a fundamental right of all individuals. Perez v. Sharp, (1948) 32 Cal. 2d 711, 714, ("Marriage is something more than a civil contract subject to regulation by the state; it is a fundamental right of free men"), Loving v. Virginia, 388 U.S. 1, 12, ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men"), In Re Carrafa, (1978) 77 Cal. App. 3d 788, 791, ("The right to marry is a fundamental constitutional right"). Unfortunately, a significant number of Californians are precluded from exercising this fundamental right because California *Family Code* sections 300 and 308.5 preclude them from marrying their

chosen spouses. Here in California, our constitution guarantees both due process of law and that similarly situated persons receive like treatment under the laws of our state. *Cal. Const. Art. 1 §7(a)*, (“A person may not be deprived of life, liberty or property without due process of law or denied equal protection of the laws”), In re Gary W., (1971) 5 Cal.3d 296, 303, (“The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment”), citing Purdy & Fitzpatrick v. State of California (1969) 71 Cal.2d 566, 578. When a statute touches on a recognized fundamental right, courts subject it to strict scrutiny to determine whether the statute is necessary to further a compelling state interest. D’Amico v. Board of Medical Examiners, 11 Cal. 3d 1, 17. In light of the foregoing, this Court should apply strict judicial scrutiny to *Family Code* sections 300 and 308.5 to determine whether these statutes are necessary to further a compelling state interest.

The fundamental right to marry cannot be qualified on the basis of race, gender or sexual orientation. For example, this Court has held that the fundamental right to marry cannot be abridged on the basis of race. Perez v. Sharp, (1948) 32 Cal. 2d 711. In Perez, this Court addressed the constitutionality of *Civil Code* sections restricting marriage between whites and people of color. Id. at 713. In its analysis, this Court first recognized the state’s right to regulate

marriage and then analyzed the statute to determine if it was based on prejudice or discrimination against a group of California citizens. Id. at 715, (“Legislation infringing such rights [to marry] must be based upon more than prejudice and must be free from oppressive discrimination to comply with the constitutional requirements of due process and equal protection of the laws”). Additionally, this Court reasoned that any statute restricting the right to marry the person of one’s choice restricts his fundamental right to marry. Id., (“Since the right to marry is the right to join in marriage with the person of one’s choice, a statute that restricts the scope of his choice thereby restricts his right to marry”). Applying strict judicial scrutiny to the statutes, this Court held that they violated the fundamental right to marry under the equal protection clause and struck them down as unconstitutional. Id. at 731.

Importantly, this Court rejected the argument that because they applied to all persons, the statutes were not discriminatory. Id. at 716. To that end, this Court reasoned that the issue was not whether different groups are equally treated by the laws, but rather how the laws acted upon the individual’s rights. Id., (“It has been said that a statute such as section 60 does not discriminate against any racial group, since it applies alike to all persons whether Caucasian, Negro, or members of any other race. The decisive question, however, is not whether different races, each considered as a group, are equally treated. The right to marry is the right of individuals, not of racial groups. The equal protection clause does

not refer to rights of the Negro race, the Caucasian race, or any other race, but to the rights of individuals”).

Just as the right at issue in Perez was not the right to interracial marriage, the right at issue in this case is not the right to same-sex marriage. Rather, the issue in both cases is the state’s power to restrict an individual’s constitutional right to marry their spouse of choice. For this reason, the appeals court erred when it declined to apply strict judicial scrutiny to *Family Code* sections 300 and 308.5. In its Opinion, the court states that no fundamental right was at stake because no court had ever recognized the right to same-sex marriage. In re Marriage, 49 Cal. Rptr. 3d 675, 699-700, (“We cannot ignore the reality that none of these cases addressed the type of union respondents are now urging California to recognize within the institution of marriage”). Concluding that no fundamental right was at stake, the court applied “rational basis review” to determine that the statutes were rationally related to a legitimate state interest. Id. at 686.

Taken together, the appeals court’s reasoning cannot be squared with this Court’s holding in Perez. Specifically, the court’s conclusion that same-sex marriage is a “new” right unrelated to the fundamental right to marry the person of one’s choice conflicts with this Court’s application of strict scrutiny to the miscegenation laws in Perez because in Perez this Court reasoned that no law infringing upon the fundamental right to marry may be unreasonably discriminatory against any individual regardless of the historical origin of the marriage-related right. Specifically, this Court held that any law infringing on a

man's right to marry the person of his choice in a manner based on prejudice and discrimination is subject to strict scrutiny. Perez at 714, (“No law within the broad areas of state interest [in marriage] may be unreasonably discriminatory or arbitrary”), Id. at 715, (“Legislation infringing such [marriage] rights must be based upon more than prejudice and must be free from oppressive discrimination to comply with the constitutional requirements of due process and equal protection of the laws”). Emphasis added. Thus, this Court applies strict judicial scrutiny whenever a law 1) restricts marriage; 2) is based upon prejudice and oppressive discrimination; and 3) without regard for the historical recognition of the right asserted.³ Just as in Perez, those elements are facially present in this case yet the appeals court declined to exercise the requisite level of scrutiny.

Accordingly, because *Family Code* sections 300 and 308.5 abridge the Clinton Petitioners' fundamental right to marry by making it impossible for them marry the spouse of their choice, this Court should apply strict judicial scrutiny to the statutes to determine whether they are necessary and narrowly tailored to serve a compelling state interest.

B. The Fundamental Right to Marry and Due Process of Law

The right of individuals to marry the spouse of their choice is well-established. Perez, *supra*, 32 Cal.2d at 715; Loving v. Virginia, 388 U.S. 1, 12.

³ “In this case, there are no decisions of either this court or the Supreme Court of the United States which uphold the validity of a statute forbidding or invalidating miscegenous marriages. The reasonableness of the regulation is the deciding factor” Perez at 737.

Indeed, the fundamental right at issue in this suit is the right of the individual citizen to participate in the government-sponsored institution of marriage with the spouse of his or her choice. To that end, the California constitution guarantees that the government will not deprive citizens of their fundamental rights without due process of law. *Cal. Const. Art. 1 §7(a)*, (“A person may not be deprived of life, liberty or property without due process of law”). Conversely, California *Family Code* sections 300 and 308.5 deprive the Clinton Petitioners from exercising their fundamental right to marry because the statutes preclude them from marrying the spouse of their choice. Whenever statutes infringe on an individual’s fundamental rights under the due process clause, California courts apply strict judicial scrutiny to ensure that the statutes are narrowly tailored to serve a compelling state interest. *D’Amico*, *supra*, 11 Cal. 3d 1, at 17. In light of prevailing legal authority, this Court should apply strict scrutiny to these statutes to determine if they unconstitutionally infringe upon the Clinton Petitioners right to marry under the due process clause.

In its Opinion on this case, the appeals court’s narrow reading of the miscegenation cases improperly limits the scope of the holdings solely to race-based statutes. *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 704, (“These laws were subject to strict scrutiny because they drew distinctions based solely on the race of potential spouses, and race has long been recognized as a suspect classification [citations to *Loving* and *Perez*]. To be sure, the cases also held antimiscegenation laws deprived the participants of their fundamental right to marriage, but this

holding cannot be divorced from the law’s racially discriminatory context”).

However, as Justice Kline notes in his dissenting opinion, “Loving cannot be seen as simply the product of the Supreme Court’s special concern about the use of racial classifications, as the majority says, because it was not decided just on the basis of equal protection.” In re Marriage Cases, *supra*, 49 Cal. Rptr. 3d 675, 737. Rather, both this Court in Perez and the U.S. Supreme Court in Loving also undertake a broader due process analysis of laws infringing on the fundamental right to marry. *Id.* at 737-738, citing Zablocki v. Redhail (1978) 434 U.S. 374, 384, (“although Loving arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals”).

To that end, the U.S. Supreme Court in Loving stated in no uncertain terms that the due process clause of the Fourteenth Amendment triggers strict judicial review whenever a statute infringes upon the fundamental right to marriage.

Loving v. Commonwealth of Virginia, 388 U.S. 1, 12:

To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry a person of another race resides with the individual and cannot be infringed by the State.”

Moreover, the appeals court in this case found that although *Family Code* sections 300 and 308.5 are gender-specific restraints on marriage, they do not trigger strict scrutiny because they apply equally to both men and women without working a disadvantage on either group. In re Marriage at 706, (“The laws treat men and women exactly the same, in that neither group is permitted to marry a person of the same gender. We fail to see how a law that merely mentions gender can be labeled ‘discriminatory’ when it does not disadvantage either group”).

Taken together, the appeals court’s holding cannot be squared with this Court’s analysis in Perez nor the United States Supreme Court’s analysis in Loving. For example, in Perez this Court held that where a statute implicates the fundamental right to marriage, the Court applies strict scrutiny regardless of the statute’s equal application to different groups. Perez, supra, 32 Cal. 2d at 716, (“It has been said that [the statute] does not discriminate against any racial group, since it applies alike to all persons. The decisive question, however, is not whether different [groups] are equally treated. The right to marry is the right of individuals, not of...groups”).

To that end, the United States Supreme Court in Loving also applied strict scrutiny to a statutory restraint on marriage regardless of the law’s “suspect” classifications. Loving at 8, (“The argument [advanced by the State] is that if the [Constitution] does not outlaw miscegenation statutes because of their reliance on racial classifications, the question of constitutionality would thus become whether there was any rational basis for a State to treat interracial marriages differently

from other marriages. We reject the notion that the mere ‘equal application’ of a statute...is enough to remove [it] from the Fourteenth’s Amendment, [and] we do not accept the State’s contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose”).

Like those classifications based on race, California’s marriage statutes broadly preclude the Clinton Petitioners and other same-gender couples from exercising the fundamental right to marry. Indeed, California’s marriage statutes were specifically enacted to deprive same-gender couples of the right to marry. In re Marriage Cases, *supra*, 49 Cal. Rptr. 3d at 709-710. To that end, they should be subject to the same level of review as the race-based restrictions on marriage.

In sum, the fundamental right to marry embodies an individual’s right to sections 300 and 308.5 make it impossible for the Clinton Petitioners and other similarly-situated Californians to exercise this fundamental right. Accordingly, these sections abrogate the Clinton Petitioners fundamental right to marry under the due process clause of the California constitution. On this basis, the Court should apply strict scrutiny to determine whether the statutes are narrowly tailored to accomplish a compelling state interest.

C. Judicial Review of Constitutional Issues

In its Opinion, the appeals court found that substantive due process analysis required it to exercise judicial restraint in narrowly defining the right at stake as the alleged right to same-sex marriage. In re Marriage Cases, (2006), 49 Cal.

Rptr. 3d 675, 701, (“We heed the guiding principle that substantive due process analysis ‘must begin with a careful description of the asserted right.’ Considering the importance of judicial restraint in this area...carefully described, the right at issue in these cases is the right to same-sex marriage, not the right to marriage”). In arriving at this restrictive conclusion, the appeals court looked to our nation’s history to essentially determined that homosexual individuals simply do not enjoy the same constitutionally-protected right to marriage enjoyed by all other free people. *Id.* at 703, (“For purposes of a due process analysis, only rights that are objectively, ‘deeply rooted in this nation’s history and tradition’ and ‘implicit in the concept of ordered liberty’ such that ‘neither liberty nor justice would exist if they were sacrificed’ are recognized as fundamental [citations]”). However, based on other precedential decisions addressing the right to marriage, the appeals court’s limiting analysis is improper.

As previously discussed, the fundamental right to marry is an individual right under the California constitution. *Perez v. Sharp*, (1948), 32 Cal. 2d 711, 714. As Californians, the Clinton Petitioners have a liberty interest in equal protection under California’s laws and to due process of law before they are deprived of their constitutional rights. *California Constitution*, Art. 1, §7. Because those rights flow from California’s constitution, laws that infringe on them are properly the subject of judicial review. *Committee to Defend Reproductive Rights v. Myers*, (1981) 29 Cal.3d 252, 261-262 (“Basic principles of federalism illuminate [the Court’s] responsibilities in construing the state

constitution”). To that end, if a constitutionally protected right is implicated by the *Family Code* sections, then California courts are the proper forum to determine whether the statutes are narrowly tailored to serve a compelling state interest.

In this case, the appeals court’s invocation of judicial restraint allowed it to sidestep addressing the constitutionality of these *Family Code* sections entirely. Instead, it deferred the issue to the legislature and the general electorate. In re Marriage Cases, *supra*, 49 Cal. Rptr. 3d at 705, (“Courts in this state simply do not have the authority to redefine marriage. In California, the Legislature has full control of the subject of marriage”).

However, actions by California’s legislative and executive branches of government while this matter was pending support the conclusion that *Family Code* sections 300 and 308.5 implicate the general fundamental right to marriage and not the narrower interest in same-sex marriage. For example, the California Legislature addressed same-gender marriage and the *Family Code* sections as broadly implicating the state’s general interest in the institution of marriage when it approved *Assembly Bill 849*. Legis. Counsel’s Dig., Assem. Bill No. 849 (2005-2006 Reg. Sess., p. 1. Notably, *AB 849*’s approval marked the first time in the United States that a state legislature has approved gender-neutral marriage laws. Known as the “Religious Freedom and Civil Marriage Protection Act,” *AB 849* was designed to amend California’s marriage laws by defining marriage in gender-neutral terms. In the Bill the California legislature declared:

Civil marriage is a legal institution recognized by the state in order to promote stable relationships and to protect individuals who are in those relationships. The institution of marriage also provides important protections for the families of those who are married, including not only any children or other dependents they may have, but also members of their extended families.

Id., SEC. 3, page 3.

Based on the language of this bill and its statement of legislative intent, AB 849 powerfully demonstrates that California's interest in marriage is to promote stable relationships and to protect individuals. Notably absent is a proclamation that the state has an interest in preserving a notion of marriage as defined only as between a man and a woman. Rather, the legislature acted to amend the Family Code sections in furtherance of the state's interest in protecting its citizens' fundamental right to marriage. To that end, this Court should analyze the *Family Code* sections as affecting the general fundamental right to marriage because AB 849 would revise those very statutes and the stated purpose of the bill is to promote stable relationships and protect individuals regardless of whether those individuals are homosexuals.

Other evidence in the bill also demonstrates that the California legislature was addressing the issue of same-gender marriage in the context of individual rights. As Assemblyman Tom Umberg stated after voting in favor of AB 849, "[h]istory will record whether we pushed a bit, took the lead to encourage tolerance, to encourage equality and to encourage fairness." Respondents Appendix at p. 0011.

California's executive branch also views the issue as a constitutional one implicating the general fundamental right to marry. Specifically, Governor Schwarzenegger referred to this pending litigation in his veto of the bill, stating: "[i]f the ban of same-sex marriage is unconstitutional, this bill is not necessary." In re Marriage Cases, *supra*, 49 Cal. Rptr. 3d at 697. The Governor's statement shows that he believes the issue is whether the *Family Code* sections impermissibly infringe on Californian's fundamental right to marry and not a limited new right to same-sex marriage. Thus, California's co-extensive branches of government both view the issue before this Court as one implicating the fundamental constitutional right of individuals to marry the person of their choice. As a result, this Court should address its analysis of the *Family Code* statutes to that general fundamental right to marry. Conversely, the appeals court's recasting of the issue into non-constitutional terms related to a "new" fundamental right is contrary to the manner in which California's legislative and executive branch view the issue.

Moreover, our nation's highest courts do not narrowly define the rights at issue in their fundamental rights analysis. Notably, AB 849 specifically invokes this Court's decision in Perez v. Sharp in the body of the bill. Dig., Assem. Bill No. 849 (2005-2006 Reg. Sess., p. 3. As discussed *supra*, this Court in Perez held that antimiscegenation laws implicated the fundamental right to marry and therefore merited strict scrutiny. Perez, *supra*, 32 Cal. 2d at 717. In framing the

issue before it, this Court did not limit scope of its inquiry to whether there existed a fundamental right to interracial marriage.

Similarly, in the recent landmark decision of Lawrence v. Texas, (2003), 123 S. Ct. 2472, the United States Supreme Court applied strict scrutiny to a Texas statute outlawing sexual intercourse between individuals of the same sex.

Lawrence at 2476. In its analysis, the Court concluded that the issue was whether an adult individual's Fourteenth Amendment liberty interest shielded him from government intrusion into private consensual sexual activity with a consenting adult. Id. at 2476. Importantly, the Court did not define the liberty interest as a new right to consensual same-sex sodomy. Indeed, the Court framed the issue broadly while recognizing a long history of anti-sodomy laws. Id. at 2479-2480.

Judicial analysis in these cases illustrate that the right at issue is the fundamental right of individual citizens to participate in the institution of marriage with the spouse of their choice. Because this right is an established fundamental right, the appeals court improperly relied on judicial restraint and deference to recast the issue in more narrower terms. For this reason, this Court should find that the Clinton Petitioners are seeking judicial relief from statutes that implicate their fundamental constitutional right to marry. To that end, because the Clinton Petitioners' constitutional rights are at stake, this Court should apply strict judicial scrutiny to determine whether the statutes are narrowly tailored to accomplish a compelling state interest.

II. The Court Should Apply Strict Scrutiny to Family Code Sections 300 and 308.5 Because the Statutes Use Suspect Classifications

A. Family Code §§ 300 and 308.5 Use Gender-Based Classifications In Violation of Equal Protection

The statutes at issue in this case expressly restrict marriage in California to unions between a man and a woman. *Family Code* §300, (“Marriage is a personal relation arising out of a civil contract between a man and a woman”), *Family Code* §308.5, (“Only marriage between a man and a woman is valid or recognized in California”)⁴. In this case, the trial court held that these statutes plainly impose gender-based classifications. Marriage Cases, Judicial Council Coordinated Proceeding No. 4365, page 17, (“If a person, male or female, wishes to marry, then he or she may do so as long as the intended spouse is of a different gender. It is the gender of the intended spouse that is the sole determining factor”). On appeal, the First Appellate District agreed with the trial court that the statutes are gender-based. In re Marriage, 49 Cal. Rptr. 3d 675, 706, (“The laws treat men and women exactly the same, in that neither group is permitted to marry a person of the same gender”). Accordingly, if the statutes in question are gender-based classifications, then this Court should apply strict scrutiny to determine whether they are narrowly tailored to serve a compelling state interest.

⁴ The Courts of Appeal are split on the scope of *Family Code* §308.5. On the one hand, the Second District held that the section is limited to marriages performed outside California. Armijo v. Miles (2005), 127 Cal. App. 4th 1405, 1422. On the other hand, the Third District read the statute broadly to limit all marriage to heterosexuals. Knight v. Superior Court (2005) 128 Cal. App. 4th 14, 18.

In California, this Court has held that laws which classify similarly-situated people differently on the basis of sex or gender are treated as “suspect.” Sail’or Inn v. Kirby, (1971) 5 Cal. 3d 1, 17, (“Classifications based on sex should be treated as suspect”), Boren v. Dept. of Employment Development, (1976), 59 Cal. App. 3d 250, 256, (“A sex-based classification is treated as suspect”).

Other courts have also held that similarly restrictive marriage statutes are suspect gender-based restrictions. For example, the Massachusetts Supreme Court recently held that language similar to sections 300 and 308.5 created a “self-evident” sex-based classification. Goodridge v. Dept. of Public Health, 440 Mass. 309, 345-346, (Greaney, J. concurring). See also, Baehr v. Lewin, (HI. 1993) 74 Haw. 530, 564 (plurality opinion, overruled by statute) [“It is the state’s regulation of access to the status of married persons, on the basis of the applicant’s sex, that gives rise to the question whether the applicant couples have been denied the equal protection of the laws....”]; Baker v. State (Vt. 1999), 170 Vt. 194, 253, (Johnson, J., concurring in part dissenting in part), (“Thus, the [Vermont] statutes [recognizing marriage as between a man and a woman only] impose a sex-based classification”), Brause v. Bureau of Vital Statistics (Alaska Super. 1998), 1998 WL 88743 *6 (Not reported in P.2d), (“specific prohibition of same-gender marriage does implicate the Constitution’s prohibition of classifications based on sex or gender....”).

Turning back to California, once a court determines that a statute differentiates based on a “suspect” classification, it applies strict judicial scrutiny

to that statute to determine if it is necessary to achieve a compelling state interest. Sail'er Inn, *supra*, 5 Cal. 3d at 17, (“strict review is required because of the characteristic upon which the classification is based”), see also Boren at 259, (“Because [the statute] establishes a sex-based disqualification, [it] is inherently suspect as a denial of equal protection. It may be sustained only by a showing of its necessity for the fulfillment of a compelling state interest”).

Unfortunately, the appeals court in this case failed to treat the *Family Code* sections as gender-based classifications requiring strict scrutiny. In its Opinion, the court states that “[t]he laws treat men and women exactly the same, in that neither group is permitted to marry a person of the same gender. We fail to see how a law that merely mentions gender can be labeled ‘discriminatory’ when it does not disadvantage either group.” In re Marriage Cases, *supra*, 49 Cal. Rptr. 3d at 706.

However, California courts apply strict scrutiny to laws based on “suspect” classifications regardless of the fact that the law might apply equally to both a “suspect” class of individuals and other non-suspect classes of similarly situated individuals. As discussed in Section I, this Court succinctly addressed the issue in Perez: “Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.” Perez at 717. Indeed, the proponents of anti-miscegenation laws argued that the laws did not discriminate because they applied equally to whites and blacks so that neither group could marry someone from the

opposite race. In response, this California Supreme Court found the 'equal application' argument unpersuasive, stating: "[t]he decisive question, however, is not whether different races, each considered as a group, are equally treated. The right to marry is the right of individuals, not of racial groups." Perez, 32 Cal.2d at p. 716. Similarly, in Loving the U.S. Supreme Court rejected "the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations...." Loving, *supra*, 388 U.S. at p. 8.

In this case, the plain language of *Family Code* sections 300 and 308.5 create gender-based classifications precluding Californians from marrying their spouse of choice. Both sections expressly and directly refer to the gender of individuals allowed to participate in the institution of marriage. Specifically, the distinction drawn by the language of the sections allows a female to marry a male, but not a female to marry a female. Applied to Petitioners, Gregory Clinton cannot marry Gregory Morris because he (Mr. Clinton) is a man and Kristen Anderson cannot marry Michelle Bettega because she (Kristen) is a woman. Thus, only their gender prevents Gregory and Kristen from marrying their chosen partners under California *Family Code* §§300 and 308.5.

To that end, the trial court Opinion of Superior Court Judge Kramer elucidates this point. In its Opinion, the court writes: "If a person, male or female, wishes to marry, then he or she may do so as long as the intended spouse is of a different gender. It is the gender of the intended spouse that is the sole

determining factor.” Marriage Cases, Judicial Council Coordination Proceeding No. 465 (2005), page 17.

Thus, *Family Code* sections 300 and 308.5 treat similarly situated individuals differently based on express and suspect gender classifications. Accordingly, this Court should apply strict judicial scrutiny to determine if the statutes are narrowly tailored to achieve a compelling state interest.

B. Family Code Sections 300 And 308.5 Classify Individuals Based on Their Sexual Orientation

The First Appellate District found that *Family Code* §§ 300 and 308.5 “implicitly classify based upon sexual orientation” but declined to apply heightened scrutiny because it determined that it lacked precedent for such an application. In re Marriage Cases, *supra*, 49 Cal. Rptr. 3d at 710. To that end, while this Court has not specifically addressed whether sexual orientation is a “suspect” classification, ample evidence exists for the establishment of an individual’s sexual orientation as a “suspect” classification requiring strict judicial scrutiny. In light of that evidence, this Court should recognize classifications based on sexual orientation as suspect and strictly scrutinize statutes that classify similarly-situated individuals on that basis.

On this issue, the Court’s reasoning in Sail’or Inn is instructive. In that case, this Court reasoned that:

[s]ex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. 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. [citation] The result is that the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members. [citation] Where the relation between characteristic and evil to be prevented is so tenuous, courts must look closely at classifications based on that characteristic lest outdated social stereotypes result in invidious laws or practices. Another characteristic which underlies all suspect classifications is the stigma of inferiority and second class citizenship associated with them.

Sail'er Inn v. Kirby, (1971), 5 Cal.3d 1, 18-19. Under this analysis, sexual orientation fits the Court's perception of a "suspect" classification.

First, sexual orientation is judicially recognized to be an immutable trait because courts have held that it is a trait so fundamental to one's identity that a person should not be required to abandon it. Hernandez-Montiel v. INS, (9th Cir. 2000) 225 F.3d 1084, 1093.⁵ To that end, this Court has also held that homosexuals as a distinct class are entitled to equal protection of the laws. Gay Law Students Association v. Pacific Telephone and Telegraph Co., (1979), 24 Cal.3d 458, 467. Notably, in this case the appeals court found the "immutable trait" factor to be the most troublesome and curtailed its analysis accordingly. However, this Court's jurisprudence views the immutable trait prong not as an essential element, but rather as one of many factors used to determine whether a group is a "suspect" class.⁶ In re Marriage Cases, *supra*, 49 Cal. Rptr. 3d at 713.

⁵ Overruled on other grounds in Thomas v. Gonzales, (9th Cir. 2005), 409 F.3d 1177, 1187, *revd.* on other grounds in Gonzales v. Thomas (2006) 547 U.S. 183.

⁶ For example, subsequent to Sail'er Inn this Court analyzed suspect classifications referencing the immutable trait element. Bowens v. Superior Court, [1991] 1 Cal.4th 36, 42, ("The determination of

Second, a person's sexual orientation in no way affects his or her ability to perform in or contribute to society. In fact, no party here makes that contention. Indeed, the Clinton Petitioners show that sexual orientation does not hinder the ability to contribute to society because they are active members of the community and contribute to society through their respective careers as a doctor, a lawyer, teachers, and social workers.

Third, homosexuals have historically endured a stigma of inferiority and a "history of persecution comparable to that of blacks and women." The People v. Garcia, (2000) 77 Cal.App.4th 1269, 1276. That homosexuals have been excluded from the institution of marriage, with all of its attendant legal and social benefits, only underscores their plight. In Goodridge, the Massachusetts Supreme Court illustrated this point:

"In this case, [involving defining marriage as between a man and a woman] as in *Perez* and *Loving*, a statute deprives individuals of access to an institution of fundamental legal, personal, and social significance--the institution of marriage--because of a single trait: skin color in *Perez* and *Loving*, sexual orientation here. As it did in *Perez* and *Loving*, history must yield to a more fully developed understanding of the invidious quality of the discrimination."

Goodridge, *supra*, 440 Mass. at p. 328

Additionally, the California Legislature has taken steps to prevent discrimination based upon sexual orientation and these additional safeguards

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."

indicate classifications based upon sexual orientation should be treated as “suspect.” For example, in 1959 California enacted the Unruh Civil Rights Act (*Civil Code* §51, *et. seq.*). Interpreting this statute, California courts have held that it prohibits discrimination based on sexual orientation. *Rulon v. Kulwitzsky* (1984) 153 Cal.App.289, 292; see also *Curran v. Mount Diablo Council of the Boy Scouts* (1983) 147 Cal.App.3d 712, 734. Indeed, California *Civil Code* § 51.7 precludes violence or the threat of violence against a person based on his or her sexual orientation:

- (a) All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their race, color, religion, ancestry, national origin, political affiliation, sex, *sexual orientation*,...
- (b) As used in this section, ‘*sexual orientation*’ means heterosexuality, homosexuality, or bisexuality.”

California *Civil Code* § 51.7 [emphasis added].

California has also enacted laws to prevent “hate crimes” such as California *Penal Code* section 422.6; which reads:

“No person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of this state or by the Constitution or laws of the United States in whole or in part because of one or more of the actual or perceived characteristics of the victim...”

These “actual or perceived characteristics” of the victim include a person’s sexual orientation. Cal. *Penal. Code* § 422.5.

Thus, the additional steps taken by both California courts and the California legislature to protect individuals from discrimination based upon their sexual orientation support the conclusion that statutes which discriminate using classifications based upon sexual orientation are “suspect” and require strict judicial scrutiny.

C. *Family Code* Sections 300 and 308.5 Have a Disproportionately Disparate Impact on One Group of People

Assuming *arguendo*, that §§ 300 and 308.5 do not discriminate because they apply equally to men and women, the analysis does not end there. Rather, when classifications are subject to an equal protection challenge in California, the court focuses less on the statute’s neutral language and more on its practical impact and ultimate effect. Boren v. Dept. of Employment Development, (1976) 59 Cal.App.3d 250, 257, (“In measuring these classifications against the equal protection clause, the court deals not so much with the statute’s neutral language as with its practical impact. Its ultimate effect is the criterion of equal treatment”). Thus, the court inquires into the statute’s actual purpose. Id., see also Parr v. Monterey-Carmel, (1971), 3 Cal. 3d 861, 863-864, (“The traditional focus of the equal protection clause has been the relationship between the classifications drawn by a statute and the purpose of the statute”).

In this case, both the practical effect and the actual purpose of the *Family Code*’s gender-specific terminology is to preclude same-gender couples from

marrying. In re Marriage Cases, (2006), 49 Cal. Rptr. 3d 675, 710, (“Indeed, the statutory definitions does not merely have a ‘greater impact’ on gay and lesbian couples; it excludes 100 percent of them from entering marriage. Moreover, the Legislature’s manifest purpose in enacting the amendments to *Family Code* §300 was to exclude same-sex couples from the institution of marriage”). Moreover, this Court has held that homosexuals are a recognized group entitled to equal protection under the laws. Gay Law Students Assn. v. Pacific Telephone and Telegraph Co., (1979), 24 Cal. 3d. 458, 467.

Thus, if a statutory classification is unrelated to a permissible purpose it infringes upon the equal protection clause and when challenged draws strict judicial scrutiny. Parr at 864. Similarly, laws which are discriminatory because they are expressions of hostility or antagonism toward certain groups or individuals will draw the court’s strict scrutiny. Id. Moreover, a facially neutral statute which actually affects a disproportionate number of one group is discriminatory and subject to strict scrutiny. Boren at 257, (“It is enough if statistics show that the standard affects [the group] only”), Baluyut v. Superior Court (1996), 12 Cal. 4th 826, 832, (“administration by state officers of a state statute that is fair on its face, which results in unequal application to persons who are entitled to be treated alike, denies equal protection if it is the product of intentional or purposeful discrimination”).

Applying Boren, Parr and Baluyut to the Clinton Petitioners case, this Court should subject the *Family Code* statutes to strict judicial scrutiny because

the statutes undisputedly affect only one group of people on the basis of sexual orientation and gender by precluding 100% that group from participating in the institution of marriage. Furthermore, these statutes were enacted with the express purpose of depriving a group of Californians of the fundamental right to marry the person of their choice and are administered in a manner that singles them out for intentional and purposeful discrimination. Accordingly, the statutes should be subject to strict judicial scrutiny because they have an improper purpose and a disparate impact on a specific group of people entitled to equal protection under the law.

III. California *Family Code* Sections 300 and 308.5 Infringe on the Individual's Right to Privacy Under California's Constitution

The California Constitution proclaims: “[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and *privacy*.” *Cal. Const.* art. I, § 1 (emphasis added). In many instances, the scope and application of the California state constitutional right to privacy is broader and more protective of privacy than its Federal counterparts. *American Academy of Pediatrics v. Lungren* (1997) 16 Cal. 4th 307, 326. In California, an impairment of an interest of constitutional dimension, such as the constitutionally guaranteed right of privacy, must meet a strict scrutiny

standard. Wood v. Superior Court Bd. Of Medical Quality Assur., (1985) 166 Cal.App.3d 1138,1147.

Moreover, the right to privacy protected under the California Constitution includes the right of personal autonomy and also ensures the freedom of intimate association. Ortiz v. Los Angeles Relief Ass'n (2002), 98 Cal.App.4th 1288, 1303. Under California law, the right to marry is also a legally protected right under the right to privacy. Id. At the federal level, the United States Supreme Court states: “[w]e deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is...intimate to the degree of being sacred.” Griswold v. Connecticut (1965) 381 U.S. 479, 486, quoted with approval in Tylo v. Superior Court (1997) 55 Cal.App.4th 1379, 1384.

However, in this case the appeals court held that the right to privacy did not encompass the right of petitioners to engage in marriage because petitioners “have cited no authority showing the right to marry a same-sex partner has ever been recognized as a legally protected privacy interest.” In re Marriage Cases, (2006) 49 Cal. Rptr. 3d 675, 716. As discussed in relation to fundamental rights, the court’s recharacterization of basic human rights as beyond the reach of this discrete class of individuals is unsupported in the annals of judicial analysis on the subject. To that end, the privacy interest at issue is the right to marry. Accordingly, this Court is not called to establish a separate privacy right related to same-gender marriage because those individuals already possess a recognized

privacy interest. However, California's *Family Code* statutes make it impossible for the Clinton Petitioners to exercise these recognized rights and join in marriage with the spouse of their choice. For this reason, the statutes infringe on their constitutionally-protected privacy rights and should be subject to strict judicial scrutiny.

California law is clear that while the right to privacy is not absolute, it can only be abridged when there is a compelling and opposing state interest. Kahn v. Superior Court (1987) 188 Cal.App.3d 752, 765. Here, the state lacks a compelling interest to warrant such a substantial interference with an individual's right to privacy as an intrusion into his fundamental right to marry. On the contrary, the state's interest in marriage is limited to encouraging individuals to form life-long unions in pursuit of liberty, happiness and self-determination. Fairly read, this interest applies to homosexual citizens in exactly the same way it applies to heterosexual individuals.

Additionally, the appeals court rejected the Clinton Petitioners request that it recognize a constitutionally-protected privacy interest in marriage on "the reality that respondents have never enjoyed such a right before...rather, this is a case in which people who have never had a legal right to marry each other argue that the institution unconstitutionally excludes them." In re Marriage Cases, *supra*, 49 Cal. Rptr. 3d at pgs. 715-716. Again, this is an improper analysis in light of California precedent on the subject. Specifically, when this Court decided Perez it did not state that because interracial couples had never had a legal right to marry

each other they were precluded from arguing that the institution unconstitutionally excluded them. It did not fabricate a new fundamental right to interracial marriage. Rather, it applied the well-established constitutionally protected privacy interest in marriage to similarly-situated people who had previously been denied their constitutional right. Such reasoning applies equally to the Clinton Petitioners and any state infringement on that right must meet the standard of strict judicial scrutiny.

For these reasons, California *Family Code* sections 300 and 308.5 infringe upon the fundamental right to marry by hindering the ability of citizens of California to enter into marriage. Such hindrance implicates those individuals right to privacy under the California constitution and merits the corresponding strict judicial scrutiny to ensure that the state's action is narrowly tailored to serve a compelling interest.

IV. California *Family Code* §§ 300 and 308.5 Fail Strict Judicial Scrutiny Because They Are Not Necessary to Achieve a Compelling State Interest

A. The *Family Code* Sections Are Subject To Strict Judicial Scrutiny

California *Family Code* sections 300 and 308.5 infringe upon the fundamental right to marry, create improper gender-based classifications, discriminate based upon an individual's sexual orientation and violate California's constitutional right to privacy. For these reasons, this Court should subject these

sections to strict judicial scrutiny. Boren v. Department of Employment Development (1976), 59 Cal.App.3d 250, 255-256; Sail'er Inn, Inc. v. Kirby (1979), 5 Cal.3d 1, 16-20; Wood v. Superior Court Bd. of Medical Quality Assur. (1985), 166 Cal.App.3d 1138,1147.

Under the "strict scrutiny" standard, the state bears the burden of establishing not only that it has a compelling interest justifying the law, but also that the distinctions drawn by the legislation are necessary to further its purpose. D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1, 17.

Applied to the consolidated marriage cases, the state has no compelling interest in maintaining a "traditional" definition of marriage when in the process it denies an entire class of citizens, including Petitioners, access to this basic and fundamentally important institution. Moreover, no amount of procedural due process is sufficient to deprive this class of similarly situated people of their fundamental right to marry.

On this issue, the appeals court's reasoning that the Domestic Partnership Act absolves the state of its obligation to allow similarly situated citizens equal access to the fundamental right of marriage is tragically flawed. As a nation, we have already learned that alleged "separate but equal" treatment is unworkable. Specifically, the U.S. Supreme Court held that maintaining segregated schools is inherently unequal even if the facilities are of identical quality. Brown v. Board of Education of Topeka, et al. (1952) 347 U.S. 483, 494.

Applied to this case, providing some of the economic benefits of marriage while precluding a class of citizens from marrying the spouse of their choice cannot absolve the state of its failure to deliver equal protection under the law. Accordingly, any argument that includes the denial of the right to marry on the one hand in favor of similar supplemental measures on the other can only be a departure from Brown's principles. Such a departure leads to the inescapable conclusion that insofar as homosexuals are concerned, "separate but equal" is constitutionally viable in California.

The Massachusetts Supreme Court addressed a similar issue when reviewing the constitutionality of "civil unions." Opinions of the Justices to the Senate (Mass. 2004), 440 Mass. 1201, 1202. The question presented to the Massachusetts Court was whether providing eligible same-gender couples the opportunity to obtain the benefits, protections, rights and responsibilities afforded to opposite sex couples without allowing them to marry would still offend constitutional principles. Id. at p. 1204. Proponents stated that allowing "civil unions" instead of allowing same-gender couples to marry would preserve the historic nature and meaning of the institution of civil marriage. Id. at p. 1205. In its Opinion, the Court held that "[m]aintaining a second-class citizen status for same-gender couples by excluding them from the institution of civil marriage *is* the constitutional infirmity at issue." Id. at p. 1209 (emphasis original). As a result, the Court concluded that providing for "civil unions" rather than marriage violated the Constitution of the Commonwealth and the Massachusetts Declaration

of Rights because it maintained an unconstitutional, inferior, and discriminatory status for same-gender couples. Id. at p. 1210.

Similarly, the State of California asserts that providing equal benefits while denying a class of people the right to marry is a compelling state interest. Applying the Massachusetts Court's reasoning, such a "separate but equal approach" relegates California citizens, including the Clinton Petitioners, to a second-class status in order to protect a "traditional" notion of marriage. When Californians pay the price of preserving a "traditional" definition with their fundamental constitutional rights, the state's interest cannot be considered compelling because it has an equally compelling interest and obligation to preserve the rights of all similarly situated citizens.

Time and again courts of this state and this nation have held that simply because an unconstitutional practice has occurred over many generations, it does not thereby gain contemporary constitutional legitimacy. As Justice Traynor wrote in Perez when the court struck down California's anti-miscegenation laws, "[c]ertainly the fact alone that the discrimination has been sanctioned by the state for many years does not supply such [constitutional] justification." Perez, supra, 32 Cal.2d at p. 727. As in Perez, California cannot have a compelling interest in maintaining a tradition for its own sake when that tradition is itself discriminatory. Hence, California has no compelling interest in precluding homosexuals from participating in the institution of marriage.

Instead, the State of California's compelling interest is providing the institution of marriage to its citizens for their liberty and self-determination, and to encourage stable child-rearing environments. On the other hand, the State of California does not have a compelling or even a legitimate interest in precluding its own citizens from marrying on the sole basis that historically those citizens have not been permitted to participate in the institution. Because *Family Code* sections 300 and 308.5 serve no function other than to limit the class of individuals who can marry, the statutes are in no sense *necessary* to achieve the state's legitimate interest in preserving liberty and encouraging positive child-rearing environments. Rather, these interests are better-served when all citizens are able to marry regardless of their sexual orientation.

Likewise, recognizing same-gender couples' right to marry does nothing to threaten the institution's integrity. Like heterosexual marriages, same-gender marriages are based on commitment, love and support. Same-gender homes provide children with safe, supportive and loving environments. Thus, same-gender marriage would benefit the state by offering more stable homes in which children can be raised by two committed parents. Consequently, precluding same-gender couples from marriage actually hinders the state's compelling interest in protecting the integrity of marriage as a viable social institution. Along those lines, it follows that *Family Code* sections 300 and 308.5 are not necessary to achieving California's compelling interest in preserving the institution of marriage.

Finally, strict judicial scrutiny applies to California *Family Code* sections 300 and 308.5 because the statutes infringe upon the Clinton Petitioners' fundamental right to marry and because the statutes discriminate on the suspect basis of gender and sexual orientation. In response, the state cannot demonstrate a compelling interest in excluding all homosexuals from the institution of marriage and has not shown that the discriminatory distinctions drawn by the laws are necessary to further any other purpose than exclusion for tradition's sake. Accordingly, the code sections violate equal protection and due process and must be held unconstitutional.

B. The *Family Code* Sections Also Fail Rational Basis Review

California *Family Code* sections 300 and 308.5 fail rational basis review because no legitimate government interest supports denying the right to marry to same-gender couples. Under the "rational basis test," a legislative classification is presumptively valid and the party challenging the legislation has the burden of demonstrating that no rational relationship exists between the disparate treatment and some legitimate governmental interest. D'Amico v. Board of Medical Examiners, (1974), 11 Cal.3d 1, 17.

1. The State Does Not Have A Legitimate Interest In Maintaining A Tradition Of Discrimination

In this case, the appeals court found that the state has a legitimate government interest in maintaining "traditional" marriage in California while

providing same-gender couples similar rights through domestic partnership laws.

In re Marriage Cases, *supra*, 49 Cal. Rptr. 3d at 716.

Undoubtedly, such a scenario would be a two-track “separate but equal” statutory scheme. On that issue, the U.S. Supreme Court in *Brown v. Board of Education of Topeka* held that maintaining “separate but equal” school facilities on the suspect basis of race is inherently unequal even if the facilities were of identical quality. Brown v. Board of Education of Topeka, et al. (1952) 347 U.S. 483, 494. Brown is analogous here because providing some of the economic benefits of marriage short of allowing all citizens to engage in the institution of marriage does nothing to absolve the state of its failure to accord similarly situated citizens equal protection under the law. Moreover, even if rights under the two tracks were identical in every way, the state would still be maintaining a system where similarly situated individuals are treated differently on the suspect basis of gender and sexual orientation.

On this point, the trial court sagely noted that the very fact that California has granted marriage-like rights to same-gender couples while denying them the right to marry demonstrates the lack of a rational government interest in denying marriage to same sex couples. Marriage Cases, *supra*, p. 9, lines 7-11, (“California’s enactment of rights for same-sex couples belies any argument that the State would have a legitimate interest in denying marriage in order to preclude same-sex couples from acquiring some marital right that might somehow be inappropriate for them to have”). In fact, California has provided same-gender

couples with many social advantages similar to married heterosexual couples, but still refuses to allow same-gender couples to be recognized as married. See, e.g., Cal. Fam. Code § 297.5. Unfortunately, this disparate treatment leads to the conclusion that there is something inferior about individuals who want to lead a committed, devoted life with a person of the same-gender. Given this conclusion, only prejudice, not rational considerations, support denying the right of marriage to same-gender couples. On that issue, this Court observed that in evaluating the state's interest in prohibiting marriage between two persons, the state may take into consideration matters of legitimate concern but the "legislation, however, must be based on tests of the individual, not on arbitrary classifications of groups or races, and must be administered without discrimination." *Perez, supra*, 32 Cal.2d at p. 718.

Undisputedly, the state does have legitimate interests in the institution of marriage. This interest includes affording liberty, self-determination and also encouraging procreation and providing the state's children with stable home environments. On the other hand, the state does not have a legitimate interest in maintaining a tradition of excluding homosexuals from the institution simply for the sake of perpetuating a tradition of discrimination. On the contrary, maintaining such a tradition of discrimination for its own sake furthers an irrational and illegitimate state interest.

2. California Family Code Sections 300 and 308.5 Bear No Rational Relation to the State's Legitimate Interests In Promoting the Institution of Marriage

In its Opinion, the appeals court indicates that the state has a legitimate interest in promoting stable family relationships by supporting heterosexual marriage on the one hand and domestic partnership laws on the other. In re Marriage Cases, *supra*, 49 Cal. Rptr. 3d at 720.

However, this finding reveals no rational link between the *Family Code* sections and California's legitimate interest in promoting stable family relationships. Rather, the finding demonstrates that the sections actually undermine the state's legitimate interests.

First, same-gender marriage would do nothing to hinder heterosexual couples' ability to procreate and raise a family. Under this reasoning, the state's legitimate interest in protecting procreation remains preserved regardless of whether homosexuals are permitted to marry. As a result, the state cannot claim any rational relation between its procreation interest and *Family Code* §§ 300 and 305.8 because the statutes are irrelevant to that state interest.

Second, if the state's interest is in creating stable relationships and environments for children, then this interest is furthered when same-gender couples are permitted to marry. For example, many same-gender couples already have and do raise children. Therefore, the state's legitimate interests in encouraging stable, loving environments for all the state's children is furthered by permitting same-gender marriage. That interest is furthered because same-gender

marriages would permit an entire otherwise-excluded class of people to use marriage as the foundation for a positive environment in which to raise children.

Next, the First Appellate District found that the state has a legitimate interest in maintaining the “historical” definition of marriage as between a man and a woman because it preserves the institution of marriage. While the state should protect the institution of marriage, preserving a historical definition at the expense of the fundamental rights of an entire class of people to participate in that institution is against the state’s interest in providing its citizens with equal protection under the laws. Rather, such a justification throws out the baby with the bathwater by undermining a primary state interest in favor of a periphery one.

Additionally, there is no rational basis for asserting that same-gender couples threaten the integrity of marriage or the welfare of children. Such conclusions stem from irrational hate, bigotry, ignorance and misunderstanding. Rather, a person’s sexual orientation has no bearing on his or her ability to be in a committed and loving relationship from which a stable and nurturing family environment might be made.

Thus, while the state does has legitimate interests in regulating marriage, none of these interests bear a rational relation to *Family Code* sections 300 and 308.5, which take as their sole function the exclusion of an entire class of Californians from the institution of marriage. Accordingly, the *Family Code* sections fail rational basis review.

In sum, California *Family Code* sections 300 and 308.5 deny same-gender couples equal protection under the laws, violate due process and the right to privacy and fail both a strict scrutiny analysis and rational basis review. The statutes are unconstitutional. Denied the right to choose their life-partner, same-gender couples are not only denied equal protection but are “excluded from the full range of human experience.” Goodridge, *supra*, 440 Mass. at p. 326. Accordingly, this Court should reverse the decision of the First Appellate District and declare California *Family Code* sections 300 and 308.5 unconstitutional.

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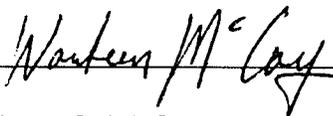
CONCLUSION

California *Family Code* sections 300 and 308.5 are unconstitutional under the California constitution. The sections abridge the fundamental right to marry, rely on the suspect classifications of gender and sexual orientation to classify similarly situated people differently under the same laws, and violate the right to privacy. In the judicial framework of constitutional analysis, the state fails to provide a compelling or even a legitimate interest justifying the practical effect of disqualifying the Clinton Petitioners, and countless other Californians, from participating in an institution of fundamental importance. Accordingly, the Clinton Petitioners respectfully request that this Court reverse the decision of the First Appellate District and declare Family Code sections 300 and 308.5 unconstitutional.

Dated: April 2, 2007

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Opening Brief on the Merits uses a 13-point Times New Roman font and contains 12,214 words according to the word count feature of the computer program used to prepare this document.

Dated April 2, 2007

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See attached **service list**.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct; that this declaration is executed on April 1, 2007, at San Francisco, California.



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