Case No. S147999

IN THE SUPREME COURT OF CALIFORNIA

In re MARRIAGE CASES

Judicial Council Coordination Proceeding No. 4365

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

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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 on the bases of sexual orientation and sex and by infringing rights of privacy, due process, intimate association, and free expression?

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

INTRODUCTION AND SUMMARY OF THE ARGUMENT

California has long led the nation in recognizing that constitutional provisions guaranteeing equal protection, privacy, due process, and freedom of association and expression require that lesbian and gay people, like all people, be treated fairly under the law. Nevertheless, California has failed in one key respect to live up to the commands of its state Constitution. Rather than permit same-sex couples to marry and thereby participate in a universally recognized and respected family status, California has constructed a separate and inferior status for same-sex couples — registered domestic partnership — that excludes those couples from the dignity of full citizenship.

As this brief shows, California's maintenance of a dual system of family law based on sexual orientation violates fundamental principles the people of California secured for everyone through our state's Constitution. In enacting various domestic partnership statutes, the Legislature has acknowledged that denying same-sex couples access to the legal protections made available to married couples violates the California Constitution. That acknowledgment does not go far enough, however. Regardless of how many legal protections registered domestic partnership

may provide, California's exclusion of same-sex couples from marriage continues to work enormous harm by signifying to lesbian and gay couples — and to the public — that same-sex relationships are less worthy of recognition than the relationships of heterosexual couples. By distinguishing between families based on sexual orientation, California's Family Code incorrectly and impermissibly communicates that sexual orientation is a valid basis for differential treatment. By doing so, the state *invites* discrimination against lesbian and gay people. For these reasons, as well as others, the state's creation of a separate legal status for same-sex couples does not, and could not, cure the constitutional defects of the statutory exclusion of same-sex couples from marriage.

Those constitutional defects are many. First, the exclusion of lesbian and gay couples from marriage violates the California Constitution's equal protection guarantee by discriminating on the basis of sexual orientation. Laws that discriminate on that basis warrant strict scrutiny from the courts. As this Court and the Legislature have recognized, lesbians and gay men have experienced a longstanding history of discrimination. That discrimination has pervaded gay peoples' lives — in employment, housing, education, public accommodations, and government treatment. Discrimination against lesbians and gay men is arbitrary because sexual orientation is irrelevant to a person's ability to contribute to society, to perform at school or work, to form a family or to raise children. Moreover, sexual orientation is a personal attribute that is central to one's identity, privacy, and autonomy. The state has no legitimate interest in attempting to discourage any Californian from forming a lasting, loving relationship that is consistent with his or her sexual orientation. Given these considerations, this Court should make clear what previous California appellate decisions have appeared to assume:

that the courts should be suspicious of any laws that discriminate based on sexual orientation. The presumption should be that such laws are invalid.

The exclusion of same-sex couples from marriage also discriminates on the basis of sex and warrants strict scrutiny for that reason, as well. Each individual Respondent in this case is barred from marrying the person of his or her choice because both partners are of the same sex. This statutory classification on the basis of sex is not merely formalistic. Rather, the restriction on spousal choice impermissibly relies on sex stereotypes that do not hold true for all women or for all men — namely, that a woman's role is to join in marriage with a man rather than another woman, and that a man's role is to join in marriage with a woman rather than another man. This Court's equal protection jurisprudence rightly has recognized that the courts should strictly scrutinize state action that perpetuates stereotypical assumptions about the abilities or preferences of women or of men. The marriage exclusion challenged here calls for just such scrutiny.

Strict scrutiny also is required because California's marriage statutes deny lesbian and gay persons the fundamental "right to join in marriage with the person of one's choice." (*Perez v. Sharp* (1948) 32 Cal.2d 711, 715 (hereafter *Perez*).) The freedom guaranteed by this established right to marry implicates autonomy, privacy, associational, and expressive interests that lie at the very heart of personal dignity and self-determination. Especially under the analysis this Court has established for evaluating claims under the state privacy clause, it is clear that lesbian and gay persons have an equal stake in the autonomy and privacy secured by the right to marry; they are harmed, and their dignity is demeaned, by being excluded from the exercise of such a vital personal right.

In addition, because same-sex couples are barred from marriage, they are unable to express their "emotional support and public

commitment" in the way that is most meaningful for themselves and their families and most respected by others. (*Turner v. Safley* (1987) 482 U.S. 78, 95. (hereafter *Turner*)) This prohibition is a direct restriction on protected speech and expressive conduct, based on the State's acknowledged desire to prevent lesbian and gay couples from expressing their commitment through marriage. Accordingly, the State must also justify this infringement of the right to free expression under the strict scrutiny standard.

California's exclusion of same-sex couples from marriage cannot survive rational basis review, much less the strict scrutiny called for by the exclusion's employment of suspect classifications and infringement of fundamental rights. The State has attempted to argue that, under rational basis review, the courts should respect the majority's decision to create a separate status for same-sex couples while reserving marriage for heterosexual couples. That argument boils down to nothing more than an assertion that the express statutory exclusion of lesbian and gay couples from marriage should be immune from meaningful judicial review. The State's other purported rationale is similar, and similarly insufficient — that the *tradition* of restricting marriage to heterosexual couples somehow justifies continuing that restriction. A constitutional harm does not become immune from constitutional scrutiny, however, merely by virtue of its longevity.

The tradition that calls for respect and furtherance here is not any such tradition of exclusion, but rather this Court's tradition of maintaining the vitality of our state's constitutional protections and the integrity of the courts' exercise of judicial review. It was this Court, in 1948, that became the first high court in the country's history to recognize that laws banning marriage between persons of different races are unconstitutional. (See *Perez, supra*, 32 Cal.2d at p. 711.) The issue was controversial, and this

Court's ruling stood alone for nearly two decades before another appellate court anywhere in the nation agreed — the United States Supreme Court. (See *Loving v. Virginia* (1967) 388 U.S. 1.) This Court recognized in *Perez* that its duty to invalidate the unconstitutional provision in that case was not affected by the fact that marriage was at issue, or by the fact that marriages across racial lines were counter to the traditional beliefs of many Californians.

It is difficult to imagine what the course of constitutional jurisprudence in California might have been had the *Perez* Court shied away from fulfilling its constitutional responsibility to invalidate the race-based restrictions on marriage then at issue. It is easy to see, however, what the legacy of this Court's opinion in *Perez* has been: California's leadership in enunciating what the constitutional guarantees of equal protection, due process, privacy, and free expression encompass. That noble legacy should continue.

A ruling by this Court ending the exclusion of lesbian and gay couples from marriage would be fully consistent with public policy as embodied in our state Constitution and as repeatedly expressed by the Legislature. In the last few years, California's Legislature has enacted more provisions protecting lesbian and gay people than any other state legislature. The Legislature has done so under the convictions, expressed in numerous statutes, that the California Constitution guarantees equal protection for lesbian and gay people and that the history of de jure discrimination against lesbian and gay people must end. The Legislature has made plain that the public policy of this state is to strengthen family bonds for same-sex couples and their children. Indeed, the Legislature in 2005 voted to end California's unconstitutional exclusion of same-sex couples from marriage. Although Governor Schwarzenegger vetoed that

measure, his veto message referred to the pendency of this very litigation and the view that these issues should be decided by the courts.

This Court should now hold that the California Constitution requires full equality for same-sex couples and their families. It would be not only unconstitutional, but also unconscionable, for California to deprive another generation of lesbian and gay youth of the expectation that they may someday, if they choose, "obtain the public validation that only marriage can give." (*Lockyer v. City & County of San Francisco* (2004) 33 Cal.4th 1005, 1132 (conc. & dis. opn. of Kennard, J.) (hereafter *Lockyer*).) In giving full effect to the Constitution's central guarantees of equal protection, privacy, due process, and freedom of association and expression, this Court would be implementing the Constitution's transcendent expression of public will that the courts fulfill their essential role to keep legislative edicts and even popular vote in line with our state's most fundamental law.

For these reasons, and as more fully explained below, Respondents respectfully request that this Court affirm the judgment and writ relief granted by the Superior Court requiring the State of California to issue marriage licenses to same-sex couples on the same terms as such licenses are issued to heterosexual couples.

PROCEDURAL BACKGROUND

Collectively, the Respondents submitting this brief are parties in four of the six marriage actions consolidated for purposes of appeal by the Court of Appeal, First Appellate District, Division Three. (Opn. p. 7.)[1] Respondents include:

[1] The Court of Appeal's opinion is cited throughout this brief as "Opn."

- In *Woo v. Lockyer*, No. A110451 (hereafter *Woo*), Joshua Rymer and Tim Frazer, Jewelle Gomez and Diane Sabin, Myra Beals and Ida Matson, Arthur Frederick Adams and Devin Wayne Baker, Jeanne Rizzo and Pali Cooper, Karen Shain and Jody Sokolower, Janet Wallace and Deborah Hart, Corey Davis and Andre LeJeune, Rachel Lederman and Alexsis Beach, Stuart Gaffney and John Lewis, Phyllis Lyon and Del Martin, Our Family Coalition, and Equality California, who were plaintiffs-petitioners in the San Francisco Superior Court and respondents in the Court of Appeal;[2]
- In *Tyler v. State of California*, No. A110450, (hereafter *Tyler*) Equality California, which was an intervener plaintiff-petitioner in the Los Angeles Superior Court, and thereafter the San Francisco Superior Court, and a respondent in the Court of Appeal; and
- In *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco*, No. A110651 (hereafter *Proposition 22*), and in *Campaign for California Families v. Newsom*, No. A110652 (hereafter *CCF*), Del Martin and Phyllis Lyon, Sarah Conner and Gillian Smith, Margot McShane and Alexandra D'Amario, David Scott Chandler and Jeffery Wayne Chandler, Theresa Michelle Petry and Cristal Rivera-Mitchel, and Equality California, who were intervener respondents in the San Francisco Superior Court and respondents in the Court of Appeal.

[2] Lancy Woo and Cristy Chung, who originally joined these parties, have not continued with this litigation for personal reasons unrelated to the case's merits.

The individual Respondents comprise fifteen couples who wish to marry in California and are eligible to do so, but for the fact that they are members of same-sex couples. (Respondents' Appendix, Case No. A110451, p. 181 (hereafter RA); Respondent-Intervener's Appendix, Case No. A110450, pp. 182-183, 294 (hereafter RIA).) The organizational Respondents are (a) Equality California, the leading statewide advocacy organization for lesbian, gay, bisexual, and transgender Californians and their families; and (b) Our Family Coalition, a San Francisco Bay Area organization dedicated to promoting the civil rights and well-being of families with lesbian, gay, bisexual, and transgender members. (RA, p. 181; RIA, pp. 182-183, 294.)

The *CCF* and *Proposition 22* actions were filed on February 13, 2004 in the San Francisco County Superior Court and sought an immediate stay and writ relief to halt the issuance of marriage licenses to same-sex couples by the City and County of San Francisco (hereafter *City*). (Respondent-Intervenor's Appendix, Case No. A110652, p. 1.) Several of the Respondents were granted leave to intervene in the *Proposition 22* action on February 19, 2004 (Respondents' Augmented Appendix, Case No. A110451, pp. 60-61 (dated Apr. 2, 2007) (hereinafter RAA))[3] and in the *CCF* action on February 20, 2004 (Respondent-Intervenor's Appendix, Case No. A110652 at pp. 20-21.) On March 11, 2004, this Court stayed the proceedings in the *CCF* and *Proposition 22* actions while original writ proceedings were pending in this Court challenging the City's issuance of marriage licenses to same-sex couples. (See *Lockyer, supra,* (2004) 33 Cal.4th at pp. 1073-1074.)

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[3] Because of space limitations, this brief discusses only some of the fifteen Respondent couples who submit this brief. Declarations by other Respondents are contained in the record or have been submitted to the Court with a concurrently filed motion to augment the record. (See RA, at pp. 62-178; RAA, p. 181.)

The *Tyler* case was commenced on February 23, 2004, in Los Angeles Superior Court, by two same-sex couples, Robin Tyler and Diane Olson, and Troy Perry and Phillip DeBliec, against the State of California, including its State Registrar of Vital Statistics, and against the County of Los Angeles. (RIA, pp. 181-183.) The *Tyler* Plaintiffs requested that the trial court declare Family Code sections 300, 301, and 308.5 unconstitutional under state law and order corresponding injunctive and writ relief. (*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 support of the *Tyler* Plaintiffs. (*Id.* at pp. 1-2.) 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. (*Id.* at pp. 292-302.)

The *Woo* action was commenced on March 12, 2004 in San Francisco Superior Court by numerous of the Respondents — including several same-sex couples, Equality California, and Our Family Coalition. (RA, pp. 179-181.) The Third Amended Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief requested that the trial court construe Family Code sections 300, 301, and 308.5 as permitting same-sex couples to marry or, in the alternative, declare those sections unconstitutional and order corresponding injunctive and writ relief. (*Id.* at pp. 203-206.)

The City also filed a complaint for declaratory and injunctive relief in San Francisco Superior Court on March 12, 2004 challenging sections 300 and 308.5. (Opn. p. 5.)

Another group of same-sex couples later filed another action, *Clinton v. State of California*, challenging sections 300 and 308.5. (Opn. p. 6.)

The six above cases were coordinated before San Francisco Superior Court Judge Richard A. Kramer. (Appellants' Appendix, Case No. A110450, p. 107 [filed by State Appellants] (hereafter AA).) Judge Kramer held a hearing in all six marriage cases on December 22 and 23, 2004. (AA, 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, discriminate based on sex, and infringe the fundamental right to marry without serving a compelling state interest. (AA, pp. 107-131.)

Judge Kramer issued separate judgments in the coordinated cases. (AA, pp. 134-205.) In the *Woo* action, Judge Kramer entered judgment granting the *Woo* Respondents declaratory relief corresponding to Judge Kramer's Final Decision in the case (AA, pp. 138-141) and issued a writ of mandate to the State Registrar of Vital Statistics (AA, pp. 149-152). In the *Tyler* action, Judge Kramer entered judgment granting the plaintiffs declaratory relief corresponding to Judge Kramer's Final Decision (AA, pp. 190-192) and issued a writ of mandate to the State Registrar of Vital Statistics (AA, pp. 200-201). Judge Kramer entered judgment in favor of the City and the intervening Respondents in the *Proposition 22* action, and in favor of Mayor Gavin Newsom and the intervening Respondents in the *CCF* action. (Appellant's Appendix, Case No. 110652, vol. VII, pp. 1864-1866 [filed by Campaign for California Families].) Judge Kramer also entered judgment in favor of the City and the *Clinton* plaintiffs in their respective lawsuits against the State of California. (AA, pp. 159-161, 170-172, 181-183.)

The State and the petitioners in *CCF* and *Proposition 22* actions appealed. (Opn. p. 7.) The Court of Appeal, First Appellate District, Division Three, ordered all six marriage cases consolidated for purposes of decision on appeal. (*Ibid*.) On October 5, 2006, the Court of Appeal issued

an opinion in all six appeals, which included an unqualified reversal of the Superior Court's judgment in the *Tyler*, *Woo, City*, and *Clinton* actions. (Opn. pp. 1, 64.) 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 association or free expression guarantees of the California Constitution. (Opn. pp. 21-64.) Presiding Justice J. Anthony Kline dissented, arguing that the statutory ban on marriage by same-sex couples violates the California Constitution's equal protection, privacy, due process, and free expression provisions. (Opn. pp. 2-3 (dis. opn. of Kline, J.).)

The Court of Appeal also affirmed the trial court's judgment against Proposition 22 Legal Defense and Education Fund and CCF, but on the ground that those cases do not present justiciable controversies. (Opn. pp. 7-12, 64.)

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

Respondents filed petitions for review, as did the City, the plaintiffs in the *Tyler* and *Clinton* actions, and Proposition 22 Legal Defense and Education Fund. CCF did not file a petition for review, but it did file an answer. This Court granted review on December 20, 2006.

STATEMENT OF FACTS

The fifteen Respondent couples reflect the diversity and contributions of the lesbian and gay population of California. Some are in their thirties; Phyllis Lyon and Del Martin are in their eighties. (See, e.g., RA, pp. 71, 133.) The durations of these couples' relationships range from

six years to more than five decades. (*Id.* at pp. 105, 68.) Some couples have just started their families or have elementary-school age children. (RAA, pp. 46, 53, 56.) Del Martin's daughter, by contrast, is sixty-five. (*Id.* at p. 40.)

Some Respondents are still building their careers and working toward financial security. (RAA, p. 45; RA, pp. 133-135.) Jeff Chandler, on the other hand, is in the second phase of his working life, having served in the Navy before starting his family. (RAA, p. 53.) Other Respondent couples are retired after long careers. (RA, pp. 69, 99.)

All of these couples believe their exclusion from marriage and their separate status as domestic partners imposes unjust financial, practical, emotional, and dignitary burdens upon them. (See, e.g., RAA, pp. 50-51; RA, app. 70-72, 95-96, 101-102, 107-109, 112, 137, 143-144, 152, 158.) Each couple wishes to marry in order to express their profound love and commitment to one another. (See, e.g., RAA, pp. 43, 47; RA, pp. 88-89, 107, 143.) Those who are parents also seek an end to the state's harmful messages to their children that there is something unworthy about their parents, and something illegitimate about their family. (See, e.g., RA, pp. 144, 164, 168.) In addition, as lesbian and gay couples, they hope to reduce their legal and social vulnerability. (RAA, pp. 44, 47, 53, 56-57; RA, at pp. 135-137, 142-143.)

Phyllis Lyon and Del Martin, who have been together for more than half a century, wish the right to marry "in [their] lifetime." (RA, p. 68.) They fell in love in the mid-fifties, a time when many lesbians and gay men scarcely dared to acknowledge each other for fear of being discovered, losing their jobs and worse. (*Id.* at pp. 68-70.) Del and Phyllis witnessed the creation of the earliest domestic partner laws. They registered in San Francisco when it gave little more than "a nice feeling." (*Id.* at p. 70.) They have seen the domestic partnership laws evolve, but they are emphatic

that "none of us could confuse those domestic partnerships with marriage." (*Id.* at p. 71.) If this litigation proceeds quickly enough to make it possible despite their advanced ages, they wish to marry with full state validation. (*Id*. at p. 74.)

Separate from their wish for equal recognition, Phyllis and Del worry about their legal vulnerability. As they experience illness and disabilities due to aging, they fear that they may be unable to speak for each other and to remain together should either become incapacitated. (RA, p. 71.) Even with the domestic partnership laws, they remain concerned about issues not covered by those laws, and that they may be at the mercy of others who do not understand or care about what those laws provide. (*Id*. at pp. 71-72.) Phyllis fears the careless ignorance of strangers in part because she believes the law endorses lesser treatment of gay people. (*Ibid*.) In her words, the domestic partner laws "always will convey that message of being second class," because they were developed to offer same-sex couples something else instead of marriage. (*Id.* at p. 72.)

Myra Beals and Ida Matson also have been waiting decades to marry. Together since 1977, they were among the first couples to enroll when the California domestic partner registry opened in 2000. (RA, p. 99.) Before undergoing treatment for cancer and retiring in 1997, Myra directed human resources for a hospital. (*Ibid*.) That same year, Ida retired from her position as a manager with the Santa Clara County Transportation Agency. (*Ibid*.) In addition to the burdens imposed by businesses refusing to treat them as a family over their thirty years together, they have also experienced the more painful insult of their own relatives doing the same. (*Id.* at p. 102 ["Over time, this wears away at a person."].)

Stuart Gaffney and John Lewis registered with the State as domestic partners as a practical step, but it holds "very little symbolic meaning" for them. (RA, p. 152.) For Stuart and his family, the couple's current

exclusion from marriage has a poignant echo. His mother is Chinese-American and his father is white. (*Id.* p. 149.) They married in California in 1952, just four years after this Court struck down California's law against interracial marriages. (*Ibid.*) Stuart has always credited the Court, at least in part, for the fact that he exists at all. (*Ibid*.) He hopes this history will repeat itself so that, like his parents, he can marry his life partner under the law. (*Ibid.*)

Corey Davis also seeks to follow his parents' example. He learned about healthy relationships from watching them, and his dream growing up was to find a close relationship like theirs. (RA, p. 134.) Ten years ago, he met Andre LeJeune. (*Id*. at p. 133.) Forging his bond with Andre has made Corey "one of the happiest people in the world." (*Id.* at p. 134.) Sharing similar values, the two men are devoted to their parents, siblings and extended families, and attend church together. (*Id.* at pp. 134-135.) Corey was the first in his family to attend college and became a teacher; Andre is a pharmacist. (*Id*. at pp. 133-134.) No matter how much Corey and Andre have entwined their lives, however, they are vulnerable because they cannot marry. (*Id*. at pp. 136-137.) For example, due to being turned down for a joint home loan because the loan officer considered them unrelated, they were unable to buy a home before the cost of housing escaped their reach. (*Id.* at p. 136.) Corey and Andre both feel they are demeaned, and their commitment made invisible, whenever they have to identify themselves as "single." (*Id.* at p. 137.) Both partners face serious health problems: Andre experienced heart troubles some years ago, and Corey is HIV-positive. (*Id*. at p. 135.) They both worry about not being recognized as immediate family and being denied the ability to care for each other should either fall ill. (*Ibid*.) Mary Davis, Corey's mother, wants her son to be able to marry Andre so that "others see them as serious, loving couples just like other couples who make solemn commitments."

(*Id.* at pp. 170-172.)

Janet Wallace and Deborah Hart have been together for 17 years. (RA, p. 127.) Even after they registered as domestic partners and held a commitment ceremony (*ibid*), both sets of their parents have refused to respect their relationship. (*Id.* at p. 129 ["Our . . . families . . . know that our relationship is not legally supported or validated, so they do not have to acknowledge it."].) They wish to marry to express their commitment, and so that others will recognize and honor that commitment as well. (*Id.* at p. 129.)

Arthur Adams and Devin Baker have been committed to each other for seven years. (RA, p. 174, 178.) Devin's mother, Judy Baker, wants them to marry. (*Id.* at p. 174 ["It makes me very happy to see them marking anniversaries because they are so good together. . . . The commitment they share is unmistakable."].) She supports their wish to marry because "it is important for their overall well being. They are in love, and are ready to take the next step . . . ." (*Ibid*.) Judy also supports their wish to marry because "I know they endure a sense of second-class citizenship and it breaks my heart . . . . [I]t is deeply distressing to see such a false and damaging influence on one's child." (*Id.* at p. 175; see also *id.* at p. 178 ["[A] mother doesn't dream about helping to plan the celebration of her child's domestic partnership registration."].)

Jeanne Rizzo's son Christopher was nine in 1989, when Jeanne met and fell in love with Pali Cooper. (RA, pp. 112.) Because marriage was unavailable, Jeanne and Pali found it hard to reassure Christopher about the permanence of their commitment. (*Ibid*.) When he entered junior high school a few years later, Christopher found it difficult to be open about his family, in part because he had no words to describe his relationship to Pali. (*Ibid*.) Looking back now as an adult, he believes it would have been easier for him if Pali "had been able to be married to [his] mother." (*Id.* at p.

164.) Christopher is distressed that while the law permits him to marry because he is heterosexual, his parents, Jeanne and Pali, are still unable to marry, despite spending most of their lives together. (*Id.* at p. 114.)

For Rachel Lederman and Alexsis Beach, together for twenty years, their young sons Izak and Raziel are "the center of [their] lives." (RA, p. 142.) Rachel and Alexsis want to protect their sons from an official state message that "there is something wrong with [their] family." (*Id.* at p. 144.)

When Karen Shain met Jody Sokolower in 1972, Karen knew she "had met the love of [her] life." (RA, p. 120.) From the beginning, the two planned to build a life together, including children. (*Ibid*.) The couple's daughter Ericka is now a teenager who describes her relationships with both of her parents as "very close." (*Id.* at p. 167.) Jody and Karen wish to marry, and Ericka believes they should have this basic choice: "[My parents] have been together for over 30 years. (*Ibid*.) "They are very loving, caring, and supportive of each other. They have been together for so long that they can read each other's minds. . . . [Y]ou can tell that my parent [sic] are never going to break up . . . [¶] It is unfair that my parents are not allowed to get married . . . " (*Id.* at pp. 167-168.)

Organizational Respondents Equality California and Our Family Coalition together represent the nearly 100,000 same-sex couples who reside in California. (Sears & Badgett, Same-Sex Couples and Same-Sex Couples Raising Children in California: Data from Census 2000 (May 2004) (hereafter Same-Sex Couples).) Equality California is the leading statewide advocacy group for same-sex couples and their families in California. (RA, p. 194.) Our Family Coalition provides support to same-sex couples who are raising children, who encounter particular hardships due to their exclusion from marriage. (*Id.* at pp. 193-194.)

THE CHALLENGED MARRIAGE STATUTES

These cases concern three marriage statutes that Respondents have challenged as unconstitutional, or in the alternative, have contended should be construed to permit same-sex couples to marry: Family Code sections 300, 301, and 308.5.

The trial court invalidated sections 300 and 308.5, but made no ruling regarding section 301. (AA, pp. 129-131.)

Family Code Section 300 provides: "Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary."

Family Code Section 301 provides: "An unmarried male of the age of 18 years or older, and an unmarried female of the age of 18 years or older, and not otherwise disqualified, are capable of consenting to and consummating marriage."[4]

Family Code section 308.5, enacted by Proposition 22, provides: "Only marriage between a man and a woman is valid or recognized in California."

As more fully explained in Section VIII below, and as the trial court held, section 308.5 does not apply to marriages entered into within California, but prohibits California from treating as valid or otherwise recognizing marriages of same-sex couples entered in other jurisdictions. (AA, p. 117.)

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[4] Respondents contend that the purpose of section 301 is simply to establish the same age of consent for men and women, not to require that only different-sex couples may marry; however, if this Court were to construe section 301 more broadly to exclude lesbian and gay couples from marriage, this provision would violate the California Constitution for the reasons stated in the Argument Section below.

ARGUMENT

I. DOMESTIC PARTNERSHIP DOES NOT CURE THE CONSTITUTIONAL VIOLATIONS CAUSED BY BARRING SAME-SEX COUPLES FROM MARRIAGE.

The State has argued that the Legislature's creation of an alternative family status for same-sex couples through the domestic partnership statutes somehow ameliorates, or even cures, the constitutional defects that Respondents contend are inherent in California's statutory exclusion of same-sex couples from marriage. That exclusion violates numerous, and to some extent overlapping, California constitutional guarantees: the right not to be denied equal protection of the laws based on sexual orientation or sex (Cal. Const. art. I. sec 7(a).); the fundamental right to marry; and the rights to privacy (Cal. Const. art. I, sec. 1.), due process (Cal. Const. art. I. sec 7(a).), intimate association, and freedom of expression (Cal. Const. art. I, sec. 2(a).). It is helpful to explain why the State's contention is erroneous even before addressing Respondents' specific constitutional claims.

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. Respondents seek marriage, not simply a bundle of specific rights and benefits. The State's argument that Respondents should be satisfied with such a bundle, under the rubric of "domestic partnership," not only harms same-sex couples, such as Respondents, who long for the right to wed, but also should offend every person who values marriage as a "cherished" institution. (See *Goodridge v. Dep't of Public Health* (2003) 798 N.E.2d 941 (hereafter *Goodridge*); *Lockyer*, *supra*, 33 Cal.4th at p. 1132 (conc. & 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."].)

Marriage remains, in our society, a civil institution of unparalleled prestige, respect, and longevity.[5] No other relationship is understood as "the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime." (*Marvin v. Marvin* (1976) 18 Cal.3d 660, 684.) No other relationship has been characterized by the United States Supreme Court as a "way of life," a "bilateral loyalty," and a relationship "intimate to the degree of being sacred." (*Griswold v. Connecticut* (1965) 381 U.S. 479, 486.) No other state-recognized relationship equally serves as an "expression of emotional support and public commitment" or has the same "spiritual significance" for many

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[5] Respondents seek the right to *civil* marriage sanctioned by the state, not *religious* marriage. Religious groups can, of course, refuse any couple's request to be married or otherwise decline to recognize, for religious purposes, a civil marriage permitted by law. That is true currently with regard to different-sex couples who marry legally, such as with the Catholic Church's refusal to recognize second marriages of Catholics who divorce, or Orthodox Judaism's refusal to perform religious marriages between Jews and non-Jews. Ending governmental discrimination against same-sex couples will not change the rights of religious groups. To the contrary, cases involving the right of same-sex couples to marry do *not* "balanc[e] the rights of same-sex couples against the rights of religious groups who oppose same-sex marriage." (*Halpern v. Canada* (2003) 176 O.A.C 276, ¶138 (Can.) (hereafter *Halpern*).). Rather, "Freedom of religion . . . ensures that religious groups have the option of refusing to solemnize same-sex marriages. The equality guarantee, however, ensures that the beliefs and practices of various religious groups are not imposed on persons who do not share those views." (*Ibid.*) Any other result would threaten the California Constitution's ban on religious preferences. Cal. Const., art. 1, section 4.

couples. (*Turner, supra,* 482 U.S. at pp. 95-96.) Because of marriage's unparalleled prestige and respect, few heterosexual spouses would substitute domestic partnership for their marriage.

The government itself has created marriage as a status that is something greater than the private bond of love and intimacy shared by two individuals. As the Court of Appeal stated, "marriage is much more than a private relationship. To be valid in California, a civil marriage must be licensed and solemnized in some form of ceremony." (Opn. p. 47 [citing *Estate of DePasse* (2002) 97 Cal.App.4th 92, 103, 106].) Marriage is the status conferred by the government to signify that two people are in a relationship worthy of the state's highest recognition and strongest protection. (*Ibid*.)

Because of its unique status, marriage carries profound personal and social meaning and value for couples that domestic partnership can never provide. Political theorist Ronald Dworkin has explained:

> The institution of marriage is unique: it is a distinct mode of association and commitment with long traditions of historical, social, and personal meaning. It means something slightly different to each couple, no doubt. For some it is primarily a union that sanctions sex, for others a social status, for still others a confirmation of the most profound possible commitment. But each of these meanings depends on associations that have been attached to the institution by centuries of experience. We can no more now create an alternate mode of commitment carrying a parallel intensity of meaning that we can now create a substitute for poetry or for love.

(Dworkin, *Three Questions for America*, 53 (14) New York Review of Books (September 21, 2006) <http://www.nybooks.com/articles/19271> [as of Mar. 31, 2007].)

In other contexts, our courts have recognized the manifest advantage

that comes from an institution's longevity, tradition and prestige as compared to a new institution created solely for a minority group. For example, in *Sweatt v. Painter* (1950) 339 U.S. 629 (hereafter *Sweatt*), the United States Supreme Court considered whether a separate law school that Texas established for black students was "substantially equal" under the "separate but equal" doctrine in effect prior to *Brown v. Bd. of Education* (1954) 347 U.S. 483 (hereafter *Brown*). Although considering tangible comparisons such as the number of faculty and the size of the library, the Court placed greater emphasis on intangible factors:

> What is *more important*, the University of Texas Law School possesses to a far greater degree those *qualities* which are *incapable of objective measurement* [such as] . . . *standing in the community, traditions and prestige*. It is difficult to believe that one who had a free choice between these law schools would consider the question close.

(*Sweatt*, *supra*, 339 U.S. at p. 634 [emphases added]; see also *Brown*, *supra*, 347 U.S. at p. 494 [explaining that separation itself "generates a feeling of inferiority as to . . . status . . . in the community that may affect . . . hearts and minds"]; *United States v. Virginia* (1996) 518 U.S. 515, 557 (hereafter *VMI*) [rejecting Virginia's alternative of a separate military institution for women and citing *Sweatt* in concluding that the "prestige – associated with [Virginia Military Institute's] success in developing 'citizen soldiers' – is unequaled"].)

By purposefully excluding lesbian and gay couples from the enormous intangible benefits that only marriage provides, the law cuts to the core of their dignity and full citizenship. As the Ontario Court of Appeal held in *Halpern, supra,* 172 O.A.C. at ¶107, "The societal significance of marriage . . . cannot be overlooked. . . . Exclusion perpetuates the view that same-sex relationships are less worthy of

recognition than opposite-sex relationships."

The State's decision to create a status for same-sex couples called something other than "marriage" "is a considered choice that reflects a demonstrable assigning of same-sex . . . couples to second-class status." (*In re Opinions of the Justices to the Senate* (2004) 802 N.E.2d 565, 570, hereafter *Opinions of the Justices*.) As New Jersey Chief Justice Poritz explained:

> Labels are used to perpetuate prejudice about differences that, in this case, are embedded in the law. By excluding same-sex couples from civil marriage, the State declares that it is legitimate to differentiate between their commitments and the commitments of heterosexual couples. Ultimately, the message is that what same-sex couples have is not as important or as significant as "real" marriage, that such lesser relationships cannot have the name of marriage.

(*Lewis v. Harris* (N.J. 2006) 908 A.2d 196, 226-227 (conc. & dis. opn. of Poritz, C.J.); see also Opn. p. 44 (dis. opn. of Kline, J.) ["entrance of a gay or lesbian couple into a legal relationship known to have been made available to them to compensate for their exclusion from the superior marital relationship compels such a couple to acknowledge their inferior status"].)

It is no more acceptable for the State of California to assign a separate family status to lesbian and gay people than it would be for the State to do so for any other minority group. For example, if the State were to determine that Catholics, or those of Chinese descent, or left-handed people were eligible only for domestic partnership, while everyone else remained eligible to marry, the constitutional defect would be unmistakable. It is no less obvious here. Having watched the domestic partnership laws evolve from essentially symbolic local ordinances to comprehensive state statutes, Respondent Phyllis Lyon observes that this

status "always will convey that message of being second class," because the concept was developed specifically to offer same-sex couples something else *instead of* marriage. (RA, p. 72 [emphasis added].) In her words, "'Separate but equal' is never equal; we all know that." (*Ibid*.)

Where a group has suffered a long history of legal discrimination and social stigma, the State's decision to create a separate legal status for that group inevitably will be viewed both by the group and by others as a badge of inferiority. Lesbian and gay people have been labeled as mentally ill, deviants, and sexual perverts; they have been fired from jobs, barred from employment by the federal government, excluded from entry into the country under our immigration laws, banned from service in our nation's armed forces, and subjected to violence and harassment.[6] Their intimacy has been criminalized and, until very recently, their relationships completely unrecognized.[7]

The State's decision to require same-sex couples to enter "domestic partnerships" rather than marriage must be seen in this historical context. *Because* gay people have been subjected to a long history of discrimination, excluding them from marriage and assigning them to a separate class created just for them is stigmatizing and injurious. It is both a remnant and a reaffirmation of the unequal, outsider status that lesbian and gay people have experienced as a historically disfavored minority. The

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[6] Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality* (1984) 57 So.Cal. L.Rev. 797, 799-808, 824-825 (hereafter *An Argument*); see also *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 849 (hereafter *Koebke*) (noting Legislature's finding that "homosexuals . . . have been subjected to widespread discrimination").

[7] See *An Argument*, *supra*, 57 So.Cal. L.Rev. at pp. 800-802 [describing sodomy statutes]; see also *Lawrence v Texas* (2003) 539 U.S. 558, 571 (hereafter *Lawrence*) (noting that "for centuries there have been powerful voices to condemn homosexual conduct as immoral").

domestic partner laws cannot remedy this discrimination, as the Legislature expressly acknowledged when it passed a bill that would have enabled same-sex couples in California to marry. (Assem. Bill No. 849, vetoed by Governor, Sept. 29, 2005 (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 State's decision to place lesbian and gay couples and heterosexual couples in different legal categories sends the dangerous message that it is appropriate to treat these two groups of families differently. By classifying families based on sexual orientation, the State is treating an irrelevant characteristic as though it were a significant and indeed paramount consideration. This invites discrimination and discourages the public from seeing lesbian and gay couples as deserving of equal acceptance and support.

In sum, 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, supra,* 802 N.E.2d 565, 569.)

In addition, as the Court of Appeal acknowledged, domestic partnership and marriage differ in significant tangible respects. (Opn. pp. 17-19.) The Third Appellate District has held that the domestic partnership statutes have "not created a 'marriage' by another name or granted domestic partners a status equivalent to married spouses." (*Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 30 (hereafter *Knight*).) Rather,

the court in *Knight* found "numerous dissimilarities between the two types of unions." (*Id.* at 31 [explaining that domestic partners have different mechanisms for forming and terminating their relationships, have different age and residence prerequisites, and are not entitled to federal benefits based on marriage[8]].) 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 employers, hospital staff, teachers, childcare providers, police officers, and

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

[9] In practice, moreover, since AB 205 went into effect, same-sex couples in California are experiencing significant difficulties and problems due to the irreducible uncertainties and confusion inherent in the irrational attempt to replicate aspects of the protections of marriage by means of a new institution that was created separately from marriage not for any functional or substantive reason, but solely in order to accommodate majority bias. As a New York Times editorial recently stated, marriage provides "a universally understood framework for formally dissolving relationships and settling financial matters" that cannot be replicated by "separate and unequal new legal regimes" such as civil unions or domestic partnerships. (*Legal Convolutions for Gay Couples*, N.Y. Times (Mar. 24, 2007) p. A12; see, e.g., *Velez v. Smith* (2006) 142 Cal.App.4th 1154 [holding that woman who erroneously believed she was in a registered domestic partnership because she and her former partner had registered with a local government rather than the state cannot rely on the putative spouse doctrine]; *Partner Failed to File Domestic Form, Man Now Battles for Communal Property*, 365gay <http:www.365gay.com/Newscon07/03/032807calif.htm> [as of Mar. 29, 2007] [reporting on similar appeal by man who innocently believed that his same-sex partner had filed the required form with the state].)

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. Moreover, domestic partnership lacks the transportability of legal recognition that marriage confers for purposes of travel to other jurisdictions that recognize the marriages of same-sex couples, including, for instance, Massachusetts, New York,[10] and Rhode Island,[11] as well as Canada, the Netherlands, Belgium, Spain, and South Africa. (See Opn. 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."].)

In sum, the separate status of domestic partnership is not and never could be equal; it cannot eliminate the constitutional harms caused by the statutory exclusion of lesbian and gay couples from marriage.

II. CALIFORNIA'S STATUTORY EXCLUSION OF SAME-SEX COUPLES FROM MARRIAGE IS SUBJECT TO STRICT SCRUTINY UNDER THE CALIFORNIA EQUAL PROTECTION CLAUSE BECAUSE IT DISCRIMINATES BASED ON SEXUAL ORIENTATION.

A. The Marriage Exclusion Discriminates Based On Sexual Orientation.

California's statutory exclusion of same-sex couples from marriage facially discriminates based on sexual orientation. In 1977, the California

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[10] See *Godfrey v. Spano* (N.Y. Sup. Ct., Mar. 12, 2007, 27105) (nonpub. opn.) (honoring marriage of same-sex couple validly entered in Canada).

[11] See Zezima, *Rhode Island Steps Toward Recognizing Same-Sex Marriage*, New York Times (Feb. 22, 2007) p. A19 (Rhode Island will honor marriages of same-sex couples entered in other states, according to state Attorney General opinion).

Legislature amended what is now Family Code section 300 to add an express requirement that marriages be "between a man and a woman." (Assem. Bill No. 607 (1977-1978 Reg. Sess.) §1.) Proposition 22 similarly enacted section 308.5 of the Family Code to provide that California will treat as valid or otherwise recognize only out-of-state marriages that are "between a man and a woman." In these provisions, "California law has expressly restricted matrimony to heterosexual couples . . . " (*Lockyer, supra,* 33 Cal.4th at p. 1128, fn. 2 (conc. & dis. opn. of Kennard, J.); see *Lawrence, supra*, 539 U.S. at p. 575 [holding that a law that proscribed intimate conduct between persons "of the same sex" criminalized "homosexual conduct"]; *id*. at p. 581 (conc. opn. of O'Connor, J.) [recognizing that adverse treatment of those with same-sex partners is discrimination based on "sexual orientation"].)

In addition to employing a facial classification based on sexual orientation, the marriage statutes have the effect, and the intent, of discriminating based on sexual orientation. As the Court of Appeal acknowledged, the current statute "renders marriage unavailable to lesbian and gay individuals, whose choice of a life partner will, by definition, be a person of the same sex." (Opn. p. 39; see also *id*. at p. 39 fn. 23 ["the statutory definition does not merely have a 'greater impact' on lesbian and gay couples; it excludes 100 percent of them from entering marriage"].)

The discrimination based on sexual orientation inherent in the marriage statutes' exclusion of same-sex couples was intentional. The legislative history of the 1997 amendment "makes [the amendment's] objective clear." (*Lockyer*, *supra*, 33 Cal.4th at p. 1076, fn. 11.) The Legislature's express intent was to exclude lesbian and gay couples from marriage. (*Ibid.* [citing Sen. Com. on Judiciary, Analysis of Assem. Bill No. 607 (1977-1978 Reg. Sess.) as amended May 23, 1977, p. 1, and explaining that the bill's official analysis stated that the purpose was "to

prohibit persons of the same sex from entering into lawful marriage."]; accord Opn. p. 39.) The bill's official analysis expressly mentioned "homosexual couples" and, relying on inaccurate stereotypes about lesbians and gay men, argued that lesbian and gay couples should not be given a supposed "windfall" by having access to the legal protections that marriage provides. (See RA, p. 269.) Similarly, the ballot materials for Proposition 22 express an intention to discriminate against marriages of same-sex couples. (See Respondents' Appendix, Vol. I, Case No. A110652, p. 98.)

B. Laws That Discriminate Based On Sexual Orientation Are Subject To Strict Scrutiny.

For more than 25 years, both this Court and other California courts have consistently struck down laws that discriminate based on sexual orientation under the California Constitution's equal protection clause. (See, e.g., *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co*. (1979) 24 Cal.3d 458, 474-475 (hereafter *Gay Law Students*); *Holmes v. California National Guard* (2001) 90 Cal.App.4th 297; *Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal.App.4th 1013, 1025-1026.) Although no appellate court in California, prior to this case, has expressly decided whether such laws are subject to strict scrutiny under the California Constitution, sexual orientation qualifies as a suspect classification under this Court's precedents.

The United States Supreme Court has also struck down laws that discriminate based on sexual orientation under the federal equal protection clause without expressly deciding what level of scrutiny is required.[12]

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[12] Although equal protection analysis under the California and federal constitutions is similar, California law is more protective. For example, while California has applied strict scrutiny to sex-based classifications for decades (see, e.g., *Sail'er Inn v. Kirby* (1971) 5 Cal.3d 1 (hereafter *Sail'er Inn*), *Catholic Charities of Sacramento, Inc. v. Superior*

(Chemerinsky, Constitutional Law: Principles and Policies (2002) p. 759.) In *Romer, supra,* 517 U.S. at pp. 631-632, the Court had no need to decide whether the courts should apply heightened scrutiny because the Court found the popularly enacted anti-gay initiative in that case lacked even "a rational relationship to legitimate state interests" and thus was "inexplicable by anything but animus towards the class it affects." Likewise, in *Lawrence*, while holding that lesbian and gay men have a fundamental right to sexual privacy, the Court found that the statute at issue did not serve even a legitimate purpose. (*Lawrence*, *supra*, 539 U.S. at p. 577.)

Cases such as *Romer* and *Lawrence* powerfully underscore the need to be suspicious that laws classifying based on sexual orientation reflect irrational prejudice rather than a legitimate public purpose, and thus warrant heightened scrutiny. Within the space of ten years, the Supreme Court has twice found it necessary to invalidate anti-gay laws as completely irrational. This in itself speaks powerfully to the prevalence of anti-gay animus and the corresponding need for courts to carefully scrutinize laws that classify on the basis of sexual orientation.

1. Sexual orientation satisfies all of the relevant indicia of a suspect classification.

In determining whether laws that classify on a particular basis are subject to strict scrutiny under the California Constitution, this Court has

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Court (2004) 32 Cal.4th 527 (hereafter *Catholic Charities*)), the U.S. Supreme Court has not yet extended such classifications "the highest level of scrutiny under the Fourteenth Amendment." (*Tain v. State Board of Chiropractic Examiners* (2005) 130 Cal.App.4th 609, 630.) Similarly, although this Court, in 1979, applied meaningful equal protection review to discrimination based on sexual orientation, the United States Supreme Court did not do so until seventeen years later. (Compare *Gay Law Students*, *supra*, 24 Cal.3d 458 with *Romer v. Evans* (1996) 517 U.S. 620 (hereafter *Romer.*))

considered several factors designed to identify classifications that are likely to be based on invidious rather than legitimate bases.[13] "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] [emphasis added].) The Court has never held that *all* of these indicia of suspectness must be present; rather, it has treated these factors as relevant considerations. In addition, the Court has stressed that the most important overarching consideration is whether the characteristic at issue is related "to ability to perform or contribute to society." (*Sail'er Inn, supra,* 5 Cal.3d at p. 18.)

Under any reasonable application of these criteria, laws that discriminate based on sexual orientation should be suspect.[14] Lesbians and gay men historically have been, and still are, targets of irrational and invidious discrimination. As the Court of Appeal observed in *People v.*

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[13] The United States Supreme Court has explained that certain classifications should be treated as suspect because they "are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective. Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law." (*Plyler v. Doe* (1982) 457 U.S. 202, 218 fn. 14 [citations omitted].)

[14] Leading constitutional scholars long have agreed that sexual orientation classifications should be subject to strict scrutiny. (See, e.g., Tribe, American Constitutional Law (2d ed. 1988) p. 1616; Ely, Democracy and Distrust (1980) pp. 162-164.)

Garcia (2000) 77 Cal.App.4th 1269, 1276 (hereafter *Garcia*), Lesbians and gay men "share a history of persecution comparable to that of Blacks and women." (*Id.* at p. 1276 [holding that excluding jurors on the basis of their sexual orientation violates the California Constitution].) The *Garcia* court added, "Outside of racial and religious minorities, we can think of no group which has suffered such 'pernicious and sustained hostility' . . . and such 'immediate and severe opprobrium' as homosexuals." (*Id.* at p. 1279 [citing *Rowland v. Mad River Local Sch. Dist.* (1985) 470 U.S. 1009, 1014 (dis. opn. of Brennan, J. from denial of cert.)]; see also *Lawrence*, *supra*, 539 U.S. at p. 559 [noting that "for centuries there have been powerful voices to condemn homosexual conduct as immoral"].)

First, California decisions amply document the longstanding and pervasive nature of anti-gay discrimination in our state. (See, e.g., *Gay Law Students*, *supra*, 24 Cal.3d 458 [describing public employer's discriminatory policy of excluding all gay employees]; *Stouman v. Reilly* (1951) 37 Cal.2d 713 [describing standard practice on the part of bars and restaurants of refusing service to patrons suspected of being gay]; *Murray v. Oceanside Unified School District* (2000) 79 Cal.App.4th 1338 [describing anti-gay workplace harassment]; *In re Joshua H.* (1993) 13 Cal.App.4th 1718 [discussing hate violence against gay people].)[15]

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[15] Other cases document sexual orientation discrimination in the contexts of employment (see, e.g., *DeSantis v. Pacific Tel. & Tel.* (9th Cir. 1979) 608 F.2d 327; *Hope v. Cal. Youth Auth.* (2005) 134 Cal.App.4th 577; *Kovatch v. Cal. Cas. Mgmt. Co.* (1998) 65 Cal.App.4th 1256, overruled on other grounds by *Aguilar v. Atantic Richfield Co.* (2001) 25 Cal.4th 826); housing (see, e.g., *Hubert v. Williams* (1982) 133 Cal.App.3d Supp. 1); and public accommodations (see, e.g., *Koebke, supra,* 36 Cal.4th 824*; Curran v. Mt. Diablo Council of the Boy Scouts* (1998) 17 Cal.4th 670; *Benitez v. North Coast Women's Med. Group* (2003) 106 Cal.App.4th 978, rev. granted; *Rolon v. Kulwitzky* (1984) 153 Cal.App.3d 289).

The Court of Appeal in this case readily acknowledged that lesbian and gay people have been subjected to a "history of legal and social disabilities." (Opn. at p. 44.) In its passage of the California Domestic Partner Rights and Responsibilities Act of 2003 (Assem. Bill No. 205 (2003-2004 Reg. Sess.) § 1(b) (hereafter AB 205)), the California Legislature also candidly recognized the continuing history of discrimination against lesbian and gay people, as well as the constitutional mandate to end that discrimination. ["Expanding the rights and creating responsibilities of registered domestic partners would . . . reduce *discrimination on the bas[i]s of . . . sexual orientation* in a manner consistent with the requirements of the California Constitution." [emphasis added].)[16]] In *Koebke*, *supra,* 36 Cal.4th at p. 849, this Court echoed those findings, stating that "discrimination based on marital status implicates discrimination against homosexuals who, as the Legislature recognized in the Domestic Partner Act, have been subject to widespread discrimination."

Second, being lesbian or gay has no bearing on a person's ability to perform or contribute to society, as the Court of Appeal also acknowledged. (Opn. p. 44.) The Legislature has declared, through a striking array of statutes, that a person's sexual orientation is irrelevant to his or her ability to contribute and participate in any aspect of society — in employment, education, housing, family life, foster care, and government programs.[17]

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[16] The Legislature reiterated this finding in passing AB 849 (Assem. Bill No. 849, vetoed by Governor, Sept. 29, 2005 (2005-2006 Reg. Sess.) (hereafter AB 849), which although vetoed by the Governor, is relevant to the Legislature's understanding of the existing, unamended law. (See *Freedom Newspapers v. Orange County Employees Ret. Sys*. (1993) 6 Cal.4th 821, 832.)

[17] The Legislature has outlawed sexual orientation discrimination by adding explicit protection to the Unruh Act (Stats. 2005, ch. 420, § 2); moving protection against sexual orientation employment discrimination

The executive branch has enacted similar policies,[18] and the judiciary has agreed as well.[19] Through these policies, the state resoundingly has rejected the view that sexual orientation has any correlation with an individual's ability to perform in society or that sexual orientation is a proper basis for differential treatment of individuals.

Third, lesbians and gay men have been the target of repeated efforts to use the majoritarian political process to deny them basic legal protections. These have included anti-gay initiatives such as Amendment 2 in Colorado;[20] statutes and, in some instances, sweeping constitutional

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from the Labor Code into the Fair Employment and Housing Act (Stats. 1999, ch. 592, § 1); protecting students from harassment and discrimination based on sexual orientation (California Student Safety and Violence Prevention Act of 2000 (Assem. Bill No. 537 (1999-2000 Reg. Sess.))); banning sexual orientation discrimination in access to foster care (Foster Care Non-discrimination Act of 2003 (Assem. Bill No. 458 (2003-2004 Reg. Sess.))); prohibiting discrimination against registered domestic partners in health insurance (California Insurance Equality Act (Assem. Bill No. 2208 (2003-2004 Reg. Sess.))); prohibiting housing discrimination based on sexual orientation (Civil Rights Housing Act of 2006 (Assem. Bill No. 2800 (2005-2006 Reg. Sess.))); and barring discrimination based on sexual orientation in services, activities and programs operated or funded by the state (Nondiscrimination in State Programs and Activities Act (Sen. Bill No. 1441 (2005-2006 Reg. Sess.))).

[18] See, e.g., Governor's Executive Order No. B-54-79 (1979) (barring sexual orientation discrimination in agencies of the state government under the jurisdiction of the Governor); Cal. Code Regs., tit. 10, § 2695.7 (prohibiting sexual orientation discrimination in insurance claims settlement practices).

[19] Cal. Code of Judicial Ethics, Canon 3 (prohibiting judicial bias or prejudice on the basis of sexual orientation).

[20] Amendment 2, which the U.S. Supreme Court struck down as a violation of the federal equal protection clause in *Romer, supra,* 517 U.S. at p. 624, was an initiative enacted by Colorado voters to amend that state's constitution to prohibit "all legislative, executive or judicial action at any

amendments that have been held to prohibit granting any benefits to those in same-sex relationships;[21] and Proposition 22 in this state. Throughout our country, voters repeatedly have enacted anti-gay prejudice into exclusionary laws. (See generally *Developments in the Law: Sexual Orientation and the Law* (May 1989) 102 Harv. L. Rev. 1508; see also, e.g., *Citizens for Responsible Behavior v. Superior Court*, *supra*, 1 Cal.App.4th at pp. 1029, 1031 [describing local initiative measure that would repeal city's anti-discrimination ordinances and ban any future measures protecting gay persons or persons with AIDS from discrimination as "plainly designed to encourage . . . discrimination" and that "[a]ll that is lacking is a sack of stones for throwing"]; Velte, *Paths to Protection: A Comparison of Federal Protection Based on Disability and Sexual Orientation* (2000) 6 Wm. & Mary J. Women & L. 323, 375 [noting that lesbians and gay men continue to be greatly underrepresented in elected office and that many legislative gains have been lost through anti-gay ballot initiatives].) The continuing vulnerability of lesbians and gay men to these discriminatory measures provides an additional reason why laws that single out gay people for disfavored treatment should be recognized as likely to have been fueled by prejudice.[22]

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level of state or local government designed to protect . . . homosexual persons."

[21] See e.g., Simon, *Michigan Denies Same-Sex Benefits*, L.A. Times (Feb. 3, 2007) p. A14.

[22] The enactment of laws prohibiting sexual orientation discrimination does not preclude the need for heightened scrutiny of laws that discriminate on this basis, just as the existence of far more extensive laws protecting women and racial, ethnic and religious groups does not obviate the need for heightened scrutiny of classifications affecting those groups. (See, e.g., *Frontiero v. Richardson* (1973) 411 U.S. 677, 687-88 [noting that the enactment of laws prohibiting sex discrimination

2. Suspect classifications are not limited to those based on "immutable" characteristics.

This Court has never held that classifications must be based on immutable traits in order to be deemed suspect. For example, both this Court and the Supreme Court have applied heightened scrutiny to laws that discriminate based on illegitimacy, poverty, religion, and nationality, despite the fact that each of these characteristics is subject to change.

In *Serrano v. Priest* (1971) 5 Cal.3d 584, 596-604, this Court found that classifications based on school district wealth are suspect under the state Constitution. The decision did not mention immutability, nor is wealth generally considered immutable in the sense that it is not genetically or biologically determined or impossible to change. (See also *Serrano v. Priest* (1976) 18 Cal.3d 728 [affirming that district wealth is a suspect classification under the California equal protection clause; *Butt v. California* (1992) 4 Cal.4th 668, 681-683 [same].)[23]

California and federal courts have also have treated religion and legitimacy as suspect classifications, even though an individual's religious beliefs, practices and affiliations may change, and a child may be legitimated. (*Williams v. Kaplow & Son, Inc.* (1980) 105 Cal.App.3d 156, 161-162 [religion]; *City of New Orleans v. Dukes* (1976) 427 U.S. 297, 303 [same]; *Darces v. Woods* (1984) 35 Cal.3d 871, 887 [legitimacy]; *Gomez v. Perez* (1973) 409 U.S. 535, 537-38 [same].)

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constitutes strong evidence that the legislature has *acknowledged* a history of purposeful unequal treatment and thus supports the need for heightened scrutiny].).

[23] This Court also has described poverty as a suspect classification, noting that poor people have "historically labored under severe legal and social disabilities." (*Sail'er Inn*, *supra* 5 Cal.3d at pp. 18-19.)

This Court's precedents have established that immutability is a less important consideration than whether the classification targets a group that has faced discrimination and stigmatization. The Court's most recent discussion of the "indicia for suspectness" did not even mention immutability. (See *Bowens*, *supra,* 1 Cal.4th at 42.) 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, supra*, 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.) (hereafter *Watkins*); see also *High Tech Gays v. Defense Indus. Sec. Clearance Office* (1990) 909 F.2d 375 (en banc) (dis. opn. of Canby, J.) ["The Supreme Court has more than once recited the characteristics of a suspect class without mentioning immutability."].)

This Court accordingly need not consider whether sexual orientation should be considered immutable in order to decide that laws that discriminate based on sexual orientation should receive strict scrutiny.

3. Even if immutability were necessary for a classification to receive strict scrutiny review, sexual orientation is immutable.

In equal protection jurisprudence, "immutable" does not mean "genetic" or "biological." In cases involving so-called "illegitimate" children, for example, this Court has explained that immutability may refer

to a characteristic that is beyond the individual's control. (See, e.g., *Darces v. Wood*, *supra*, 35 Cal.3d at pp. 891-892; see also *City of Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, 441 [explaining why illegitimacy is a suspect classification].)

Immutability also does not mean an absolute inability to change the class trait. Illegitimate children can be legitimated; aliens can become naturalized; individuals can change their sex; and designations of a person's race or ethnicity may shift depending on the context and definitions being used in a particular case.[24] Thus, rather than requiring that "members of the class must be physically unable to change or mask the trait defining their class," "the Supreme Court is willing to treat a trait as effectively immutable if changing it would involve great difficulty, such as requiring . . . . a traumatic change of identity." (*Watkins*, *supra*, 875 F.2d at p. 725 (conc. opn. of Norris, J.) "Immutability therefore defines traits which are central, defining traits of personhood, which may be altered only at the expense of significant damage to the individual's sense of self." (*Jantz v. Muci* (D. Kan. 1991) 759 F. Supp. 1543, 1548, rev'd on other grounds by *Jantz v. Muci* (10th Cir. 1992) 976 F.2d 623 [declining to hold whether sexual orientation is a suspect classification].)

Sexual orientation satisfies this constitutional definition of immutability. For the great majority of people, sexual orientation is a deeply personal characteristic that is either impossible or very difficult to

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[24] Even with regard to race, which is the paradigmatic suspect classification, the United States Supreme Court and other courts have acknowledged that most modern scientists have "conclude[d] that racial classifications are for the most part sociopolitical, rather than biological, in nature." (*St. Francis College v. Al-Khazraji* (1987) 481 U.S. 604, 609 fn. 4; see also *Ho ex rel. v. S.F. Unified Sch. Dist.* (9th Cir. 1998) 147 F.3d 854, 863 [asserting that races are not biologically-defined groups and that "race is a social construct"].) As such, race is not impossible to change.

change, whatever its biological or genetic basis may be. As Judge Norris explained in *Watkins*:

> Although the causes of homosexuality are not fully understood, scientific research indicates that we have little control over our sexual orientation and that, once acquired, our sexual orientation is largely impervious to change. Scientific proof aside, it seems appropriate to ask whether heterosexuals feel capable of changing *their* sexual orientation. Would heterosexuals living in a city that passed an ordinance burdening those who engaged in or desired to engage in sex with persons of the *opposite* sex find it easy not only to abstain from heterosexual activity but also to shift the object of their sexual desires to persons of the same sex? It may be that some heterosexuals and homosexuals can change their sexual orientation through extensive therapy, neurosurgery or shock treatment. But the possibility of such a difficult and traumatic change does not make sexual orientation "mutable" for equal protection purposes.

(*Watkins*, *supra,* 875 F.2d at p. 725 (conc. opn. of Norris, J.) [emphases in original].)

"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." (*Hernandez-Montiel v. I.N.S.,* (9th Cir. 2000) 225 F.3d 1084, 1093 ["sexual identity is inherent to one's very identity as a person"].) Thus, "to discriminate against individuals who accept their given sexual orientation and refuse to alter that orientation to conform to societal norms does significant violence to a central and defining character of those individuals." (*Jantz v. Muci*, *supra,* 759 F.Supp. at p. 1548.) By any reasonable measure, to the extent that immutability is a factor that courts may consider in suspect class analysis, sexual orientation is immutable.

Finally, contrary to the Court of Appeal's view (Opn. p. 44-45), whether a particular classification should be subject to strict scrutiny is not

a factual question, but a legal question: it is a constitutional principle that does not depend on the evidentiary record developed in a particular case or on a trial court's factual findings. (See, e.g., *Sail'er Inn*, *supra*, 5 Cal.3d at pp. 18-19 [deciding that sex is a suspect classification under the California Constitution as a legal, rather, than a factual matter]; *Frontiero v. Richardson, supra,* 411 U.S. at p. 677 [likewise deciding to apply heightened scrutiny to sex discrimination under the federal Constitution based on legal rather than factual grounds]; 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 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, 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]."]

III. CALIFORNIA'S STATUTORY EXCLUSION OF SAME-SEX COUPLES FROM MARRIAGE IS SUBJECT TO STRICT SCRUTINY UNDER THE CALIFORNIA EQUAL PROTECTION CLAUSE BECAUSE IT DISCRIMINATES BASED ON SEX.

The statutory exclusion of same-sex couples from marriage facially discriminates on the basis of sex and, simultaneously, perpetuates gender stereotypes. This is confirmed by justifications for the exclusion that have been put forward by those who oppose permitting same-sex couples to marry. These justifications rely on harmful sex stereotypes, such as that

men and women, simply by virtue of their gender, necessarily provide distinct role models for children; that men and women should play "opposite" or "complementary" roles within marriage; and that marriage is essential to protect "vulnerable" women from "irresponsible" men who, absent marriage, would not support their children.

The gender-neutrality that this Court has required in other contexts should be applied to the marriage statute. Today, the law does not presuppose that all married men must be breadwinners or that all married women must be home-makers; nor does the law assume or require that men and women adhere to gender stereotypes in their raising of children. While some married couples embrace a traditionally gendered division of labor, a couple is not any less "married" if the spouses depart from conventional gender roles in some or all respects. Because the law now leaves these decisions to the individuals involved and no longer imposes an official, state-mandated version of what a wife or a husband should be, the statutory exclusion of same-sex couples from marriage is an anachronism based on outdated stereotypes that are harmful to both women and men.

To be clear, it is not marriage itself, but California's continued exclusion of same-sex couples from marriage that Respondents challenge as perpetuating harmful sex stereotypes. Because that exclusion from marriage expressly restricts the exercise of an important personal right based on sex, the exclusion warrants the strict scrutiny that California's courts apply to laws that discriminate based on sex. (*Catholic Charities, supra,* 32 Cal. 4th at p. 564.).

A. The Marriage Exclusion Is Subject To Strict Scrutiny Because It Perpetuates Impermissible Sex Stereotypes.

In 1977, the Legislature added an *express* sex-based restriction to what is now Family Code section 300. The legislative history of the 1977

amendment invoked the notion that women are assumed to be dependent on men and to have primary responsibility for the care of children, and that men are assumed to be breadwinners and must be legally compelled to support their children. The Assembly Judiciary Committee Analysis described the purpose of the amendment as follows:

> Marriage as a legal institution carries with it a number of special benefits . . . . Without exception, these special benefits were designed to meet situations where one spouse, typically the female, could not adequately provide for herself because she was engaged in raising children. In other words, the legal benefits granted married couples were actually designed to accommodate motherhood . . . .
>
> Assuming the legitimacy of the above arguments, it then becomes difficult to justify extending the "benefits" of marriage to childless heterosexual couples . . . . [However], [w]hy extend the same windfall to homosexual couples except in those rare situations (perhaps not so rare among females) where they function as parents with at least one of the partners devoting a significant period of his or her life to staying home and raising children?

(Assem. Com. on Judiciary, Digest of Assem. Bill 607 (1977-78 Reg. Sess.) pp. 1-2.)

These assumptions were outmoded even in 1977. Thirty years ago, this Court recognized that laws presuming that all wives are financially dependent on their husbands were out of step with reality:

> Although the underlying assumption that married men support their families and married women do not may once have borne a substantial and self-perpetuating relationship to hard economic realities, it was not entirely accurate at the time (at the turn of the century, 5 million women workers comprised 18 percent of the total labor force); clearly, it is outmoded in a society where more often than not a family's standard of living depends upon the financial contributions of both marital partners.

(*Arp v. Workers' Comp. Appeals Bd.* (1977) 19 Cal.3d 395, 405-406.) The social assumptions embodied in the 1977 amendment are even more anachronistic now. Today, the number of families in which the wife is the primary breadwinner, or in which both spouses work, is even higher;[25] the number of lesbian and gay couples who are living openly in long term committed relationships has increased dramatically; and the number of same-sex couples raising children has likewise increased.[26] Moreover, whereas in 1977, the Legislature did not even contemplate the possibility that two men might be raising children together, today, that notion is commonplace, and the reality of such families has been widely acknowledged.[27]

The legal assumptions underlying the 1977 law are equally outdated and erroneous. Thirty-six years ago, this Court held that stereotypical "notions of what is a . . . proper pursuit for a woman in our society . . . cannot justify discrimination." (*Sail'er Inn, supra,* 5 Cal. 3d at p. 21; see

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[25] See, e.g., Women's Bureau, U.S. Dep't of Labor, Employment Status of Women and Men in 2005 <http://www.dol.gov/wb/factsheets/Qf-ESWM05.htm> (as of Mar. 30, 2007).

[26] See Lee Badgett Decl. ¶¶ 9-12, 15 (Respondents' Appendix, Vol. I, Case No. A110449, pp. 189-191); see also *Sharon S. v. Superior Court* (2003) 31 Cal.4th 417 [holding that a parent's same-sex partner can adopt the parent's child without terminating the parent's rights].

[27] See Kurdek, *Are Gay and Lesbian Cohabiting Couples Really Different From Heterosexual Married Couples?*, Journal of Marriage & the Family, Vol. 66, Issue 4 (Nov. 1, 2004) ["Using data from the 2000 Census, Simmons and O'Connell (2003) estimated that . . . 22% of male same-sex householders lived with their own children who were under the age of 18."]; Texeira, *Demographic Study: New Look At Black Gay Families Study Says Black Same-Sex Partners More Likely To Be Raising Children Than White Counterparts*, Newsday (Oct. 9, 2004) p. A32 ["Among black gay couples nationwide, . . . almost half of men are raising children."].

also *Arp*, *supra*, 19 Cal.3d at p. 405 [government policies cannot be based on stereotypical "notions of woman's proper social and economic roles"].)[28]

The exclusion of same-sex couples from marriage is a relic of an era in which the rights and duties of spouses were defined by sex, and women were presumed to be legally, socially and financially dependent upon men. Historically, marriage laws were based "on the [common-law] theory that the wife's personality merged in that of the husband's, that she had no right to hold property separate and apart from her husband, and had no right to sue in her own name." (*Follansbee v. Benzenberg* (1954) 122 Cal.App.2d 466, 476.)

Today, however, in nearly every respect, California law has eliminated gender stereotypes in marital and parenting law – with the significant, and constitutionally unacceptable, exception of the requirement that, to marry, two people must be of different sexes. Married women may own and sell property,[29] enter into contracts, and sue their husbands for

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[28] This is true under the federal Equal Protection Clause as well. (See *Stanton v. Stanton* (1975) 421 U.S. 7, 14-15 [laws cannot be based on the stereotype that the female is "destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas"]; *VMI*, *supra*, 518 U.S. at p. 533 [laws "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females"].)

[29] See, e.g., *Peck v. Vandenberg* (1866) 30 Cal. 11, 58 ("A woman, whether married or single, is capable of taking and holding a title in her own right and upon a money consideration."); *Droeger v. Friedman, Sloan & Ross* (1991) 54 Cal.3d 26, 35 (contrasting "the husband-dominated community property law of the past and the equal managerial rights of the present day").

sexual assault and other torts.[30] Married women now equally are obliged to provide financial support for a spouse, to pay alimony or child support upon divorce, and to assume all of the other obligations entailed by marriage, according to gender-neutral standards.[31] The parentage statutes must be construed and enforced without regard to gender.[32] Neither women nor men may be given an advantage in child custody cases,[33] and courts are prohibited from basing custody decisions on gender stereotypes.[34] In contrast, the exclusion of same-sex couples from marriage perpetuates sex stereotypes that deny equal protection and conflict with "the policy that irrational, sex-based differences in marital and parental rights should end." (*In re Marriage of Schiffman* (1980) 28 Cal.3d 640, 645.)

"A change in [social] conditions may invalidate a statute which was reasonable and valid when enacted." (*Perez*, *supra*, 32 Cal.2d at p. 737

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[30] *People v. Hillard* (1989) 212 Cal.App.3d 780, 784 (describing the elimination of "the marital exemption for forcible spousal rape"); see also *Self v. Self* (1962) 58 Cal.2d 683, 689 ("[T]he fundamental basis of the interspousal disability doctrine – legal identity of husband and wife – no longer exists.").

[31] See, e.g., *Follansbee v. Benzenberg, supra* 122 Cal.App.2d 466 (striking common-law rule prohibiting women from recovering necessary medical expenses when their spouses were negligently injured); *Self v. Self*, *supra*, 58 Cal.2d 683 (striking common-law rule that a wife could not sue her husband for a negligent or intentional tort).

[32] See *Elisa B. v. Superior Court* (2005) 37 Cal.4th 108, 119 ("We perceive no reason why both parents of a child cannot be women.").

[33] See, e.g., Fam. Code § 3040(a)(1) ["[T]he court ... shall not prefer a parent as custodian because of that parent's sex."].

[34] *In re Marriage of Carney* (1979) 24 Cal.3d 725, 736 (holding that courts may not base family law determinations on sex-based stereotypes about parenting).

(conc. opn. of Carter, J.) [citations omitted].) As Justice Johnson observed in the Vermont marriage case, "the [sex-based] classification is a vestige of the historical unequal marriage relationship that more recent legislative enactments and our own jurisprudence have unequivocally rejected." (*Baker v. State* (1999) 744 A.2d 864, 912 (conc. & dis. opn. of Johnson, J.); see also *Goodridge*, *supra*, 798 N.E.2d at p. 973 (conc. opn. of Greaney, J.) ["[T]he case requires that we confront ingrained assumptions with respect to historically accepted roles of men and women within the institution of marriage[.]"].)

Retaining the rule that marriage cannot be between two persons of the same sex, long after the societal and legal conditions that gave rise to this stereotypical prohibition have ceased to exist, violates the requirement of equal protection for all Californians. Now that all other sex-based classifications and distinctions in marital and parental rights have been abolished, retaining this stereotypical remnant of a prior era is inexplicable on any rational, much less compelling, ground.

B. The Marriage Exclusion Is Also Subject To Strict Scrutiny Because It Is A Facial, Sex-Based Classification.

Family Code section 300 limits marriage to male-female couples by statutorily defining marriage as "a personal relation arising out of a civil contract between a man and a woman." As Judge Kramer ruled, this is a sex-based classification. (AA, p. 125.) "As a factual matter, an individual's choice of marital partner is constrained because of his or her own sex." (*Goodridge*, *supra*, 798 N.E.2d at p. 971 (conc. opn. of Greaney, J.); see also *Baehr v. Lewin* (Haw. 1993) 852 P.2d 44, 64 [holding that "[the Hawaii marriage statute], on its face and as applied, regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants' sex."]; *Baker*, *supra*, 744 A.2d at p. 905 (conc. & dis. opn.

of Johnson, J.) ["A woman is denied the right to marry another woman because her would-be partner is a woman . . . Similarly, a man is denied the right to marry another man because his would-be partner is a man . . . Thus, an individual's right to marry a person of the same sex is prohibited solely on the basis of sex . . . ."].)

When the Legislature enacted AB 205, it expressly found that the current marriage law discriminates on the basis of sex.[35] In the findings supporting AB 205, the Legislature stated: "Expanding the rights and creating responsibilities of registered domestic partners would . . . *reduce discrimination on the bas[i]s of sex* . . . in a manner consistent with the requirements of the California Constitution." (See AB 205, *supra*, at § 1(b) [emphasis added].)[36] This Court has instructed that courts should defer to the Legislature's identification of even "subtle forms of gender discrimination." (See *Catholic Charities*, *supra*, 32 Cal.4th at p. 564.) The sex discrimination inherent in the marriage statutes' express exclusion of same-sex couples is by no means subtle. Moreover, as explained in the preceding section, this sex-based classification is not a matter of mere formalism; rather, the legislative history of the 1977 amendment makes clear the harmful sex stereotypes perpetuated by this measure.

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[35] The Legislature reiterated its determination that excluding same-sex couples from marriage discriminates based on sex when passing AB 849, the marriage equality bill in 2005. (See AB 849, *supra* at § 3(d) ["The gender-specific definition of marriage that the Legislature adopted specifically discriminated in favor of different-sex couples and, consequently, discriminated and continues to discriminate against same-sex couples."].)

[36] The Legislature did not find that AB 205 would eliminate the sex-based discrimination inherent in California's marriage statutes, only that it would "*reduce* discrimination" and "help California *move closer* to fulfilling the promises of inalienable rights, liberty, and equality contained in section 1 and 7 of Article I of the California Constitution." (See AB 205, *supra,* at § 1(b), 1(a) [emphases added].)

Despite the statute's express reliance on sex, the Court of Appeal held that the statutory exclusion of same-sex couples from marriage does not trigger heightened scrutiny because it does not disadvantage either men or women as a group. (Opn. p. 34.) The relevant inquiry under the equal protection clause, however, 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 (hereafter *Connerly*) [holding that "the guarantee of equal protection is an individual right"]); see also *J.E.B. v. Alabama ex rel. T.B.* (1994) 511 U.S. 127, 152-153, [(conc. opn. of Kennedy, J.) [observing that the federal Equal Protection Clause is primarily "concern[ed] with rights of individuals, not groups"].)

In *Perez*, this Court rejected the argument that a law may classify on a suspect basis, so long as it subjects different groups "equally" to the same restriction. The State argued that the then-existing marriage statute did not discriminate based on race, because it "equally" prohibited non-whites from marrying whites and whites from marrying non-whites. The Court rejected this fallacy, explaining: "The decisive question . . . 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*, *supra*, 32 Cal.2d at p. 716 [emphasis added].) Likewise, in *Loving v. Virginia*, the United States Supreme court held that a Virginia law prohibiting interracial marriage constituted impermissible discrimination based on race, notwithstanding that it imposed the same restriction "equally" on whites and non-whites. (*Loving v. Virginia*, *supra*, 388 U.S. 1; see also *McLaughlin v. Florida* (1964) 379 U.S. 184, 189-190 (holding that a penalty on interracial cohabitation constituted race discrimination, even though the statute applied "equally" to different races].)

Here, from an individual's perspective, the marriage restriction is not gender-neutral. For example, Respondent Del Martin is prohibited from

marrying the woman she has loved and shared her life with for more than fifty years because Del is a woman rather than a man, just as the statute challenged in *Perez* prevented Andrea Perez from marrying the person of her choice – Sylvester Davis – because of her race. Although the statute prohibits both men and women from marrying a person of the same sex, mere equal application to different groups does not negate the injury to individuals.

The Court of Appeal erroneously suggested that the *reasoning* in *Perez*, not merely its holding, was limited to race. (Opn. pp. 36-37.) Under well settled California law, however, laws that draw lines based on sex must be subjected to the same strict scrutiny as laws that classify based on race. In *Sail'er Inn*, this Court explained that this is so because an individual's sex generally "bears no relation to ability to perform or contribute to society" and because women have suffered a history of discrimination that is comparable in certain basic respects to that suffered by African Americans and other legally and socially disadvantaged groups:

> Women, like Negroes, aliens, and the poor have historically labored under severe legal and social disabilities. Like black citizens, they were, for many years, denied the right to vote and, until recently, the right to serve on juries in many states. They are excluded from or discriminated against in employment and educational opportunities. Married women in particular have been treated as inferior persons in numerous laws relating to property and independent business ownership and the right to make contracts.

(*Sail'er Inn*, *supra*, 5 Cal.3d at pp. 18-19; see also *VMI*, 518 U.S. at pp. 532-533 ["Without equating gender classifications, for all purposes, to classifications based on race or national origin, the Court . . . has carefully

inspected official action that closes a door" based on gender.]..)[37] Thus, governmental distinctions based on race and sex are both subject to the most careful, searching level of review under the California Constitution.

The Court of Appeal also erroneously reasoned that sex-based laws do not discriminate and thus do not require heightened scrutiny if they were not intended to discriminate against either women or men *as groups*. In fact, however, strict scrutiny is required when the government imposes a sex- or race-based line, regardless of whether it did so out of a desire to disadvantage any particular group. (*Connerly*, *supra*, 92 Cal.App.4th at pp. 35, 40 ["The strict scrutiny standard of review applies . . . regardless of whether the law may be said to benefit and burden the races [or the sexes] equally."].) The ideology of White Supremacy that characterized the laws struck down in *Loving* and *Perez* made the constitutional infirmities in those cases more clear, but it was not a prerequisite to the application of strict judicial scrutiny. In *Johnson v. California* (2005) 543 U.S. 499, for example, the Court recently held: "We have insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications." (*Id*. at p. 505-506 [rejecting state's claim that strict scrutiny should not apply to racial segregation of prisoners because all prisoners are "equally" segregated].)

Likewise, the gender stereotypes that underlie California's exclusion of same-sex couples from marriage, with their assumptions about female dependence and caretaking, are not a prerequisite to the application of strict judicial scrutiny, though they certainly make the constitutional infirmity of

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[37] While the U.S. Supreme Court applies intermediate rather than strict scrutiny to sex-based classifications, this standard strongly presumes "that gender classifications are invalid" and requires the state to produce an "exceedingly persuasive justification" in order to sustain the classification. (*VMI*, *supra*, 518 U.S. at p. 533.)

the exclusion even more clear.[38] As noted above, the exclusion of same-sex couples from the current marriage law both reflects and supports outmoded gender stereotypes. By reinforcing such stereotypes, the marriage exclusion perpetuates sex roles in society in a manner analogous to the way the ban on interracial marriage helped perpetuate false social distinctions based on race. This Court should accordingly should hold that the exclusion of same-sex couples from marriage is unconstitutional unless the State can demonstrate that the exclusion is narrowly tailored to further a compelling government interest—a showing that the State has not attempted in these cases.

IV. CALIFORNIA'S STATUTORY EXCLUSION OF SAME-SEX COUPLES FROM MARRIAGE IS SUBJECT TO STRICT SCRUTINY UNDER THE CALIFORNIA EQUAL PROTECTION CLAUSE BECAUSE IT DENIES EQUAL ACCESS TO A FUNDAMENTAL RIGHT.

As explained in Sections II and III, the statutory exclusion of same-sex couples is subject to strict scrutiny under the California equal protection guarantee because it discriminates based on the suspect classifications of sexual orientation and of sex. This statutory exclusion is also subject to strict scrutiny under the state equal protection clause because it denies equal access to the fundamental right to marry. If the State denies equal access to

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[38] While gender stereotypes are harmful to both men and women (just as racial stereotypes are harmful to persons of all races), gender stereotypes are particularly detrimental to women because women have been the primary victims of sexism (just as racial stereotypes are particularly detrimental to people of color). (See *Sail'er Inn*, *supra*, 5 Cal.3d at pp. 19-20 [describing history of discrimination against women].) The ban on interracial marriage actually burdened people of various races (for example, it burdened both Andrea Perez and Sylvester Davis) but was aimed at ensuring racial supremacy. Similarly, the ban on marriage by same-sex couples burdens both men and women but also perpetuates sex stereotypes that, in the main, harm women.

a fundamental interest or right, equal protection jurisprudence requires that strict scrutiny be applied, regardless of whether a suspect classification is involved. (*Butt v. California* (1992) 4 Cal. 4th 689, 685-686 ["California decisions make clear that heightened scrutiny applies to State-maintained discrimination whenever the disfavored class is suspect *or* the disparate treatment has a real and appreciable impact on a fundamental right or interest" (emphasis in original)]; see also *Johnson v. Hamilton* (1975) 15 Cal.3d 461, 466 ["In cases . . . touching upon 'fundamental interests' . . . the state bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose" (emphasis in original)].)

As explained in Section V below, the right to marry the person of one's choice has been recognized as fundamental in California since at least *Perez*, *supra*, 32 Cal.2d at p. 714. Therefore, even if the marriage statutes did not involve suspect classifications, the State still would need to demonstrate that its choice to exclude same-sex couples from marriage is "*necessary* to further" a "*compelling* interest." (*Johnson v. Hamilton, supra*, 15 Cal.3d at p. 466 [emphasis in original].) As Section VII explains, the State cannot make any such showing.

V. CALIFORNIA'S STATUTORY EXCLUSION OF SAME-SEX COUPLES FROM MARRIAGE IS SUBJECT TO STRICT SCRUTINY UNDER THE STATE PRIVACY CLAUSE.

The Respondents seek to exercise the established fundamental "right to join in marriage with the person of one's choice." (*Perez*, *supra*, 32 Cal.2d at p. 715.) It is well settled that the right to marry is protected by multiple and largely overlapping California constitutional guarantees, including the rights of privacy, due process, and intimate association. (*Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252,

275 (hereafter *Myers*) [individuals have a "'right of privacy' or 'liberty' in matters related to marriage . . . "]; *Conservatorship of Valerie N.* (1985) 40 Cal.3d 143, 161 (hereafter *Valerie N.*) [the right to marry is an aspect of the right of privacy]; *Aden v. Younger* (1976) 57 Cal.App.3d 662, 679 [same]; *People v. Thomas* (1984) 159 Cal.App.3d Supp. 18, 21 [same]; *Ortiz v. Los Angeles Police Relief Ass'n, supra*, 98 Cal.App.4th at p. 1303 ["under the state Constitution, the right to marry and the right of intimate association are virtually synonymous"]; *Perez*, *supra*, 32 Cal.2d at p. 714 [describing the right to marry as a due process liberty interest and a freestanding fundamental right]; *In re Carrafa* (1978) 77 Cal.App.3d 788, 791 ["The right to marry is a fundamental constitutional right."].)

In a line of decisions stretching back more than 80 years, the U.S. Supreme Court also has held that the freedom to marry is a fundamental privacy, liberty, and associational right. (See, e.g., *Meyer v. Nebraska* (1923) 262 U.S. 390, 399 [the federal due process clause protects the right to marry]; *Loving v. Virginia*, *supra*, 388 U.S. at p. 12 [marriage is a "fundamental freedom" under due process and "one of the vital personal rights essential to the orderly pursuit of happiness by free men"]; *Griswold, supra,* 381 U.S. at p. 486 [marriage is a "right of privacy older than the Bill of Rights"]; *Cleveland Board of Education v. LaFleur* (1974) 414 U.S. 632, 639-640 ["This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause . . . ."]; *Zablocki v. Redhail, supra,* 434 U.S. at p. 384 [marriage is an aspect of the "fundamental 'right of privacy' implicit in the . . . Due Process Clause"]; *Roberts v. United States Jaycees* (1984) 468 U.S. 609, 620 (hereafter *Roberts*) [the right of intimate association limits the State's "power to control the selection of one's spouse"]; *Turner*, *supra,* 482 U.S. at p. 95 ["the decision to marry is a fundamental right"].)

Regardless of whether the right to marry is seen as an aspect of privacy, intimate association, or due process, or as an independent fundamental right, marriage is protected because it implicates fundamental aspects of personhood, autonomy, and dignity. As this Court has explained, marriage is a deeply *personal* right: "[T]he essence of the right to marry is the right to join in marriage with the person of one's choice." (*Perez*, *supra*, 32 Cal.2d at p. 715; *Koebke*, *supra*, 36 Cal.4th at p. 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."].)

State interference with "personal decisions relating to marriage" is prohibited by the right of privacy and due process because it would impose an intolerable burden on individual dignity and self-determination. "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." (*Planned Parenthood v. Casey* (1992) 505 U.S. 833, 851; see also *Myers*, *supra*, 29 Cal.3d at p.275.)

Similar considerations underlie the protection of marriage by the right of intimate association. *Warfield v. Peninsula Golf & Country Club* (1995) 10 Cal.4th 594, 624-625 (hereafter *Warfield*) [the right of intimate association protects "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctly personal aspects of one's life." (quoting *Roberts*, *supra*, 468 U.S. at p. 619)].) The right to choose one's spouse is quintessentially the kind of decision that our culture recognizes as personal and important. Though the choice of a partner is not left to the individual in some cultures, in ours it is no one else's to make. (*Warfield*, *supra*, 10 Ca.4th at p. 625 [holding that the choice of one's

spouse lies at the most protected end of the spectrum of relationships protected by the right of intimate association].) Simply put, the freedom to marry is necessary to preserve "the ability independently to define one's identity that is central to any concept of liberty." (*Roberts , supra,* 468 U.S. at p. 619.)

A. Lesbian And Gay Persons Have The Same Constitutionally Protected Interests In Marriage As Heterosexual Persons.

Lesbian and gay persons have the same stake as others in the underlying autonomy, privacy, and associational interests protected by the fundamental freedom to marry. Without deciding whether the state must permit same-sex couples to marry, the United States Supreme Court has held that lesbian and gay people have the same protected liberty and privacy interests in their intimate relationships as heterosexual people. (*Lawrence*, *supra*, 539 U.S. at pp. 577-578.) The Court explained that decisions about marriage and relationships "'involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy' . . . . Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." (*Id*. at p. 574 [citing *Planned Parenthood , supra,* 505 U.S. 833.].)

The intimate relationships of lesbians and gay men also embody the attributes of marriage that the U.S. Supreme Court has identified as necessary to create a constitutionally protected marital relationship. In *Turner*, the Court struck down a prison regulation denying inmates the right to marry under the fundamental right of privacy and due process. (*Turner, supra*, 482 U.S. at p. 82.) Even applying the deferential standard of review typically afforded to prison regulations, the Court affirmed that marriage is a fundamental right, which the regulation "impermissibly burdened." (*Id*.

at p. 97) Writing for a unanimous Court, Justice O'Connor explained:

> Many important attributes of marriage remain . . . after taking into account the limitations imposed by prison life. *First*, inmate marriages, like others, are expressions of emotional support and public commitment. . . . *In addition*, many religions recognize marriage as having spiritual significance . . . . *Third*, most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated. *Finally*, marital status often is a precondition to the receipt of government benefits . . . , property rights . . . , and other, less tangible benefits . . . .

(*Id.* at pp. 95-96 [emphasis added].) "Taken together," the Court concluded, "these remaining elements are sufficient to form a constitutionally protected marital relationship in the prison context." (*Id*. at 96)[39]

Like heterosexual couples, lesbian and gay couples wish to express their "emotional support and public commitment" through marriage. (*Koebke*, *supra*, 36 Cal.4th at 850 [domestic partnership is "evidence of mutual commitment and responsibility comparable to marriage"].) Many religions sanctify marriages of same-sex couples, and marriage has substantial spiritual significance for many same-sex couples. Same-sex

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[39] *Turner* did not include procreation among the attributes required to form a constitutionally protected marital relationship and specifically held that prisoners who were unable to procreate (because of constraints on conjugal visits) nonetheless had a fundamental right to marry. (T*urner, supra,* 482 U.S. at 96.) Accordingly, *Turner* makes plain that procreation is not a constitutionally essential element of marriage. This also is evident from the Supreme Court's decision in *Griswold*, which held that married couples have a protected right to refrain from procreation through the use of contraceptives. (*Griswold*, *supra*, 381 U.S. at p. 486.) Even if procreation were a constitutionally significant attribute of marriage, however, same-sex couples have an equal interest in the freedom to procreate, and the public policy of this State unambiguously requires equal treatment of same-sex parents and their children. See *infra*, Section VII.D.

couples are no less capable of sexual intimacy than heterosexual couples. And same-sex couples, if permitted to marry, would qualify for attendant government benefits.

As Justice Kline concluded: "Gay men and lesbians are no less capable of enjoying and benefiting from the constitutionally significant aspect of marriage [than others]." (Opn. p. 50 (dis. opn. of Kline, J.)) Same-sex couples "are as able as heterosexual couples to love and commit themselves to one another, to responsibly raise children, and to define for themselves and to express to the world the authenticity of their relationship." (*Ibid.*) And "they are as able . . . to benefit from the spiritual, religious, and emotional experience marriage best provides, and as deserving of the official respect and numerous other benefits the state confers upon the marital relationship." (*Ibid*.)

B. The Marriage Exclusion Is Subject To Strict Scrutiny Because It Infringes On A Fundamental Privacy Right.

As explained above, the California Constitution protects the fundamental right to marry through its guarantees of privacy, due process, and intimate association. Because the state privacy clause expressly encompasses the rights to due process and intimate association, as explained below, Respondents primarily focus their analysis on the state privacy clause to avoid burdening the Court with duplicative arguments.

Although similar to federal privacy protection, "the scope and application of the state constitutional right of privacy is broader and more protective of privacy than the federal constitutional right of privacy as interpreted by the federal courts." (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 326 (hereafter *Lungren*)).

Article I, section 1 of the California Constitution provides: "All 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*." (Emphasis added.) The voters added this specific protection for privacy to the state Constitution through a ballot initiative in 1972. (See *Hill v. National Collegiate Athletic Association* (1994) 7 Cal.4th 1, 15 (hereafter *Hill*).)

The ballot materials accompanying the initiative described the right to privacy as "a fundamental and compelling interest." (Ballot Pamp., Gen. Elec. (Nov. 7, 1972) Proposed Amends. to Cal. Const. with argument to voters, Gen. Elec. p. 27.) The ballot materials stated that the right of privacy encompasses rights that are also protected by other fundamental rights, including due process, association, and freedom of expression: "It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion, and our freedom to associate with the people we choose." (*Ibid.* [the right of privacy is "essential to the fundamental rights guaranteed by the First, Third, Fourth, Fifth, and Ninth Amendments to the U.S. Constitution"].) The ballot materials also stated that the right of privacy "should be abridged only where there is compelling public need." (*Ibid*.)

To establish an invasion of the state constitutional right to privacy, a plaintiff must show: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy under the circumstances; and (3) an invasion of the privacy interest that is "serious" rather than "slight" or "trivial." (*Hill*, *supra*, 7 Cal.4th at pp. 35-37.) Once a significant intrusion is shown, legislation that infringes on a privacy right that has been deemed "fundamental" is subject to strict scrutiny. (*Lungren*, *supra*, 16 Cal. 4th at p. 329; *see also Hill, supra,* 7 Cal. 4th at p. 34.)

Under the test in *Hill,* the marriage exclusion violates the privacy clause because it deprives lesbians and gay men of a protected interest that

past decisions have identified as "clearly among the most intimate and fundamental of all constitutional rights." (*Myers*, *supra*, 29 Cal.3d at p. 275.) As explained in Section VII below, the interests asserted by the State do not justify this constitutional deprivation even under rational basis review, and certainly not under the strict scrutiny required by *Hill*.

1. Same-sex couples have a legally protected interest in the established right to marry.

Privacy interests are of two kinds: (1) autonomy privacy, which is the interest "in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference" and (2) informational privacy, which is the interest in preventing "dissemination or misuse of sensitive and confidential information." (*Hill*, *supra*, 7 Cal.4th at p. 35) In this case, the specific interest claimed by Respondents is the established autonomy interest in the freedom to marry the person of one's choice. Indeed, Respondents simply seek to exercise the same fundamental right to marry that is accorded all other persons.

In her concurring opinion in *Lungren*, Justice Kennard helpfully distinguished between the term "interest" and the term "right": "The term 'interest' generally means 'having a share or concern' in some thing so that one is 'liable to be affected or prejudiced' depending on its condition or outcome." (*Lungren, supra,* 16 Cal.4th at p. 369 (conc. opn. of Kennard, J.) [internal citations omitted].) "When an interest has legal protection, it is then referred to as a 'right.'" (*Ibid*.) As Justice Kennard explained, a court presented with a privacy claim must determine whether a plaintiff has a sufficient privacy *interest* as part of determining whether the plaintiff has a protected privacy *right*. Summarily concluding, as the Court of Appeal did, that Respondents do not have a right to marry simply because they "have never enjoyed such a right before" erroneously omits any consideration of

the Respondents' interests in not being excluded from marriage. (Opn. at pp. 47-48.)

Respondents' privacy claim cannot be side-stepped by re-framing it as an asserted right to "same-sex marriage." (Opn. at p. 27.) This Court has repeatedly recognized that the scope of a fundamental privacy right is defined by the nature of the underlying interests it protects, not by the people who seek to exercise it. Thus, the right at stake here is not "same-sex marriage" any more than *Perez* or *Loving* concerned the right to "interracial marriage;" *Zablocki v. Redhail*, the "right of those who fail to pay child support to remarry;" or *Turner v. Safley*, the right to "inmate marriage." Indeed, it is no more appropriate to speak of a right to "same-sex marriage" than to talk about a right to "women's vote," "Negro citizenship," or "interracial education."

This point is more than mere semantics. Respondents seek to participate equally in the only legal and social institution that permits them to express their emotional support and public commitment in a manner that will be universally understood and respected. To suggest that marriage is inherently heterosexual (and that permitting same-sex couples to marry therefore requires the creation or recognition of a "new" right), tautologically begs the very question to be answered. Justice Greaney succinctly explained the flaw in this position in his concurring opinion in *Goodridge*: "To define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of those to whom it never has been accessible, is conclusory and bypasses the core question . . . ." (*Goodridge*, *supra*, 798 N.E.2d at pp. 972-73 and fn. 5 (conc. opn. of Greaney, J.).)

Similarly, in *Lungren, supra,* 16 Cal.4th at pp. 334, 392, this Court rejected the analogous argument that minors, by definition, do not have a protected interest in procreative choice and that their privacy rights with

regard to abortion are "qualitatively different" than those of adults. (See also *id.* at pp. 369-370 (conc. opn. of Kennard, J.) ["Every pregnant woman, regardless of age, is vitally affected by the decision to continue or terminate her pregnancy . . . . Thus, the privacy *interest* in procreative choice does not vary based on the age or maturity of the pregnant woman whose choice is at issue." (emphasis in original)].)

This Court also has rejected the notion that access to fundamental privacy rights may be limited based on historical patterns of discrimination. In *Valerie N.*, *supra,* 40 Cal.3d 143, 152, fn. 8 for example, this Court held that developmentally disabled women have the same interest in procreative autonomy as others, despite a long history of discrimination against mentally impaired persons, including through compulsory sterilization. In other cases involving historically stigmatized groups, this Court likewise has affirmed the universality of fundamental rights and the necessity of safeguarding those rights for all persons. (See, e.g., *Thor v. Superior Court* (1993) 5 Cal.4th 725 [prisoners do not forfeit the "fundamental right to self-determination"]; *City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, 130 [persons in "alternate famil[ies]" may not be denied the fundamental "right of privacy not only in one's family but also in one's home"].)

The notion that fundamental rights are protected for some groups and not others is antithetical to our constitutional system of equality under law. As this Court has made plain, the constitutional guarantee of privacy incorporates a commitment to the principle of equality under the law. (See, e.g., *Myers*, *supra*, 29 Cal.3d at pp. 274-276 [discussing interrelationship of privacy and equal protection]; *Valerie N.*, *supra*, 40 Cal.3d at p. 163-164 [same]; *Perez*, *supra,* 32 Cal.2d at pp. 713-715 [same]; see also *Lawrence*, *supra,* 539 U.S. at p. 575 [holding that privacy rights protected by due process and equality "are linked in important respects"].) Thus, the history

of discrimination against lesbian and gay people, including their historical exclusion from marriage, is not a valid basis for concluding that lesbians and gay men do not have a legally protected privacy interest in marriage.

2. Same-sex couples have a reasonable expectation of privacy.

Respondents' claim also satisfies the second element under *Hill* – a reasonable expectation of privacy under the circumstances. (*Hill*, *supra*, 7 Cal.4th at p. 36.) This Court has held that, in determining whether an expectation of privacy is "reasonable," courts cannot rely on past or current practices of discrimination to dismiss an otherwise valid claim: "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." (*Lungren*, *supra,* 16 Cal.4th at p. 339 [italics in original].)

Rather, in determining whether an expectation of privacy is reasonable under the circumstances in a particular case, this Court has looked to changing social conditions and to evolving laws and policies. In *City of Santa Barbara*, for example, the Court rejected the outdated assumption that families comprised of biologically "related" persons are necessarily more stable than those comprised of "unrelated" persons. (*City of Santa Barbara*, *supra*, 27 Cal.3d at p. 133 [courts applying the state privacy clause must consider the changing nature of "family groups" in contemporary society].) In *Lungren*, the Court took into account "significant statutory developments" over the past forty years permitting minors to obtain medical care without parental consent in matters concerning sexual conduct. (*Lungren*, *supra*, 16 Cal.4th at pp. 315-317.)

Similarly, in *Valerie N.*, the Court noted "significant advances . . . in public awareness that many developmentally disabled persons lead self-sufficient, fulfilling lives, and become loving, competent, and caring marriage partners and parents." (*Valerie N.*, *supra*, 40 Cal.3d at p. 154-160 [describing the development of legal protections for people with disabilities].)

In this case, the Court of Appeal erred by failing to acknowledge the equally significant changes in the social and legal treatment of lesbian and gay persons in California over the past several decades. The U.S. Supreme Court's decision in *Lawrence* to overturn its prior decision in *Bowers v. Hardwick* (1986) 478 U.S. 186, makes this societal shift evident. In *Bowers*, the Court saw "[n]o connection between family, marriage, or procreation on the one hand" -- i.e., the substance of family privacy – "and homosexual activity on the other." (*Id.* at 191.) In *Lawrence*, the Court found the connection to be obvious, based in part on society's "emerging recognition" that lesbians and gay men have relationships and create families essentially like those of heterosexuals. (*Lawrence*, *supra*, 539 U.S. at p. 572.)

In California, this recognition is not merely "emerging," it is now ubiquitously established in policy and law. The legal treatment of same-sex couples in California has evolved from the abolition of laws criminalizing same-sex intimacy in California in 1975, to the enactment of far-reaching protections for same-sex partners through domestic partnership in 2003, to the Legislature's attempt to abolish the current restrictions on marriage for same-sex couples in 2005. Apart from excluding same-sex couples from marriage, California has taken more steps to eradicate discrimination against same-sex couples and their children and to include lesbians and gay men as equal members of society than any other state. (See, e.g., footnote 18, *supra* [describing laws and court decisions that prohibit sexual orientation discrimination].)

The social treatment of lesbian and gay people has evolved as well. Increasingly, same-sex couples and their families are an integral part of the social fabric in this State. More same-sex couples reside in California than in any other state, and many are raising children.[40] Throughout the state, openly lesbian and gay individuals serve as judges, legislators, public officials and teachers. Increasingly, many clergy in California officiate religious marriage ceremonies for same-sex couples.[41] In light of this increasing legal and social acceptance of lesbian and gay people, Respondents' expectation that they have the same privacy interest in marriage as other Californians is reasonable.

3. The marriage exclusion is a serious invasion of the privacy interests of same-sex couples.

The marriage exclusion also meets the third threshold element of *Hill* — a serious invasion of a privacy interest. (*Hill, supra*, 7 Cal. 4th at p. 37 [holding that the impact on the claimant's privacy rights must be more than "slight or trivial."].) "[T]his element is intended simply to screen out intrusions on privacy that are de minimis or insignificant." (*Lungren*, *supra*, 16 Cal.4th at p. 339 [citing *Loder v. City of Glendale* (1997) 14 Cal.4th 846, 895, fn. 22].) The current marriage law works a serious deprivation because it denies gay people the "right to join in marriage with the person of one's choice." (*Perez*, *supra*, 32 Cal.2d at p. 715.)

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[40] *Same-sex couples, supra,* at pp. 2, 7 (stating that thirty-two percent of same-sex couples in California are raising children, who number more than 70,000).

[41] See, e.g., Resolution on Same Gender Officiation, adopted by the Board of Trustees of the Central Conference of American Rabbis, March 2000 <http://urj.org/ask/homosexuality> (as of Mar. 30, 2007); policy statement of the United Church of Christ <http://www.ucc.org/lgbt/pdfs/1996%20-20EQUAL%20MARRIAGE%20RIGHTS%20FOR%20SAME-SEX%20COUPLES.pdf> (as of Mar. 30, 2007).

In failing to acknowledge this significant deprivation, the Court of Appeal held that "[t]he state is not interfering with how respondents conduct personal aspects of their lives." (Opn. at p. 48 [*Id.* at p. 49 "The right to be let alone . . . is the polar opposite of insistence that the government acknowledge and regulate a particular relationship, and afford it rights and benefits that have historically been reserved for others."].) It is well settled, however, that the right of privacy extends beyond mere freedom from physical interference and encompasses affirmative protections for autonomy and dignity. (See *Meyer*, *supra*, 262 U.S. at p. 399 [the term "liberty" denotes "not merely freedom from bodily restraint but also the right of the individual . . . to marry, establish a home and bring up children . . . . "]; see also *Hill*, *supra*, 7 Cal.4th at 25 [noting that "'privacy' is simply a label we use to identify one aspect of the many forms of respect by which we maintain a community"].) In addition to guaranteeing individuals the right to sexual, reproductive, and parental autonomy, privacy also protects the *relationships* that develop in the course of exercising these individual rights. The right to privacy protects "certain kinds of highly personal relationships" and shelters certain social institutions, such as marriage and the family, that "act as critical buffers between the individual and the power of the State." (*Roberts*, *supra*, 468 U.S. at pp. 618-619.)

From this perspective, there is nothing anomalous about the notion that the right to privacy encompasses access to the affirmative ways in which the state protects certain relationships and institutions, including marriage. In seeking to participate in this constitutionally protected institution, Respondents merely seek the same dignity and respect that are readily available to those in heterosexual relationships. In addition, as this Court held in *Myers*, regardless of whether the State has an obligation to establish or maintain marriage as a protected legal status, once it chooses to

do so, it must do so in a non-discriminatory manner. (*Myers*, *supra*, 29 Cal.3d at p. 285.)

VI. CALIFORNIA'S STATUTORY EXCLUSION OF SAME-SEX COUPLES FROM MARRIAGE IS SUBJECT TO STRICT SCRUTINY UNDER THE FREE EXPRESSION CLAUSE OF THE CALIFORNIA CONSTITUTION.

Saying that one is "married" conveys a distinct message that is understood across all borders. Parents readily appreciate that having their child announce "I'm getting married" imparts symbolic meaning that no other message – including "I'm entering a domestic partnership" – can. (See, e.g., RA, p. 178.) Even young children understand that whether or not their parents are "married" has a meaning and value that no other words provide. (See, e.g., *Id.* at p. 164.)

By denying same-sex couples the freedom to marry, the State denies them access to this unparalleled expressive opportunity. The State's only asserted purpose for this restriction is directly related to the expressive aspects of marriage: the State excludes same-sex couples from marriage in order to preserve the "traditional meaning" of marriage. Accordingly, the marriage exclusion violates the guarantee of freedom of expression and is subject to strict scrutiny under Article I, section 2(a) of the California Constitution.[42]

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[42] Because Article I, section 2 of the California Constitution explicitly embraces people's right to express themselves on "all subjects," it provides "broader" and "greater" protection of expression than the federal Constitution. (*Gerawan Farming, Inc. v. Kawamura* (2004) 33 Cal.4th 1, 15 [quoting *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 482].)

A. Marriage Is Inherently Expressive And, At A Minimum, Constitutes Expressive Conduct That Cannot Be Forbidden To Same-Sex Couples Based On Disapproval Of The Message They Wish To Send.

Most people do not marry primarily to obtain legal rights or benefits, but because they want to express the unique permanence and depth of their relationship to their spouse and to others.[43] In fact, "for most people, marriage is . . . *primarily* a symbolic statement of commitment and self-identification." (Karst, *The Freedom of Intimate Association* (1980) 89 Yale L.J. 624, 651 [emphasis added].) The United States Supreme Court has held that marriages serve as important "expressions of emotional support and public commitment." (*Turner*, *supra*, 482 U.S. at p. 95; see also Cruz, "*Just Don't Call it Marriage": The First Amendment and Marriage as an Expressive Resource* (May 2001) 74 So.Cal. L.Rev. 925, 928 ["Civil marriage is a unique symbolic or expressive resource, usable to communicate a variety of messages to one's spouse and others, and thereby to facilitate people's constitution of personal identity."].)

Because marriage is inherently expressive, government restrictions that directly restrict the expressive aspects of marriage are subject to strict scrutiny under the state Constitution. Content-based restrictions placed on speech – or who may speak – because of the message that will be conveyed are presumed unconstitutional. (*In re M.S.* (1995) 10 Cal.4th 698, 720.) Such restrictions, "at a minimum," must be "narrowly tailored to serve compelling state interests." (*Keenan v. Superior Court* (2002) 27 Cal.4th 413, 429 (hereafter *Keenan*.)

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[43] While same-sex couples in registered domestic partnerships may not be forbidden from saying "we're married" in casual conversations, such assertions always are subject to qualifications or rejoinders like "but not *legally*." Perjury concerns also may prevent calling the relationship a marriage when legal accuracy is required.

At a minimum, restrictions on the expressive aspects of marriage must comply with the test for laws that regulate expressive conduct. Couples who choose to marry intend to convey a particularized message about the nature of their commitment, and that message is universally understood. (See *Spence v. Washington* (1979) 418 U.S. 405, 410-411; see also *Texas v. Johnson* (1989) 491 U.S. 397, 404 [holding flag-burning to be conduct "sufficiently imbued with elements of communication to implicate" the freedom of expression].)[44] Although generally subject to a less strict standard than content-based restrictions of speech, regulations restricting expressive conduct are likewise subject to heightened scrutiny *when they are directly related to the suppression of expression*. (*Spiritual Psychic Science Church*, *supra*, 39 Cal.3d at pp. 516-19; see also *In re M.S.*, *supra*, 10 Cal.4th at pp. 722-723.)

Regardless of whether it is considered a restriction on speech or on expressive conduct, the statutory exclusion of same-sex couples from marriage is subject to strict scrutiny because the State's rationale for prohibiting lesbian and gay couples from marrying is expressly content-based: The State seeks to preserve what it describes as the "traditional"

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[44] California's constitutional protection of expression broadly covers conduct as diverse as fortune-telling (*Spiritual Psychic Science Church v. City of Asuza* (1985) 39 Cal.3d 501, 512 overruled in part on other grounds, *Kasky v. Nike* (2002) 27 Cal.4th 939, 968) and growing a beard as a symbol of masculinity or nonconformity (*Finot v. Pasadena City Bd. of Education* (1967) 250 Cal.App.2d 189, 201-02). Likewise, the ability to express one's commitment to another person through marriage is protected expression. This Court has recognized related forms of self-definition involving lesbian and gay persons as involving protected speech. (See, e.g., *Gay Law Students, supra,* 24 Cal.3d at p. 488 [recognizing "coming out" as gay as protected political expression]; see also *Fricke v. Lynch* (D.R.I. 1980) 491 F.Supp. 381, 384-385 [holding that taking a same-sex date to a prom is expressive conduct protected under the First Amendment].)

meaning of marriage as being between two people of different sexes. (Opn. pp. 50, 52.) In other words, the State will not allow same-sex couples to marry because it does not want them to have access to the privileged meaning conveyed by the term "marriage" to describe their relationships. This goal cannot be considered "unrelated to the suppression of free expression." (See *Texas v. Johnson*, *supra*, 491 U.S. at pp. 413-417 [rejecting notion that "government may permit designated symbols to communicate only a limited set of messages"].) The State's rationale unconstitutionally seeks to "prescribe what [messages] shall be orthodox." (*Id* at p. 415 [quoting from *West Virginia State Bd. of Ed. v. Barnette* (1943) 319 U.S. 624, 642].) As explained in *Police Department v. Mosley* (1972) 408 U.S. 92, 95, "above all else," what the constitutional protection of freedom of expression means, is "that government has no power to restrict expression because of its message . . . ."

In addition, prohibiting one class of persons from expressing themselves through marriage in order to privilege another class is not a legitimate state interest. (See *Romer*, *supra*, 517 U.S. at p. 623 [quoting Justice Harlan's dissent in *Plessy v. Ferguson* (1896) 163 U.S. 527, 559, that the Constitution "neither knows nor tolerates classes among citizens"]; see also *Keenan*, *supra*, 27 Cal.4th at p. 429 [freedom of expression "surely do[es] not vary with the identity of the speaker."]; *Police Department v. Mosley*, *supra*, 408 U.S. at p. 96 [noting the courts' frequent condemnation of "discrimination among different users of the same medium for expression"].) A law that deliberately seeks to preclude same-sex couples from expressing their commitment through marriage accordingly violates California's guarantee of freedom of expression.

B. Providing Same-Sex Couples Access To Registered Domestic Partnerships Rather Than Marriage Compounds The Constitutional Violation.

The Court of Appeal held that denying same-sex couples the opportunity to marry did not violate the free expression guarantee because other expressions of commitment and love are available to lesbian and gay couples. (Opn. p. 50.) Such reasoning cannot be reconciled with the holding of cases like *Huntley v. Public Utilities Com.* (1968) 69 Cal.2d 67, 77, that restraints on speech are not justified simply because "alternative forms of expression are available."

Even were that not so, no other form of expression provides an adequate alternative to marriage. Certainly, the concept of "registered domestic partnership" or, in other states, "civil union," does not and cannot signal what marriage does.[45] Indeed, the reason why same-sex couples are not allowed to marry in California is to deny them access to what marriage expresses in order to reserve that for heterosexuals. (See *Opinions of the Justices, supra,* 802 N.E.2d at p. 570) ["The 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."]; *Lewis v. Harris*, *supra*, 908 A.2d at p. 227 (conc. & dis. opn. of Poritz, C.J.) ["What we 'name' things matters, language matters." "Labels set people apart as surely as physical separation on a bus or in school facilities."].) As a result, same-sex couples who are consigned to domestic partnerships are forced to

[45] See, e.g., Goldstein, *Still Out of Reach*, The Record (Oct. 29, 2006) p. 1 (recounting experience of registered same-sex domestic partners who, when one was hospitalized, were denied the ability to have one make medical decisions for the other that a spouse could, illustrating that "marriage is the only currency of commitment the real world understands").

speak of their relationships in terms that communicate its inferiority to marriage.

Because the State denies same-sex couples the ability to communicate the unique messages that marriage conveys, and because this denial is based on the State's stated desire to suppress the "non-traditional" message that same-sex couples would send if they could marry rather than simply enter domestic partnerships, the marriage ban violates the California Constitution's guarantee of freedom of expression.

VII. THERE IS NO CONSTITUTIONALLY ADEQUATE JUSTIFICATION FOR THE EXCLUSION OF SAME-SEX COUPLES FROM MARRIAGE UNDER EITHER STRICT SCRUTINY OR RATIONAL BASIS REVIEW.

The statutory exclusion of same-sex couples from marriage is subject to strict scrutiny because it burdens suspect classes and abridges Respondents' fundamental right to marry and freedom of expression. To justify this exclusion, the State must show that barring same-sex couples from marriage is necessary to serve a compelling state interest. (*Warden v. State Bar* (1999) 21 Cal.4th 628, 640-641 (hereafter *Warden*.).)

Throughout these proceedings, the State has asserted only two interests in excluding same-sex couples from marriage. First, the State has argued that it is entitled to maintain a purportedly "common" or "traditional" understanding of marriage as limited to different-sex couples, while offering protections to same-sex couples through domestic partnership. Second, the State has argued that the authority to define marriage should rest with the legislature, to the exclusion of the courts. In addition, although not raised by the State, some parties have argued that the exclusion of same-sex couples from marriage is justified based on the State's interest in procreation and protecting the best interests of children.

As explained below, none of these interests is sufficient even under the lowest level of scrutiny, and certainly none is sufficient under the heightened scrutiny that must be applied in this case.

A. The Statutory Exclusion Of Same-Sex Couples From Marriage Fails Rational Basis Review.

Rational basis review under the California Constitution requires that a challenged classification must serve a legitimate public purpose. (See, e.g., *People v. Wilkinson* (2004) 33 Cal.4th 831, 836 (hereafter *Wilkinson*); see also *Romer*, *supra*, 517 U.S. at p. 631.) The asserted purpose "must involve something more than mere characteristics which will serve to divide or identify the class. There must be inherent differences in situation related to the subject-matter of the legislation." (*Young v. Haines, supra*, 41 Cal.3d at p. 900; see also *Wilkinson*, *supra*, 33 Cal.4th at p. 836.)

In addition, even if the proffered purpose is a legitimate one, the court must undertake "a serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals." (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1201 [citing *Warden*, *supra*, 21 Cal.4th at p. 647] [italics omitted].)

If any one of these elements is missing – if the asserted objective is not legitimate or is not independent of the classification, or if there is no connection (or an insufficient connection) between the classification and the asserted objective – the law fails the rational basis test. (*Wilkinson, supra,* 33 Cal.4th at p. 836; see also *Quackenbush v. Superior Court* (1997) 60 Cal.App.4th 454, 466.)

The statutory exclusion of same-sex couples fails this test because the distinction between same-sex couples and different-sex couples is not based on any relevant differences between the two groups and thus lacks any legitimate purpose. (*Young v. Haines*, *supra*, 41 Cal.3d at p. 900 [even

under rational basis review, a classification must be based on "inherent differences in situations related to the subject matter of the legislation"].) It also fails because excluding same-sex couples from marriage is not rationally related to any of the legitimate purposes served by marriage.

To the contrary, as Judge Kramer held, by acknowledging that same-sex couples deserve equality and must be given the same "marriage-like rights" as heterosexual couples, the State has effectively conceded that it lacks any legitimate reason to exclude lesbian and gay couples from marriage itself:

> 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. . . . Thus, the State's position that California has granted marriage-like rights to same-sex couples points to the conclusion that there is no rational state interest in denying them the rites of marriage as well.

(AA, p. 115.)

Judge Kramer's analysis properly highlights the unconstitutional irrationality at the center of this case: There is an existing legal institution (marriage) that provides the very protections the Legislature has determined that it wishes to provide, and even now believes it is constitutionally required to provide, for same-sex couples. And yet, rather than permitting same-sex couples to participate equally in this existing institution, it took the unusual step of creating a separate legal status – not for any substantive reason, but rather merely to maintain a legal distinction between the two groups.

The creation of a separate status for same-sex couples solely in order to put lesbian and gay people in a different legal category than heterosexual

people is not a legitimate state purpose. "[T]he Equal Protection Clause does not permit" "a classification of persons undertaken for its own sake." (*Romer*, *supra*, 517 U.S. at p. 635.) Since this Court's decision in *Perez* and the United States Supreme Court's decision in *Brown*, courts have underscored how such classifications create stigma and dignitary harm. As Judge Kramer rightly held:

> The idea that marriage-like rights without marriage is adequate smacks of a concept long rejected by the courts: separate but equal. In *Brown v. Board of Education of Topeka*, et al. (1952) 347 U.S. 483, 494, the Court recognized that the provision of separate but equal educational opportunities to racial minorities "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Such logic is equally applicable to the State's structure granting substantial marriage rights but no marriage and is thus is a further indication that there is no rational basis for denying marriage to same-sex couples.

(AA, p. 115)

As explained below, even under rational basis review – and surely under the strict scrutiny here required, neither the State's attempt to cloak this discriminatory classification in the mantle of "tradition" nor the State's arguments in favor of deference to the legislature are sufficient.

B. Deference To Tradition, Without More, Is Not A Legitimate State Interest.

Deference to tradition, by itself, is not a legitimate state interest. The State may not maintain a discriminatory statutory restriction simply because it has done so in the past. As Judge Kramer usefully explained, "[i]n [the] appropriate contexts, the legislative embodiment of history, culture and tradition is constitutionally permissible. . . . In each such instance, however, an underlying rational basis beyond general acceptance

by society justifies the law." (AA, p. 112.) In contrast, "[t]he state's protracted denial of equal protection cannot be justified simply because such constitutional violation has become traditional." (*Id* at p. 113; see also *Lawrence*, *supra*, 539 U.S. at p. 577 ["[T]hat the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . . "].)

Maintaining the "traditional" definition of marriage is not a purpose that is independent of the classification. The classification — excluding same-sex couples from marriage — is the same as the asserted purpose — preserving that exclusion. The purpose does not explain the classification, it merely repeats it, rendering it "a classification undertaken for its own sake, something the Equal Protection Clause does not permit." (*Romer*, *supra*, 517 U.S. at p. 635.)

This Court should be suspicious of the State's assertion of tradition. Tradition has been invoked time after time in our history in efforts to justify what we now recognize as invidious discrimination. (See, e.g., *Plessy v. Ferguson*, *supra*, 163 U.S. at p. 550 [legislature is "at liberty to act with reference to the established usages, customs and traditions of the people"]; see also *Sail'er Inn*, *supra*, 5 Cal.3d at p. 17, fn. 15 ["No judge today would justify classifications based on sex by resort to such openly biased and wholly chauvinistic statements as this one made by Justice Brewer in *Muller*: '[H]istory discloses the fact that woman has always been dependent upon man.'" (citing *Muller v. Oregon* (1908) 208 U.S. 412, 421-422)].)

Deference to tradition, if accepted as a legitimate rationale, would have justified upholding laws restricting marriage based on race. This Court in 1948 became the first in the country to strike down a law restricting marriage based on race, in spite of the "unbroken line of judicial support, both state and federal," for the validity of such laws. (*Perez,*

supra, 32 Cal.2d at p. 752 (dis. opn. of Shenk, J.); see also Opn. p. 31 (conc. & dis. opn. of Kline, J.) [noting that the dissent in *Perez* "emphasized the depth of then-existing antipathy toward interracial marriage, arguing that in light of scientific, judicial and religious support for the traditional prohibition of such marriages, it was not within the Court's province to upset the legislative determination"].)

The *Perez* majority was not deterred, however, by the dissent's citation of decisions upholding anti-miscegenation laws (*Perez*, *supra*, 32 Cal.2d at p. 752 (dis. opn. of Shenk, J.)), nor by its complaints that "such laws have been in effect in this country since before our national independence and in this state since our first legislative session." (*Id.* at p. 742.) The majority understood that the long-standing duration of an unconstitutional law cannot justify its perpetuation, and that, as our understanding of equality evolves, the illegitimacy of laws that might once have seemed too well entrenched in custom and tradition to question can become apparent. (See *id*. at pp. 724-726.)

Similarly, this Court should reject the notion that merely because California's exclusion of same-sex couples from marriage is of longstanding duration, the law is immune from constitutional defect.

C. Deference To The Legislature Is Not A Legitimate State Interest.

As in many past cases in which the government has opposed the equality claims of historically disenfranchised groups, the State seeks to insulate the marriage restriction from meaningful scrutiny by urging this Court simply to defer to the legislature. (See, e.g., *Perez, supra*, 32 Cal.2d at p. 754 (dis. opn. of Shenk, J.) ["The Legislature is ... the judge of what is necessary for the public welfare. Earnest conflict of opinion makes it especially a question for the Legislature and not for the courts."]; *Bradwell*

v. State (1872) 83 U.S. 130, 142 (conc. opn. of Bradley, J.) [concurring in denial of law license to female applicant and noting "it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men"]; *Buck v. Bell* (1927) 274 U.S. 200, 207 [upholding law mandating forced sterilization of people with disabilities] ["In view of the general declarations of the legislature . . . obviously we cannot say as matter of law that the grounds do not exist, and if they exist they justify the result."]; *Bowers v. Hardwick, supra,* 478 U.S. at p. 197 (conc. opn. of Burger, J.) [concurring in judgment upholding sodomy statute and noting "[t]his is essentially not a question of personal 'preferences' but rather of the legislative authority of the State"].)

In retrospect, the impropriety of these arguments is apparent. (See, e.g., *Perez*, *supra*, 32 Cal.2d at p. 736 ["[I]t is not conceded that a state may legislate to the detriment of a class . . . when such legislation has no valid purpose behind it . . . "]; *Lawrence*, *supra*, 539 U.S. at 583 (conc. opn. of O'Connor, J.) ["Moral disapproval of a group cannot be a legitimate governmental interest . . . because legal classifications must not be 'drawn for the purpose of disadvantaging the group burdened by the law.'" (citing *Romer*, *supra*, 517 U.S. at p. 633)].)

This Court has consistently been at the forefront of protecting individual liberties, recognizing that the "duty to confront and resolve constitutional questions, regardless of their difficulty or magnitude, is at the very core of our judicial responsibility." (*People v. Anderson* (1972) 6 Cal.3d 628, 640.) In challenging the constitutional validity of their exclusion from marriage, Respondents do no more than ask the Court to fulfill its time-honored role in our tripartite system of government. As Chief Justice John Marshall proclaimed two centuries ago, "[i]t is emphatically the province and duty of the judicial department to say what the law is." (*Marbury v. Madison* (1803) 5 U.S. 137, 177; see also *Lockyer*,

supra, 33 Cal.4th at p. 1068 ["The judicial power is the power to interpret statutes and to determine their constitutionality."].) Thus, contrary to the State's position, it *is* the role of the judiciary, not the people or even the Legislature, to decide whether the marriage statute violates the California Constitution.

D. The Exclusion Of Same-Sex Couples From Marriage Does Not Rationally Promote Society's Interest In Protecting Children.

The State has "expressly disavowed" any assertion that the marriage exclusion furthers any state interests related to procreation or the best interests of children, in recognition that California's public policy extends equal rights and protections to domestic partners and spouses in these arenas. (Opn. pp. 59-60, fn. 33 ["[T]he Attorney General takes the position that arguments suggesting families headed by opposite-sex parents are somehow better for children, or more deserving of state recognition, are contrary to California policy"].) Both the Campaign for California Families and the Proposition 22 Legal Defense & Education Fund, however, have sought to justify the marriage ban on these grounds.

Barring lesbians and gay men from marriage does not rationally encourage heterosexual couples either to marry or to procreate and therefore does not *further* any state interest. (See, e.g., *Halpern v. Canada,* supra, 172 O.A.C. at ¶121 ["Heterosexual married couples will not stop having or raising children because same-sex couples are permitted to marry."]; see also *Goodridge*, *supra*, 798 N.E.2d at p. 963 ["The department has offered no evidence that forbidding marriage to people of

the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children."].)[46]

Excluding same-sex couples from marriage does not rationally promote society's interest in protecting children. "Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying [the advantages provided by marriage]." (*Goodridge*, *supra*, 798 N.E.2d at p. 964; see also *Baker v.* State, *supra*, 744 A.2d at p. 882 ["If anything, the exclusion of same-sex couples from the legal protections incident to marriage exposes *their* children to the precise risks that the State argues the marriage laws are designed to secure against."].)

As the State has acknowledged, any claim that the exclusion of same-sex couples from marriage somehow furthers the welfare of children is particularly untenable in California, where the law unambiguously supports parenting by lesbian and gay people and unambiguously aspires to provide equal treatment of same-sex parents and their children. (See, e.g., *Elisa B.*, *supra*, 37 Cal.4th at p. 119 ["no reason appears that a child's two parents cannot both be women"].) California's domestic partnership law expressly provides that the rights and responsibilities of domestic partners with regard to children shall be the same as those of spouses. (Fam. Code § 297.5(d).) Even prior to the enactment of A.B. 205, California law provided that sexual orientation is not relevant to a person's ability to parent,[47] that lesbian and gay people can be adoptive parents,[48] and that

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[46] In addition, neither the ability nor the intent to procreate is a requirement for marriage in California, nor in any other state.

[47] See, e.g., *In re Marriage of Birdsall* (1988) 197 Cal.App.3d 1024 [holding that sexual orientation is not relevant to child custody or visitation].

lesbian and gay people can serve as foster parents.[49]

In light of this strong public policy favoring equal treatment of children with same-sex and different-sex parents, the argument that the State has a legitimate interest in excluding same-sex couples from marriage based on a hypothetical preference for different-sex parenting is patently contrary to established law and therefore cannot be not a "reasonably conceivable" purpose of the law.[50] (See *Hofsheier*, *supra*, 37 Cal.4th at pp. 1200-1201.)

VIII. FAMILY CODE SECTION 308.5, WHICH ENACTED PROPOSITION 22, APPLIES ONLY TO MARRIAGES FROM OTHER JURISDICTIONS.

As a final matter, Respondents wish to clarify that Family Code section 308.5 does not limit who may marry within California, but rather only provides that California will not recognize or otherwise treat as valid a marriage between two people of the same sex that was entered into in

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[48] See, e.g., *Sharon S. v. Superior Court, supra*, 31 Cal.4th at p. 437 & fn. 14 [noting that approximately 10,000 to 20,000 second parent adoptions have been granted in California]; Fam. Code § 9000 [providing that registered domestic partners can use the state's stepparent adoption procedures].

[49] Welf. & Inst. Code § 16013 ["all persons engaged in providing care and services to foster children, including . . . foster parents [and] adoptive parents . . . shall not be subjected to discrimination or harassment on the basis of . . . sexual orientation"].

[50] As the Vermont Supreme Court noted in *Baker, supra*, 744 A.2d at p. 870, it would not be rational for a state to create a "legislative scheme that recognizes the rights of same-sex partners as parents, yet denies them – and their children – the same security as spouses."

another jurisdiction.[51] As the Court of Appeal observed in this case, two appellate courts have indicated in *dicta* that they would reach differing conclusions on this issue. (Opn. pp. 13-15.; compare *Armijo v. Miles* (2005) 127 Cal.App.4th 1405, 1424 ["[Proposition 22] was designed to prevent same-sex couples who could marry validly in other countries or who in the future could marry validly in other states from coming to California and claiming, in reliance on Family Code section 308, that their marriages must be recognized as valid marriages."] with *Knight, supra,* 128 Cal.App.4th at pp. 23-24 [opining that Proposition 22 means that "California will not legitimize or recognize same-sex marriages from other jurisdictions" *and* "will not permit same-sex partners to validly marry within the State"].)

Proposition 22's text is ambiguous as to whether it applies to marriages entered into in California. Although the initiative's text could be construed broadly to apply to in-state marriages, Proposition 22's text equally supports an application only to marriages from out-of-state. A recent Assembly Judiciary Committee report explained:

> Proposition 22 uses language long used by courts in California and elsewhere to describe two different ways that a state may regard an out-of-state marriage as entitling a claimant to inheritance rights or other incidents of marriage. The state may choose to treat the out-of-state marriage as a "valid" marriage for all purposes, or the state may choose to "recognize" the marriage for certain limited purposes (such as inheritance rights) even if the marriage will not be treated as valid for other purposes. Proposition 22 used precisely this language-"valid or recognized in California."

[51] To the extent that the Court disagrees with Respondents' position about the meaning of section 308.5, that section is unconstitutional for the same reasons that section 300 is unconstitutional.

(Assem. Com. on Judiciary, Analysis of Assem. Bill No. 1967 (2003-2004 Reg. Sess.).)

Indeed, the terms "valid" and "recognize" both are legal terms of art long used in judicial opinions in California that have considered whether a jurisdiction should "recognize" a foreign marriage for the limited purpose of granting the participants certain rights associated with marriage, even though the jurisdiction will not treat the marriage as "valid" in all respects under its own laws. Thus, even when California, on public policy grounds, will not treat a marriage entered elsewhere as a "valid" marriage in this state, California nonetheless may "recognize" the marriage for purposes of enforcing a particular marital right that would not offend California public policy under the circumstances. (*See, e.g., In re Bir's Estate* (1948) 83 Cal.App.2d 256, 261 [holding that even though California would not regard the decedent's polygamous marriage as valid in California, it would recognize that marriage for the limited purpose of permitting both wives to share in the decedent's estate].)

Because of the ambiguity in Proposition 22's text, the Court must determine "the electorate's purpose, as indicated in the ballot arguments," to resolve the competing interpretations. (*Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114.) Where a specific interpretation of the language was presented to the voters, that interpretation must prevail, even if a "broad literal interpretation" of the language is also possible. (*Id*. at 118.) In *Hodges*, the Court held that, where the ballot materials of an initiative precluding recovery of non-economic damages by uninsured motorists did not expressly mention product liability claims, the voters could not be presumed to have intended to affect those claims, even though the literal text of the initiative could be construed broadly to include them. (*Id.* at p. 114 ["We may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not

more and not less."].)

Judged by this standard, Proposition 22 must be construed only to prohibit California from recognizing marriages from other jurisdictions, not as a limitation on who may marry in California. Proposition 22's ballot materials repeatedly informed the voters that the measure's purpose was to ensure that California would not be required to treat as valid or otherwise recognize marriages from out of state. (Assem. Com. on Judiciary Analysis of Assem. Bill No. 849 (2005-2006 Reg. Sess.) ["The ballot arguments in support of Prop. 22 made clear the proposition was directed at preventing recognition of same-sex marriages performed outside the state."].)

Proposition 22 qualified for the ballot in 1999 and was passed in March 2000, just three months after the Vermont Supreme Court held that excluding same-sex couples from the benefits of marriage violated the Vermont Constitution. (*Baker, supra,* 744 A.2d 864.) Earlier in 1999, the Canadian Supreme Court held that same-sex partners must be considered spouses (*M. v. H.* (1999) 2 SCR 3 (Can.)), the Netherlands announced its intention to permit same-sex couples to marry,[52] and several other European countries were considering similar proposals. Proposition 22 was introduced in this context, with the stated purpose of preventing California from being required to accept the validity of marriages between same-sex couples entered into in other jurisdictions.

There was no need in March 2000 for an initiative to prohibit same-sex couples from marrying within California because Family Code section 300 already served that purpose. In contrast, unless the law relating to out-of-state marriages was changed, same-sex couples *who married in another place* would be entitled to have their marriage treated as valid

[52] The Netherlands began permitting same-sex couples to marry on April 1, 2001. (Staatsblad 2001, nr. 9 (Netherlands.).)

under Family Code section 308. Family Code section 308, which is titled "Validity of Foreign Marriages," states: "A marriage contracted outside this state that would be valid by the laws of the jurisdiction in which the marriage was contracted is valid in this state." In construing section 308, the California Supreme Court has held that California will recognize marriages that are valid where enacted, even if the marriage would be prohibited in California. (See *Norman v. Norman* (1898) 121 Cal. 620 ["A marriage which is prohibited here by statute, because contrary to the policy of our laws, is yet valid if celebrated elsewhere according to the law of the place …."].)

The full text of Proposition 22, which was included in the ballot materials supplied to voters, provided for its codification as section 308.5, immediately following section 308. Further, the official ballot materials for Proposition 22 focused on the need to close the "legal loophole" requiring California to accept marriages between same-sex couples from other states. (See Respondents' Appendix, Vol. I, Case No. A110652, p. 98 [argument in Favor of Proposition 22, referring to the constitutional mandate that each state give full faith and credit to the laws of other states as a "legal loophole"]; *Knight, supra,* 128 Cal.App.4th at pp. 25-27.) The official summary of the proposition explained: "Under current California law, 'marriage' is based on a civil contract between a man and a woman. Current law also provides that a legal marriage that took place outside of California is generally considered valid in California." (See Respondents' Appendix, Vol. I, Case No. A110652, p. 97; see also *Knight*, *supra*, 128 Cal.App.4th at p. 25.) The ballot argument in support of the measure stated:

> When people ask, "why is this necessary?" I say that even though California law already says only a man and a woman may marry, it also recognizes marriages from other states.

> However, judges in some of those states want to define marriage differently than we do. If they succeed, California may have to recognize new kinds of marriages . . . .

(See Respondents' Appendix, Vol. I, Case No. A110652, p. 99.) The Rebuttal to Argument Against Proposition 22 continued to stress this point: "UNLESS WE PASS PROPOSITION 22, LEGAL LOOPHOLES COULD FORCE CALIFORNIA TO RECOGNIZE 'SAME-SEX MARRIAGES' PERFORMED IN OTHER STATES." (*Id.* at p. 98 [capitalization and italics in original]; *Knight*, *supra*, 128 Cal.App.4th at p. 26.)

Neither Proposition 22's text nor the ballot materials supporting it indicated that the measure's purpose was to prevent same-sex couples from marrying *within* California. Such a purpose would have been surplusage because, as the ballot materials explained, marriage in California already was limited to unions between a man and a woman. The only possible purpose for repeating that exclusion in Proposition 22 might have been to remove the Legislature's power to alter the eligibility requirements for marriage in California. There is no indication in any of the ballot materials, however, that Proposition 22 had any such purpose of limiting the California Legislature's authority over marriage eligibility. Rather, while the ballot materials repeatedly alerted voters to the need to limit the power of "judges in [other] states," they were completely silent with regard to any need to limit the power of the Legislature. (See Respondents' Appendix, Vol. I, Case No. A110652, p. 99.) Under the California Supreme Court's holding in *Hodges*, it would be impermissible to hold the people to a much broader meaning of Proposition 22 than was presented to them at the time it was enacted.

This conclusion is further strengthened by comparing Proposition 22 to prior measures introduced in the Legislature by Proposition 22's sponsor, Senator William J. ("Pete") Knight. In 1996, for example, then-

Assemblyman Knight unsuccessfully attempted to pass a bill in the legislature that specifically sought to reiterate and strengthen the existing limitation in Family Code Section 300 by adding Section 300.5, which would have provided that California's marriage laws "apply only to male-female couples, not same-gender couples." (Assem. Bill No. 3227 (1995-1996 Reg. Sess.).) In 1997, Assemblyman Knight and others co-authored a similar bill (Assem. Bill No. 800 (1997-1998 Reg. Sess.) § 3), which in addition to prohibiting the recognition of marriages of same-sex couples from other jurisdictions, would have added a section 300.5 providing for "statutory recognition of marriage only between one man and one woman, whether contracted in this state or a foreign jurisdiction."

Senator Knight, who authored Proposition 22, did not include in the initiative any such language to bolster the existing sex-based limitation on marriages entered in California. Because the ballot materials for Proposition 22 did not inform the voters of any purpose other than prohibiting recognition of out-of-state marriages, it would be improper to construe Proposition 22 to include an additional purpose.

IX. CONCLUSION

One overarching question pervades this case: whether the California Constitution permits the majority to treat those in the minority in a way the majority would never accept for itself, simply because it wants to and has done so for a long time. The answer is supplied by the "Golden Rule" underlying many of the protections of California's Constitution. "The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. . . . Courts can take no

better measure to assure that laws will be just than to require that laws be equal in operation." (*United States Steel Corp. v. Public Utilities Com*. (1981) 29 Cal.3d 603, 612 [citing *Railway Express v. New York* (1949) 336 U.S. 106, 112-113].)

For the reasons set forth in this brief, Respondents respectfully request that this Court affirm the judgment and writ relief granted by the Superior Court requiring the State of California to issue marriage licenses to same-sex couples on the same terms as such licenses are issued to heterosexual couples.

Dated: April 2, 2007

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CERTIFICATE OF WORD COUNT
PURSUANT TO RULE 8.520(c)(1)

Pursuant to California Rule of Court 8.520(c)(1), counsel for Respondents hereby certifies that the number of words contained in this Opening Brief, including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate, is 26,025 words as calculated using the word count feature of the computer program used to prepare the brief.

Dated: April 2, 2007

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