Case No. S 147999

IN THE SUPREME COURT OF CALIFORNIA

In re MARRIAGE CASES
Judicial Council Coordination Proceeding No. 4365

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

CAMPAIGN FOR CALIFORNIA FAMILIES' CONSOLIDATED BRIEF IN RESPONSE TO AMICUS CURIAE BRIEFS

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SUMMARY OF RESPONSE

Out of the din of amici curiae voices clamoring for this Court's attention, one set of voices stands out: that of the African-American pastors. Speaking on behalf of those who have experienced the ravages of true invidious discrimination, the pastors unequivocally and compellingly establish that defining marriage as the union of one man and one woman is just that – a definition – **not** a discriminatory scheme akin to laws against interracial marriage."The analogy to racial discrimination is not only false, it is destructive."[1]

> The African-American community does not need one more reminder that many otherwise-educated people still do not understand why anti-miscegenation laws were wrong in the first place. Nor do they need another unwelcome reminder that state and local government officials sometimes do not seem to have a firm grasp of the history that continues to shape the challenges that lie ahead for our communities.[2]

"The *Loving-Perez* (anti-miscegenation law) analogy denies the relevance of human nature and biology."[3]

> It is a "law office history" that expropriates the unique cultural and social history of African-Americans and **uses it to support a political and social agenda concerning marriage and sexual**

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[1] Brief of Amici Curiae African-American Pastors in California, at p. 3.

[2] *Id.* at pp. 3-4.

[3] *Id.* at p. 4.

> **relationships that is deeply offensive to, and rejected by, large majorities in the faith and civic communities** served by your *Amici*.[4]

The pastors also prove that the mantra of Plaintiffs[5] and their supporting amici – that marriage is a "committed relationship with a person of one's choice" – is just that – a meaningless repetition of a phrase which has no substantive content.

> Unlike chattel slavery and the culture it spawned in the United States, marriage is not a "socially constructed" relationship rooted only in the law or in the social or religious conventions of the society in which it is recognized. Nor is it simply a "committed relationship" with a person of one's choice. The union of a man and a woman in marriage is, and always has been, the fundamental building block upon which families, communities and entire societies are built.[6]

Other amici writing in support of Defendants[7], including family law scholars, professors and religious organizations similarly repudiate Plaintiffs'

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[4] *Id.* (emphasis added).

[5] The Campaign for Children and Families (the "Campaign") will use the term "Plaintiffs" throughout this Brief to refer to the City and County of San Francisco ("CCSF") and the same-sex couples who filed the lawsuits challenging the constitutionality of the marriage laws that were consolidated as part of the Coordination proceeding.

[6] Brief of Amici Curiae African-American Pastors in California, at p. 4.

[7] The Campaign will use the term "Defendants" to refer to the State of California, including the administration, and intervenors the Campaign and Proposition 22 Legal Defense and Education Fund (the "Fund").

and their supporting amici's repetitive litany that: the definition of marriage is born of animus against homosexuals, defining marriage as the union of one man and one woman is a perpetuation of gender role stereotypes, the marriage laws discriminate on the basis of sex and sexual orientation and California's domestic partnerships relegate same-sex couples to second class citizenship. Same-sex couple Leland Traiman and Stewart Blandon also debunk Plaintiffs' and Amici's claims that re-labeling domestic partnerships as "marriage" will benefit same-sex couples.

This Court should reject the false, destructive and illogical arguments inherent in the Plaintiffs' and their Amici's claims that defining marriage as the union of one man and one woman somehow violates the California Constitution. Whether raised by parties, law professors or special interest groups, arguments attempting to analogize the definition of marriage to impermissible hindrances placed upon marriage are illogical, specious and disingenuous.

As Defendants and their Amici demonstrate, the definition of marriage as the union of one man and one woman has transcended law, geography, social customs and religious rites for millennia. Nothing has been presented to this Court, either by the parties or amici to change that reality.

LEGAL ARGUMENT

I. ALL PARTIES AND AMICI AGREE THAT MARRIAGE IS A FOUNDATIONAL SOCIAL INSTITUTION WITH A UNIVERSAL MEANING. PLAINTIFFS' RECOGNITION OF THAT FACT IS FATAL TO THEIR CLAIMS.

Despite the vast differences in viewpoints expressed by the hundreds of Amici represented in the 45 briefs presented to this Court, there is one thing that everyone agrees on – marriage is a foundational social institution with a universal meaning. Ironically, Plaintiffs' and their Amici's concurrence with that statement defeats their claims that same-sex couples must be permitted to participate in that institution because the "universal meaning" that sets marriage apart from other relationships is that it is the union of one man and one woman. Plaintiffs and their Amici attempt to avoid the consequences of their admission by either misrepresenting the universal meaning or neglecting to discuss it.

A. Plaintiffs And Their Amici Correctly Acknowledge That Marriage Is A Fundamental Social Institution, But Then Omit Or Misrepresent The Reason Why.

Plaintiffs and their Amici acknowledge, as they must, that marriage is "a foundational institution in our society, with a unique place in the traditions of virtually every culture of the globe, including our own."[8] What Plaintiffs

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[8] Brief of Amici Curiae Bay Area Lawyers for Individual Freedom, et. al, at p. 27.

and their Amici fail to acknowledge, or, in most cases, misrepresent, is, in the words of commentator Paul Harvey, "the rest of the story." Marriage is, as the Amici Cities and Counties attest, "a fundamental right and a social institution of profound importance,"[9] not because it is an amorphous "right to unite with the person of one's choice," but because it is the union of one man and one woman.

1. Plaintiffs' Amici ignore or misrepresent this Court's explicit ruling that marriage is the union of one man and one woman.

The most telling demonstration of the Amici's attempt to either avoid or misrepresent the universal meaning of marriage is in their treatment of this Court's definitive statement that '**[t]he joining of the man and woman in marriage** is at once 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 [134 Cal.Rptr. 815, 557 P.2d 106]; *Elden v. Sheldon* (1988) 46 Cal.3d 267, 274-275 [250 Cal.Rptr. 254, 758 P.2d 582] (emphasis added). Of the 30 amicus briefs submitted in support of the Plaintiffs, only two even reference the *Marvin* decision. One of those references is merely part of a string citation in support of the general proposition that marriage is a

[9] Brief of Amici Curiae Cities and Counties, at p. 34.

distinctive and special institution.[10] In the only other reference to *Marvin* Amici Bar Associations conveniently leave out the portion of this Court's ruling that is troublesome to Amici's position – that marriage is the union of a man and a woman. Instead, Amici merely pick up on the last portion of the sentence about marriage being "the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime."[11] Why marriage is the "most socially productive relationship" is left to speculation under Amici's version. However, under this Court's actual holding, it is clear that marriage is the "most socially productive relationship" because it is the union of one man and one woman.

By refusing to cite *Marvin* or excising the language in *Marvin* that contradicts their position, Amici are able to support Plaintiffs' attempt to re-define the institution of marriage to better suit their agenda. Ironically, in espousing a re-definition of marriage, Amici seek to destroy the very institution in which they claim to want to participate. Amici, like Plaintiffs, claim that they are not trying to redefine marriage, but merely to share in its universally understood meaning. However, what they cite as the universally understood meaning – the right to marry whomever one chooses – is itself a

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[10] Brief of Amici Curiae Professors of Family Law, at p. 11.

[11] Brief of Amici Curiae Bar Associations, at p. 4.

redefinition of the institution based upon misconstruction of this Court's ruling in *Perez v. Sharp* (1948) 32 Cal.2d 711 [198 P.2d 17].

2. Plaintiffs' Amici hijack one sentence in this Court's Perez ruling to claim that marriage should be defined as the right to marry whomever a person chooses.

Amici, like Plaintiffs, excise one phrase from *Perez* out of context and declare that it is the universal definition of marriage. In *Perez*, this Court invalidated California's anti-miscegenation laws and said:

> Since the right to marry is the right to join in marriage with the person of one's choice, a statute that prohibits an individual from marrying a member of a race other than his own restricts the scope of his choice and thereby restricts his right to marry. It must therefore be determined whether the state can restrict that right on the basis of race alone without violating the equal protection of the laws clause of the United States Constitution.

Id. at 715. This Court went on to discuss the various justifications the state offered in defense of the law, all of which focused on the "progeny" of a mixed race marriage. *Id.* at 721-724. The "progeny" of a mixed race marriage necessarily refers to children resulting from the union of a man and a woman. The emphasis on the progeny of mixed race couples means that this Court was operating from the premise that marriage is the union of one man and one woman. That conclusion is confirmed by this Court's subsequent statement in *Marvin*, quoted in *Elden* and numerous subsequent cases, that marriage is the joining of one man and one woman. *Marvin*, 18 Cal. 3d at 684*; Elden,* 46

Cal.3d at 274-275; *Nieto v. Los Angeles* (1982) 138 Cal.App.3d 464, 470; *Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 28.

Undeterred by these facts, Amici join with Plaintiffs in claiming that in *Perez* this Court established that marriage in California consists of the right of one person to marry any other person that they choose, regardless of sex or other characteristic. Therefore, according to Amici, the essence of marriage is "freedom to join in marriage with the person of one's choice."[12] According to Amicus NAACP Legal Defense and Education Fund, Californians have the "fundamental right to marry the person they love."[13] Some Amici exaggerate the effect of defining marriage as the union of one man and one woman by claiming that "every other adult in society, save same-sex couples are permitted to marry the person of their choice."[14] Since a large number of adults cannot marry whomever they choose, including those who are already married, those who want to marry children and those who want to marry a close relative, the statement is patently untrue. The Family Law Professors'

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[12]Brief of Amici Curiae Unitarian Universalist Association and other religious organizations and individuals, at p. 36; Brief of Amicus Curiae San Francisco Bar Association, at p. 11; Brief of Amicus Curiae Southern Poverty Law Center, at p. 11; Brief of Amicus Curiae Santa Clara County Bar Association, at p. 1.

[13] Brief of Amicus Curiae NAACP Legal Defense and Education Fund, at p. 3.

[14] Brief of Amici Curiae Matrimonial Lawyers, et. al, at p. 12.

conclusion that "There is no one 'traditional' legal meaning of marriage that has endured since the beginning of California's Statehood"[15] similarly strains credulity.

Amici Constitutional Law Professors provide a candid picture of the standard-less, amorphous institution that Plaintiffs and their Amici are trying to create when they state that this Court should find that "the public privilege of marriage be equally open to all loving and responsible unrelated adults on an equal-opportunity basis."[16] Under that no-holds-barred formulation, marriage would cease to be the unique and universal social institution it has been for millennia.

Plaintiffs' and Amici's protestations to the contrary, those who are challenging the definition of marriage as the union of one man and one woman are not seeking to merely re-define marriage, but to raze it and replace it with an ill-defined, malleable lump of clay that can be molded to suit the particular fancies of those who wish to participate. Marriage would lose its meaning.

3. Defendants' Amici demonstrate that Plaintiffs and their Amici are perpetuating a false and potentially disastrous re-definition of marriage.

As Amici supporting Defendants demonstrate, Plaintiffs' and their

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[15] Brief of Amici Curiae Family Law Professors, at p. 23.

[16] Brief of Amici Curiae Constitutional Law Professors, at p. 20.

Amici's claim that marriage is nothing more than a committed relationship between any two people who love each other is not only false, but also potentially disastrous.

Echoing this Court's rulings from the beginning of statehood, Amici African-American Pastors correctly state that marriage is not a "committed relationship with a person of one's choice. The union of a man and a woman in marriage is, and always has been, the fundamental building block upon which families, communities and entire societies are built."[17] *See Baker v. Baker* (1859) 13 Cal. 87, 94; *Sharon v. Sharon* (1888) 75 Cal.1, 8 [16 P. 345]; *Sesler v. Montgomery* (1889) 78 Cal. 486 [21 P. 185]; *Marvin v. Marvin*, 18 Cal. 3d at 684*; Elden v. Sheldon* 46 Cal.3d at 274-275.As the Amici Church of Jesus Christ of Latter-Day Saints, et. al. recognize, when this Court wrote in *Marvin* that the structure of society itself largely depends upon the institution of marriage, it understood that "marriage is a social 'institution,' not merely a private arrangement between two people. And it understood that what is at stake in marriage is no less than the well-being of 'society itself.'"[18] The

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[17] Brief of Amici Curiae African-American Pastors in California, at p. 4.

[18] Brief of Amici Curiae Church of Jesus Christ of Latter-Day Saints, California Catholic Conference, National Association of Evangelicals, and Union of Orthodox Jewish Congregations of America ("LDS Amici"), at p. 2.

definition of marriage as the union of one man and one woman addresses the biological and social realities that uniquely pertain to intimate male-female relationships and the children they produce.[19]

By contrast, the definition suggested by Plaintiffs and their Amici "will transform the official meaning and purpose of marriage from an age-old institution centered on uniting men and women for the bearing and rearing of children to a new institution centered on affirming adult relationship choices."[20] "A fundamental assertion, often unspoken, of same-sex marriage supporters is that the public purposes and meaning of the institution of marriage should not center on making and raising children but rather on accommodating and facilitating intimate adult relationships and diverse family arrangements."[21] Once such a shift in focus occurs, then there would be no principled basis upon which to deny marriage to any group of people. "If the male-female definition of marriage is not intrinsic to its social meaning and function – if marriage is foremost about facilitating the needs of intimate adult relationships – on what basis could the two-person limitation survive strict

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[19] *Id.* at p. 5.

[20] *Id.* at p. 4.

[21] *Id.* at p. 9.

scrutiny?"[22] After all, a two-person definition of marriage would not accommodate the sexual orientation of bisexuals, and would infringe upon the rights of polygamists and polyamorists.[23] Plaintiffs and their Amici tend to dismiss such arguments as political hyperbole. However, if this Court were to do what they ask and re-define marriage to be a committed relationship between people who love each other, there would be no rational basis upon which to support limiting such relationships to two people.

Finally, the Amici Family Scholars demonstrate how Plaintiffs' proposal to re-define marriage as the right to marry a person of one's choice fails to meet even their standard of review:

> If as Petitioners suggest, the purpose of marriage in California is primarily a state-sanctioned declaration of personal love and commitment, then marriage clearly fails their own rational basis standard for both same-sex and opposite-sex couples, since there are many single people in loving and committed relationships, some married people who are not especially loving, and many kinds of loving, intimate and familial relationships that involve more than two people that are not recognized as marriages, or offered its governmental benefits.[24]

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[22] *Id.* at p. 35.

[23] *Id. See also,* Brief of Amicus Curiae American Center for Law and Justice, at p. 17; Brief of Amici Curiae Legal and Family Scholars, at p. 48.

[24] Brief of Amici Curiae Legal and Family Scholars, at p.27.

B. Plaintiffs And Their Amici Dismiss The Inherent Procreative Foundation Of Marriage In Order To Further Their Agenda To Deny Or Misrepresent The Universal Meaning Of Marriage.

In order for their version of the fundamental social institution of marriage to work, Plaintiffs and their Amici must disavow the very concept that makes marriage a fundamental institution – that the union of a man and a woman is necessary to create future generations and for that reason the union is afforded a unique social status. In this portion of their argument, Plaintiffs and their Amici have allies in the Attorney General and Governor. However, that allegiance does not mean that the link between marriage and procreation has disappeared or suddenly become irrelevant after millennia of human history. Plaintiffs, their Amici and even the Court of Appeal treat the Attorney General's and Governor's dismissal of the link between procreation and marriage as determinative. However, the Attorney General's and Governor's claim that procreation and marriage are no longer linked does not make it true any more than their claiming that the sun no longer rises in the east would make that statement true.

Numerous Amici have joined with Plaintiffs, the Attorney General and Governor in claiming that fostering responsible procreation is no longer a valid reason for defining marriage as the union of one man and one woman. Since neither the Plaintiffs and their Amici nor the Attorney General and Governor

can change the biological reality of human reproduction, they cannot logically explain how defining marriage as the union of one man and one woman is unrelated to procreation.

Plaintiffs' Amici's attempts to rationalize the Plaintiffs', Attorney General's and Governor's position result in illogical conclusions and inapt analogies. For example, Professor Eskridge asserts that there is no longer any material difference between same-sex and opposite-sex unions.[25]

Similarly, Amici Concerned with Women's Rights ("Women's Rights Amici") claim that the physical differences between men and women do not justify defining marriage as the union of one man and one woman because "not all men and women possess such differences."[26] The Women's Rights Amici then try to explain the proposition without actually addressing the physical differences between the sexes. "[N]ot all women who can marry can bear children, not all heterosexual couples are capable of biological procreation, many same-sex couples are raising children that were born as a result of prior heterosexual relationships, and many heterosexual and same-sex couples can and do adopt children."[27] Of course, whether certain individuals are capable

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[25] Brief of Amicus Curiae Professor William N. Eskridge, Jr., at p. 2.

[26] Brief of Amici Concerned with Women's Rights, at p. 41.

[27] *Id.*

of bearing children, are raising non-biological children or choose to adopt has no relation whatsoever to the innate biological and physiological differences between male and female human beings. It is the combination of those physiological differences and only the combination of those physiological differences – either directly or indirectly – that creates new human beings and is a *sine qua non* for marriage.

As Amici Curiae Legal and Family Scholars state, "same-sex and opposite sex couples are simply not similarly situated with respect to the great public purposes of marriage."[28] "Marriage has never been the sole way to create a family, or a parent-child relationship in the state of California," and California law has always recognized that people besides married couples raise families.[29] "Yet throughout this long period, this Court understood one of the key public purposes of marriage in law was procreation: that sexual unions between men and women are different from other kinds of relationships because of their powerful tendency to produce babies."[30] The Legal and Family Scholars demonstrate how severing the link between marriage and procreation

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[28] Brief of Legal and Family Scholars, at p. 45.

[29] *Id.* at p. 7.

[30] *Id.*

renders marriage "virtually unintelligible."[31]

> A human right to have the government give a Good Housekeeping Seal of Approval to your most intimate, personal, and sacred relationships, if and only if they are (a) sexual relations and (b) no close family members, and (c) only come in pairs? What possible justification can the government have for dispensing special benefits only to adults who agree to live by and through this form?. . . What business has the state of California determining for its citizens that the highest form of love is an exclusive sexual union of two people?[32]

The only way to justify state sanction of an exclusive sexual union of two people is by recognizing that "marriage as a natural human right, codified by California law, is the union of husband and wife, because only such a union can produce children and connect them to their natural mother and father."[33] That is the primary reason why marriage has been defined as the union of one man and one woman since before California became a state, and indeed before the United States became a nation.

This Court has acknowledged the link between marriage and procreation since the early days of statehood, *see, e.g., Baker v. Baker* (1859) 13 Cal. 87, 94 (Marriage is the foundation of the social system.); *De Burgh v. De Burgh* (1952) 39 Cal.2d 858, 864 (Since the family is the core of our

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[31] *Id.* at p. 13.

[32] *Id.* at pp. 13-14.

[33] *Id.* at p. 14.

society, the law seeks to foster and preserve marriage); *Marvin v. Marvin* (1976) 18 Cal.3d 660, 684 ("The joining of the man and woman in marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime."). Neither improvements in assisted reproduction nor the granting of certain rights to same-sex couples nor any other recent innovation has changed the reality that it is the union of one man and one woman that creates the next generation. That reality, being critical to the survival of society, is worth promoting and fostering through the unique social institution known as marriage – the union of one man and one woman.

II PLAINTIFFS' AND THEIR AMICI'S CONTINUED RELIANCE UPON ANTI-MISCEGENATION CASES IS NOT MERELY INTELLECTUALLY DISHONEST, BUT ALSO DESTRUCTIVE TO THE VERY CIVIL RIGHTS MOVEMENT PLAINTIFFS AND THEIR AMICI CLAIM TO BE EMULATING.

As the African-American pastors demonstrate, Plaintiffs' and their Amici's repeated reference to the anti-miscegenation cases as the models for their redefinition of marriage is not merely an inapt analogy, but is offensive to those most affected by the racial discrimination that spawned the anti-miscegenation laws. Astonishingly, the Amici who are among the most zealous proponents for the false analogy between anti-miscegenation laws and the definition of marriage are the very groups who claim to be advocates for

victims of racial discrimination – the NAACP and Howard University School of Law Civil Rights Clinic. Since the people who have actually suffered racial discrimination view the comparison between anti-miscegenation laws and the definition of marriage as offensive, their purported advocates' continued support of the comparison is impossible to justify except as the facade for a hidden political agenda.

Amici writing in support of Plaintiffs adopt Plaintiffs' tactic of trying to compare defining marriage as the union of one man and one woman with invalidated laws that attempted to implant upon the union restrictions designed to further notions of White supremacy. In order to accomplish their sleight of hand, Amici adopt Plaintiffs' terminology, referring to the definition of marriage as the union of one man and one woman as a "marriage exclusion" or "ban" against homosexuals. Armed with those pejoratives, Amici try to convince this Court that the proposition that only the union of one man and one woman can be called "marriage" is the same as saying that Black people are inferior to White people so that Whites and Blacks cannot intermarry.

The most egregious example of this strained analogy is the California NAACP's juxtaposition of the terms "same-sex," "gender" and "sexual orientation" with this Court's use of terms "race" and "different races" in *Perez v. Sharp* (1948) 32 Cal.2d 711. Stretching the concept of "poetic

license" beyond the breaking point, the California NAACP claims that their juxtaposition of terms morphs Justice Traynor's majority opinion in *Perez* into the argument in favor of same-sex "marriage."[34] Furthermore, they claim that juxtaposition of terms in the *Perez* dissent morphs that opinion upholding invidious racial discrimination into an opinion supporting marriage as the union of one man and one woman.[35] Implicit in the Amici's argument is the idea that the injustices suffered by African-Americans as a result of slavery and invidious racial discrimination are somehow comparable to what homosexuals experience because the state will not call their same-sex unions "marriage."

Amicus NAACP Legal Defense and Education Fund similarly implies that homosexuals have been subjected to the same injustices as African-Americans in their statement that "[t]here is no reason for this Court to treat marriage between persons of the same sex any differently than it treated interracial marriages in *Perez*."[36] This Amicus claims that "[t]he basic constitutional principles addressed in *Perez* and *Loving [v. Virginia* (1967) 388 U.S. 1] are not and should not be limited to race, but can and should be

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[34] Brief of Amicus Curiae California NAACP, at pp. 6-8.

[35] *Id.*

[36] Brief of NAACP Legal Defense and Education Fund, at p. 3.

universally applied to any State effort to deny people the right to marry the person they love."[37]

Amicus the Howard University School of Law Civil Rights Clinic similarly claims that the historical arguments against interracial sex, marriage and parenting have been resurrected by those who seek to retain the definition of marriage as the union of one man and one woman.[38] Howard University even goes so far as to claim that opposition to same-sex "marriage" is premised upon the same "baseless prognoses that children of such unions would be physically and psychologically damaged" that fueled the opposition to interracial marriage and on "pseudo-science" that resembles the "eugenics" movement used to justify anti-miscegenation laws.[39]

Underlying these arguments are two misconceptions that are also apparent throughout Plaintiffs' arguments.

A. Plaintiffs' Amici Mistakenly Analogize Defining Marriage As The Union Of One Man And One Woman With Denying Homosexuals The Right To Enter Into Intimate Relationships.

The first misconception underlying Amici's and Plaintiffs' claims is

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[37] *Id.* at p. 4.

[38] Brief of Amicus Curiae Howard University School of Law Civil Rights Clinic.

[39] *Id.* at pp.27-37.

that same-sex couples' rights to engage in consensual sexual relations, to live with a person of the same-sex and to establish a relationship are somehow infringed by defining marriage as the union of one man and one woman. As Amici writing in support of Defendants explain, the definition of marriage does nothing to affect any of those rights.

In *Lawrence v. Texas,* the United States Supreme Court invalidated statutes that criminalized consensual sexual relations between adults of the same sex*,* but went no further. *Lawrence* (2003) 539 U.S. 588, 578. The Court specifically stated that it was **not** addressing "whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.* at 578.Justice O'Connor more pointedly suggested that "preserving the traditional institution of marriage" could be a legitimate state interest for distinguishing between homosexuals and heterosexuals. *Id.* at 585 (O'Connor, J. concurring).

Plaintiffs' and their Amici's arguments notwithstanding, this Court's and other appellate courts' decisions regarding the autonomy right to privacy also did not establish a right to state recognition of homosexual relationships as "marriage." *See e.g., City of Santa Barbara v. Adamson* (1980), 27 Cal.3d 123, 137[164 Cal.Rptr. 569, 610 P.2d 436] (finding that a city ordinance that limited the number of unrelated persons living in a single family home (aimed

at reducing the instance of numerous college students renting rooms in a single family home) was an unwarranted invasion of privacy).

Finally, as Amici Douglas Kmiec and other Law Professors ("Kmiec Amici") state, the marriage laws do not establish any *legal* impediment to homosexuals entering into a marriage with a person of the opposite sex.[40] Plaintiffs and their Amici decry such statements as offensive to their sensibilities, but "there is no fundamental human right to change the conception of marriage so that it fits one's own relationships better."[41]

B. Plaintiffs' Amici's Hijacking of *Perez* and *Loving* Betrays The Very People *Perez* and *Loving* Sought To Protect And Whom Amici Claim To Represent.

The second misconception underlying Plaintiffs' and their Amici's reliance upon anti-miscegenation cases is that defining marriage as the union of one man and one woman somehow taints the fundamental institution of marriage in the same manner that racial discrimination tainted the institution before *Perez*. As Amici writing in support of Defendants demonstrate, not only is such logic flawed, it is offensive and destructive.

Amici African-American Pastors cogently describe how the Plaintiffs'

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[40] Brief of Amici Curiae Douglas Kmiec, et.al., Professors of Law ("Kmiec Amici"), at p. 8.

[41] Brief of Amici Legal and Family Scholars, at p. 53.

Amici's persistent reference to anti-miscegenation laws is illogical, offensive and destructive to the very civil rights movement many of Plaintiffs' Amici claim to be emulating.

> The laws overturned in *Loving v. Virginia*, 388 U.S.1 (1967) and *Perez v. Lippold [Sharp]*, 32 Cal.2d 711, 728 198 P.2d 17 (1948), were integral components of a system of social subordination and isolation that is unique in American history. Like the institution of chattel slavery from which they arose, anti-miscegenation laws were a symptom of an institutionalized social and legal culture that systematically denied the *humanity* of African-Americans.[42]

"Laws that define 'marriage as a male/female relationship are, by contrast, firmly rooted in the biology that defines human nature and reproduction."[43] "A sex-based definition of the marital relationship is certainly 'rational' from a biological, psychological, developmental, and sociological point of view, and there is no reason, political or otherwise, for this Honorable Court to change it."[44] Amici African-American Pastors explain that the *Loving-Perez* analogy which forms the backbone of Plaintiffs' arguments denies the relevance of human nature and biology. In fact, it is nothing more than an exploitative "law office history" that hijacks the "unique cultural and social history of African-

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[42] Brief of Amici Curiae African-American Pastors of California, at p. 2. (emphasis in original).

[43] *Id.* at p. 3.

[44] *Id.*

Americans and uses it to support a political and social agenda concerning marriage and sexual relationships that is deeply offensive to, and rejected by, **large majorities** in the faith and civic communities served by your *Amici.*"[45] The anti-miscegenation laws struck down in *Perez* and *Loving* were "badges or incidents of slavery" grafted onto the institution of marriage as the union of one man and one woman.[46]

> Neither *Perez* nor *Loving* can be characterized as anything *other than* "race cases." Nor can they be read as anything other than a reaffirmation of the biological and sociological underpinnings of marriage *as currently defined*. *Perez* and *Loving* are landmarks of equal justice under law [for] racial integration precisely *because* they affirm that biological factors such as skin color that are completely irrelevant to the sexual relationship of a man and a woman.[47]

The Campaign echoes the pastors' conclusion that "[t]his court should not permit 'law office historians' to rewrite this history – and the California Constitution – by conflating the historical experiences of one community with the entirely different history and experience of another."[48]

As Amici United Families explain, this Court in *Perez* and the United States Supreme Court in *Loving* refused to permit the institution of marriage

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[45] *Id.* at p. 4. (emphasis added).

[46] *Id.* at p. 6.

[47] *Id.* at p. 7. (emphasis in original).

[48] *Id.*

to be misappropriated for non-marriage ends, and this Court should follow suit in this case.[49] In the case of *Perez* and *Loving*, supporters of anti-miscegenation laws sought to misappropriate the institution of marriage to further their socio-political agenda of keeping the races separate. This Court correctly rejected that misappropriation in *Perez.* For same-sex marriage proponents to now use *Perez* and *Loving* to support their proposed misappropriation of the institution of marriage to support their socio-political agenda of government validation of homosexuality is, in the words of United Families, to "betray"[50] those landmark cases.

In *Perez* and *Marvin* this Court declared that marriage in California, as throughout human society, is the union of one man and one woman, and no political interest group is permitted to misappropriate the institution to further its agenda. This Court should communicate that message again by refusing Plaintiffs' request to re-define marriage in order to further their political agenda.

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[49] Brief of Amici Curiae United Families International, et al, at pp. 72-74.

[50] *See id.* at p. 74.

III. SINCE SAME-SEX COUPLES CANNOT, BY DEFINITION, FORM THE UNION OF ONE MAN AND ONE WOMAN NECESSARY FOR MARRIAGE, PROVIDING THEM WITH THE RIGHTS AND BENEFITS OF MARRIAGE THROUGH DOMESTIC PARTNERSHIPS DOES NOT CREATE AN IMPERMISSIBLE "SEPARATE BUT EQUAL" REGIME REJECTED IN *BROWN V. BOARD OF EDUCATION.*

An outgrowth of Plaintiffs' Amici's argument that the definition of marriage is a manifestation of animus toward homosexuals is their argument that the Legislature's granting of marriage rights under AB 205 creates an impermissible "separate but equal" situation for homosexuals. Plaintiffs' Amici compare the AB 205 domestic partnership legislation to the segregation laws upheld in *Plessy v. Ferguson* (1896) 163 U.S. 537 and invalidated in *Brown v. Board of Education* (1954) 347 U.S. 483.

As is true with their analogy to *Perez*, Plaintiffs' Amici's analogy to *Plessy* and *Brown* is based upon misconceptions and misrepresentations. Plaintiffs' Amici base their analogy upon the flawed premise that same-sex couples are being "excluded" from a right to which they are entitled, or that they are being excluded on the basis that is wholly unrelated to the enjoyment of the right. That premise, in turn, is based upon the flawed premise that the institution to which they are seeking admission is defined as the right to enter into a union with "whomever they choose," instead of the right to enter into a union of one man and one woman. Amicus the Equal Justice Society

illustrates this point with its argument that same-sex couples and opposite-sex couples are substantially similar and therefore same-sex couples must be granted exactly the same right to marry as are opposite-sex couples.[51] Therefore, Amici claim, any alternative legal regime granting marital rights, no matter how comprehensive, represents impermissible "separate but equal" segregation.[52] Once the light of the true definition of marriage – the right to enter into the union of one man and one woman – is shone upon their arguments, Amici's "separate but equal" analogy disintegrates.

Amicus Southern Poverty Law Center ("SPLC") demonstrates the error and irrationality of Amici's "separate but equal" argument. According to the SPLC, defining marriage as the union of one man and one woman and granting marriage rights to same-sex couples as domestic partners creates "more egregious discrimination than did the circumstances in *Brown[v. Board of Education]*."[53] "The inequities which exist between marriage and domestic partnerships are flagrant and relegate same-sex couples to the status of second-

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[51] Brief of Amicus Curiae Equal Justice Society, at p. 6.

[52] *Id.; See also* Brief of Amici Family Law Professors at p. 28, Brief of Amicus Santa Clara County Bar Association, at p. 2, Brief of Amici Bar Associations, at p. 13.

[53] Brief of Amicus Curiae Southern Poverty Law Center, at p. 13.

class citizens by providing a 'second tier' which is inferior to marriage."[54]

Similarly, Amici American Psychoanalytical Association, et al. argue that "California law creates a classic regime of legal segregation, in which two groups of otherwise similarly situated people are separated into mutually exclusive legal categories."[55] Homosexual advocacy groups call the domestic partnership law "pernicious" state-sponsored segregation that relegates same-sex couples to a different legal regime that "separates lesbians and gay men from the rest of the society and reinforces preexisting notions that gay men and lesbians are 'different' from – and inferior to – the heterosexual majority."[56]

This statement not only defies logic – by definition a *homo*sexual is different from a *hetero*sexual – but also demonstrates the inherent contradictions present through Plaintiffs' and their Amici's arguments. On one hand, they insist that homosexuals cannot participate in the institution of marriage as the union of one man and one woman because they prefer to engage in sexual relationships with people of the same sex. On the other hand, Plaintiffs and their Amici also say that homosexuals should be treated exactly

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[54] *Id.*

[55] Brief of Amici Curiae American Psychoanalytical Association, American Anthropological Association, et. al, at p. 8.

[56] Brief of Amici Curiae Parents and Friends of Lesbians and Gays, People for the American Way, et. al., at pp. 34, 36.

the same as heterosexual couples in terms of rights and benefits associated with marriage. Obviously, both cannot be true. Homosexuals can either choose to be married by entering into a union of one man and one woman or can choose to enter into a relationship with a person of the same sex and call it something else – in California, a "domestic partnership." Homosexuals cannot reject both options and require that the institution of marriage be re-defined to suit their preferences. Plaintiffs and their Amici are not asking for homosexuals to be part of a social institution, but demanding that the social institution change to accommodate them. That is a far cry from what the interracial couples in *Perez* and *Loving* or the students in *Brown v. Board of Education* were seeking.

In *Perez* and *Loving*, the interracial couples wanted to enter into the institution of marriage as the union of one man and one woman, not to require that the institution be restructured. The interracial couples met all of the requirements for marriage – they were opposite sexes, were of the age of consent and were not related – but were denied the right based upon an extraordinary criterion – skin color – placed upon the institution. This Court in *Perez* and the United States Supreme Court in *Loving* invalidated the extraordinary criterion and affirmed that biological factors such as skin color are completely irrelevant to the sexual relationship of a man and a woman,

which is the definition of marriage. *See Perez v. Sharp* (1948) 32 Cal.2d 711, 716; *Loving v. Virginia* (1967) 388 U.S. 1, 11. By contrast, the sex of the participants is not only relevant, but essential to the sexual relationship between a man and a woman. Defining marriage as the union of one man and one woman does not add irrelevant characteristics to a universally understood institution, as did the anti-miscegenation laws, but is the definition of the institution. Same-sex couples do not possess one of the necessary prerequisites for entering into marriage, so their exclusion from the institution is no more discriminatory than is the exclusion of close relatives, children or groups of more than two people.

The exclusion of same-sex couples from a union of one man and one woman does not constitute impermissible discrimination, so the state is not obligated to remedy past discrimination by granting equal rights to same -sex couples. California's Legislature chose to provide same-sex couples and other unmarried couples with a mechanism to obtain state benefits in the form of domestic partnerships. This was not done as a means of keeping homosexuals out of an institution to which they otherwise have a right of access, but as a means of bestowing marital benefits on designated unmarried couples.

This principle is born out by the fact that California's domestic partnership law applies not only to same-sex couples, but also to opposite-sex

couples comprised of at least one person over age 62. Family Code § 297. If domestic partnerships were meant to be "separate but equal" institutions aimed at stigmatizing homosexuals, then the Legislature would not have included any opposite-sex couples in the definition. The fact that legislators included older opposite-sex couples demonstrates that domestic partnerships were established to distribute marriage rights to a larger group of people, not separate and stigmatize homosexuals.

By contrast, the segregated schools at issue in *Brown v. Board of Education* were established as a means of keeping African-American children out of the public schools to which they had a right of access. Like the anti-miscegenation laws stuck down in *Perez* and *Loving*, the school segregation laws struck down in *Brown* imposed an irrelevant criterion – skin color – upon a fundamental right – a free public education. *See Brown v. Board of Education* (1954) 347 U.S. 483, 495. The *Brown* Court found, as did the *Loving* Court and this Court in *Perez*, that a person's skin color was unrelated to his ability to fully participate in the institution at issue. In *Brown*, that institution was public education. In *Perez* and *Loving,* the institution was the union of one man and one woman known as marriage.

Plaintiffs' and their Amici's arguments notwithstanding, same-sex couples are not substantially similar to the interracial couples in *Perez* and

Loving nor the minority students in *Brown*. A man who wants to marry a man or a woman who wants to marry a woman is not the same as a Black man who wants to marry a White woman or a White man who wants to marry a Black woman. The interracial couple can get married without changing the nature of the institution, but the same-sex couple cannot. Similarly, a Black student can attend a public school without changing the nature of the institution.

As the Kmiec Amici explain, rather than applying the equal protection doctrines of *Perez, Loving* and *Brown*, Plaintiffs are actually turning those principles upside down.[57] Marriage is an integrative institution, which brings the sexes together "so that society has the next generation it needs, and so that children have the mothers and fathers for which they long."[58]

> Petitioners turn equal protection principles on their head – seeking a right for sex-segregated marriages, rather than the integrative institution recognized by the State. The state is no more obligated, under principles of equal protection, to create same-sex marriages than it would be required, in the name of gender equality, to provide single-sex universities for men or women who prefer to study only with others of the same sex.[59]

Amici Leland Traiman and Stewart Blandon, a same-sex couple, echo these observations. They argue that same-sex couples are being treated equally

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[57] Brief of Kmiec Amici, at p. 24.

[58] *Id.* at p. 25

[59] *Id.* at p. 24.

before the law as the state grants them all of the rights and responsibilities of marriage that the state has the power to convey.[60] Amici Law Professors similarly state that even if California were to label same-sex unions as "marriages," it could do nothing to resolve the conflicts with the 48 other states that do not recognize same-sex "marriage."[61] "To insist that same-sex unions be labeled 'marriages,' will not only not give them [same-sex couples] any greater interstate recognition in 48 states, but will convey a misleading expectation to the parties."[62]

Domestic partnerships are not discriminatory "separate but equal" institutions which need to be reformed by instituting same-sex "marriage." Same-sex partners cannot marry each other because they cannot form the union of one man and one woman, not because past discrimination placed an impermissible restriction upon marriage. Creation of domestic partnerships was an eleemosynary act of giving marriage rights to certain unmarried couples, not the creation of a "separate but equal" institution to remedy past discrimination. The philanthropic ideals of some legislators cannot now

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[60] Brief of Amici Curiae Leland Traiman and Stewart Blandon, at p. 9.

[61] Brief of Amici Law Professors, at p. 15.

[62] *Id.* at p. 18.

become the basis for re-defining a universal social institution.[63]

IV. DEFINING MARRIAGE AS THE UNION OF ONE MAN AND ONE WOMAN IS ROOTED IN BIOLOGICAL AND SOCIOLOGICAL REALITY, NOT "ANTIQUATED GENDER STEREOTYPES."

Another recurring theme running throughout Plaintiffs' and their Amici's presentations is that defining marriage as the union of one man and one woman is discriminatory because it is nothing more than the perpetuation of antiquated "gender stereotypes."[64] The statement that marriage is the union of one man and one woman says nothing about "roles" to be played by the respective sexes. Furthermore, since marriage is defined as the union of one man and one woman even in matriarchal societies, this particular theme cannot be considered as anything more than rhetoric. When viewed in light of the legal, sociological, anthropological and historical background of the institution of marriage it becomes clear that Plaintiffs' and Amici's claim is a house of cards built upon shifting sand.

Amici claim that California's definition of marriage as the union of one

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[63] That is true regardless of the number of people who profess to be homosexual, as discussed by Amici M.V. Lee Badgett and Gary J. Gates. Brief of Amici Curiae M.V. Lee Badgett and Gary J. Gates, at p. 3. Furthermore, as Amici JONAH and PFOX point out, the definitions of homosexuality differ so much that the number of homosexuals in California can range from 514,531 to 1,816,236 depending upon how the term is defined. Brief of Amici Curiae JONAH, PFOX, et. al, at p. 6.

[64] Brief of Amici Concerned with Women's Rights, at p. 20.

man and one woman was enacted with the discriminatory purpose of reinforcing "sex-based stereotypes regarding the roles of men and women in marriage and parenting."[65] They base this extraordinary statement on a single comment made in the Legislature in 1977 prior to passage of the bill that added "man" and "woman" to what is now Family Code §300.[66] Based upon that single comment about the historic roles of husband and wife, Amici imagine what they call a "legal framework for, and state-sanctioned reinforcement of, conventional gender norms."[67]

Amici claim that statements regarding the benefits of children being raised by their mother and father are nothing more than "deep-seated stereotypes regarding male and female characteristics that are properly condemned as sex discrimination."[68] In particular, Amici claim that in defining marriage as the union of one man and one woman "the state perpetuates the insult that mothers are unable to teach 'intelligence" or 'problem-solving skills' and that fathers cannot provide 'comforting' or 'empathetic' love to their children – and perpetuates the absurd proposition that, even if these

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65 *Id.* at p. 16.

66 *See id.,* at p. 18.

67 *Id.* at p. 20.

68 *Id.* at p. 28.

stereotypes were true, prohibiting same sex couples from marrying would have a favorable influence on child welfare."[69] Amici Matrimonial Lawyers similarly claim that the statement "it is better, other things being equal, for children to grow up with both a mother and a father," somehow offends the "public policies of California, which does not discriminate on the basis of sex or sex-roles in the determination of parentage or child custody."[70]

Amici do not offer any substantiation for their claim that simply defining marriage as the union of one man and one woman communicates discriminatory stereotypical gender norms that violate California public policy. Amici's conclusions are particularly disingenuous in light of this Court's holding that '**[t]he joining of the man and woman in marriage** is at once 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. Notably, *Marvin* was decided in 1976, one year before the Legislature enacted the 1977 bill that added "man" and "woman" to Family Code §300. Therefore, the addition of "man" and "woman" to Family Code §300 was not the act of a bigoted Legislature bent on discriminating against homosexuals, as Amici claim, but was a legislative confirmation of what this Court had

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[69] *Id.*

[70] Brief of Amici Curiae Matrimonial Lawyers, et. al, at p. 27.

already determined was the public policy of California. This Court confirmed the continuing validity of the definition in *Elden v. Sheldon* (1988) 46 Cal.3d 267, 274-275. *Elden* was decided after *In re Marriage of Carney* (1979) 34 Cal.3d 725, the case Amici cite as reflecting the public policy against sex-role discrimination. Since this Court declared in *Carney* that there could be no discrimination on the basis of sex roles, then later held in *Elden* that marriage is the union of one man and one woman, the definition of marriage as the union of one man and one woman cannot be state-sanctioned reinforcement of impermissible sex role stereotypes.[71]

Plaintiffs' and their Amici's statements to the contrary are nothing more than opinion and conjecture. As the Kmiec Amici state, "[i]t strains credulity to suggest that the virtually universal understanding of marriage, across all social, ethnic and historic lines, is the product of gender stereotypes which were articulated by the California Legislature in 1977."[72] In fact, as Defendants' Amici demonstrate, defining marriage as the union of one man and one woman actually fosters sex equality in parenting.[73]

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[71] When presented with a similar argument by same-sex "marriage" proponents, the Maryland Court of Appeals concluded that "the distinction drawn by [the marriage statute] in the present case is not based on this sort of archaic stereotyping." *Conaway v. Deane* (Md. 2007) 932 A.2d 571, 600 n 28.

[72] Brief of Amici Curiae Kmiec, et al., at p. 23.

[73] *Id.* at p. 25.

> The very purpose of marriage is to create substantially greater equality of parenting between men and women (getting fathers as well as mothers for children) and thus reducing the likelihood that women as a class will unfairly bear the high and gendered costs of childbearing disproportionately.[74]

"In one sense, nature itself discriminates in the conception, birth and raising of children. Marriage serves a compelling interest, mitigating the effects of this biological inequity,"[75] in keeping with this Court's finding that the state has a compelling interest in eradicating sex-based discrimination. *See Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 543 (acknowledging that the Legislature has a compelling interest in seeking to reduce the inequitable financial burden of health care on women). "Marriage thus attempts to create a substantially greater equality in distributing parenting burdens between men and women than nature alone sustains."[76]

Anthropological studies of human social interaction confirm that defining marriage as the union of one man and one woman is not the manifestation of archaic sex role stereotypes. The primary rule in human societies is "for every child, a mother *and* a father."[77] That rule is manifested

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[74] *Id.*

[75] *Id.*

[76] *Id.* at 26.

[77] David Blankenhorn, THE FUTURE OF MARRIAGE 85 (2007 Encounter Books).

through the institution of marriage – the union of a man and a woman – even in societies guided by mother-right, societies with permissive sexual codes and societies in which the father is viewed as a biological stranger to the child.[78]

> The nuclear family is 'universal to all known human societies' and contains two core features. The first is a mother loving and caring for her child. The second is that the mother has 'a special relationship to a man outside her descent groups who is sociologically the 'father' of the child, and that this relationship is the focus of the 'legitimacy of the child, of his referential status in the larger kinship system.[79]

Therefore, contrary to Plaintiffs' and their Amici's speculative conclusions, defining marriage as the union of one man and one woman is not state-sanctioned perpetuation of sex-role stereotypes, but is the universally established definition of an institution that "addresses the biological and social realities that uniquely pertain to intimate male-female relationships and the children they produce."[80] "Plaintiffs do not have an individual constitutional right to rewrite the common meaning of words, on the grounds they find the way the public uses them underinclusive and experience psychic harm therefrom."[81] "An individual cannot have a unilateral constitutional right to

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[78] *Id.* at pp. 86-87.

[79] *Id.* at 87.

[80] Brief of Amici Curiae Latter-Day Saints, et. al at p. 5.

[81] Brief of Amici Curiae Law Professors, at p. 19.

transform the shared public meaning of a word."[82]

V. DEFINING MARRIAGE AS THE UNION OF ONE MAN AND ONE WOMAN DOES NOT EVEN ADDRESS, LET ALONE DISCRIMINATE ON THE BASIS OF SEXUAL ORIENTATION.

Amici supporting Plaintiffs echo Plaintiffs' argument that defining marriage as the union of one man and one woman impermissibly discriminates against homosexuals. Amici employ the same pejorative terms as do Plaintiffs, referring to the definition of marriage as an "exclusion" or a "ban." However, Amici further claim that defining marriage as the union of one man and one woman is state-sponsored segregation based upon a "structural stigma" against homosexuals.[83] According to Plaintiffs' Amici, defining marriage as the union of one man and one woman is nothing more than the manifestation of an historical animosity toward homosexuals and an expression of a popular will motivated by "a simple prejudice against gays and lesbians."[84] In fact, as Defendants' Amici demonstrate, defining marriage as the union of one man and one woman is just that – a definition – born not of animosity, prejudice or a desire to exclude, but of the universal understanding of the nature of human

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[82] *Id.* at p. 20.

[83] Brief of Amici Curiae American Psychological Association, American Psychiatric Association, et. al. ("APA Amici") at p. 43.

[84] Brief of Amici Cities and Counties, at pp. 14, 29.

reproduction and relationships.[85]

A. Plaintiffs' Amici Improperly Characterize The Definition Of Marriage As An Exclusionary Rule Born of Animus.

By adopting Plaintiffs' characterization of the definition of marriage as a "marriage exclusion" or "marriage ban,"Plaintiffs' Amici can simultaneously argue that homosexuals should be permitted to participate in the universal institution of marriage and that the institution must be razed and reconstructed, but deny that they are seeking to redefine marriage.

Plaintiffs' Amici claim that the Legislature "deliberately imposed marriage discrimination against same-sex couples" when "one man and one woman" was added to what is now Family Code §300.[86] Amici Cities and Counties claim that defining marriage as the union of one man and one woman does not advance a legitimate governmental interest because it is based "solely upon a desire to harm homosexuals as a politically impossible group."[87] Amici APA claim that "California's prohibition on marriage by same-sex couples is, by definition, an instance of structural stigma. It conveys the State's judgment

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[85] Brief of Amicus Curiae National Legal Foundation, at p. 7; Brief of Amicus Curiae California Ethnic Religious Organizations for Marriage ("CEROM"), at p. 10, Brief of Amici Curiae Law Professors, at p. 19.

[86] Brief of Amici Curiae Asian American Bar Association of the Greater Bay Area and 62 Asian Pacific American Organizations, at p. 32.

[87] Brief of Amici Cities and Counties, at p. 11.

that, in the realm of intimate relationships, a same-sex couple possesses an 'undesired differentness' and is inherently less deserving of society's full recognition through the status of civil marriage than are heterosexual couples."[88] Amici make these claims while also asserting that marriage is a fundamental right and a social institution of profound importance, apparently unaware or hoping that this Court is unaware of the inherent contradiction in their positions.

As discussed more fully above, the Legislature's action in adding "one man and one woman" to Family Code §300 in 1977 was not a deliberate act of state-sanctioned bigotry akin to the adoption of anti-miscegenation laws decades earlier. One year before the 1977 legislative action this Court confirmed that marriage is the "joining of a man and a woman." *Marvin v. Marvin* (1976) 18 Cal.3d 660, 684. Plaintiffs' Amici cannot reconcile the fact that the Legislature merely confirmed what this Court had stated was the law in *Marvin* with Amici's claim that defining marriage as the union of one man and one woman was a deliberate act of state-sponsored discrimination. Are Amici claiming that this Court was acting out of animus toward homosexuals when it decided *Marvin* or twelve years later when it decided *Elden v. Sheldon*?

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[88] Brief of Amici APA et. al., at p. 43.

Amici also cannot overcome the fact that California's definition of marriage as the union of one man and one woman is the universally accepted definition of the fundamental social institution of marriage. By denigrating Family Code §300, Plaintiffs' Amici are denigrating the very institution to which they seek admission. Defendants' Amici demonstrate the contradiction inherent in Plaintiffs' Amici's positions.

B. As Defendants' Amici Properly Demonstrate The Definition Of Marriage Is Just That – A Definition – And As Such Necessarily Means That Certain People Qualify And Others Do Not.

Amicus National Legal Foundation ("NLF") explains that "prohibiting same-sex marriage does not constitute discrimination; rather, such prohibition simply implies that definitions matter. *By definition*, same-sex unions cannot be marriages."[89] NLF demonstrates that the definition of marriage is "much more than a relatively meaningless semantic distinction" by using an analogy from chemistry.[90] For millennia, people have known sodium chloride as salt, and chemists have established that a molecule of salt is made up of the union of one atom of sodium and one atom of chlorine.[91] Two chlorine atoms can

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[89] Brief of Amicus Curiae National Legal Foundation, at p. 7 (emphasis in original).

[90] *Id.* at p. 5.

[91] *Id.*

join and two sodium atoms can join, but those unions are not and can never be salt; (*i.e.*, sodium chloride), even if people call them "salt."[92] "Just as the union of one atom of sodium and one atom of chlorine has a very specific outcome, so the union of one man and one woman has a very specific outcome."[93] Therefore, reservation of the term "marriage" to the union of one man and one woman is not an arbitrary exclusion born of animus or an act of discrimination, but is simply utilization of the basic system of verbal communication by which human beings convey meaning.

Just as the word "salt" has been used for millennia to describe the union of an atom of sodium and an atom of chlorine, so "marriage" has been used for millennia to describe the union of a man and a woman. Consequently, "any effort to portray California's historical understanding of marriage as rooted in bigotry would be deeply inaccurate and profoundly unfair. The institution of male-female marriage has its own venerable pedigree intended from time immemorial to address both biological and social realities."[94] The legislative history of Family Code §300 does not evince a desire to stigmatize, but describes "a powerful desire to respect the common meaning of the word

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92 *Id.*

93 *Id.*

94 Brief of Amici Curiae Latter-day Saints, et. al, at p. 19.

"marriage."[95] That common meaning is what makes marriage a foundational social institution and is what dictates that same-sex unions cannot be marriages. Same-sex couples cannot compel the state to grant them admission into the marriage institution without de-constructing that institution.

VI. THIS COURT SHOULD REJECT PLAINTIFFS' AMICI'S PLEAS TO PROSELYTIZE ON BEHALF OF SAME-SEX COUPLES AND CONVERT THE IMPETUOUS MINDS OF THE PEOPLE OF CALIFORNIA.

A number of Plaintiffs' Amici, including Boalt Hall Professor Jesse Choper, urge this Court to take on the role of preacher and convert the people of California to the idea of same-sex "marriage" by imposing the will of same-sex "marriage" advocates on the rest of California.[96] Professor Choper and others assure the Court that if it imposes the will of same-sex "marriage" advocates onto everyone, the people of California will "get over it" and soon see the error of their ways.[97] Even if they do not, he says, it is unlikely that they will be able to muster sufficient support to re-instate the institution of marriage as the union of one man and one woman.[98] Professor Choper and other Amici are asking this Court to abandon the principles of a democratic republic and

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[95] Brief of Amici Curiae Law Professors, at p. 19.

[96] Brief of Amicus Curiae Professor Jesse Choper, at p. 6.

[97] *Id.*

[98] *Id.*

create a judicial oligarchy. This Court must decline that invitation.

Professor Choper tells this court that "it is not appropriate for courts to take political considerations into account" when undertaking judicial review, but then says that the Court must do just that to support the political agenda of same-sex couples.[99]

> It cannot be forgotten that the people, albeit sometimes discontentedly, usually heed judicial appeals to conscience and selflessness; a high court's message can have a proselytizing and sobering effect, converting an impetuous popular mind into one more receptive to reason. Unconstitutional policies invalidated by court rulings often cannot muster sufficient political backing for reinstatement, even if they may have originally enjoyed popular support for enactment.[100]

In other words, the 4.6 million Californians who voted for Proposition 22 were acting impetuously and unreasonably and must be taught a lesson. According to Professor Choper, it is those who support same-sex "marriage" who are acting out of conscience and selflessness and who must prevail on this issue. The minds of those who oppose same-sex "marriage" must be re-programmed to be more receptive to "reason," as defined by same-sex "marriage" proponents, he says. According to Professor Choper, this re-programming will be successful because those who believe that marriage should be defined as the union of one man and one woman will not likely be able to win again at the

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[99] *Id.* at p. 5.

[100] *Id.* at p. 6.

ballot box.

Amicus San Francisco Bar Association shows similar disdain for the people of California when it argues that "[j]ust as they have accepted and even embraced, other decisions of this Court, and as same sex partners are given full legal rights, years from now the majority of Californians will look back and question why same sex marriage was once controversial."[101] Similarly, Amici Legislators claim that California's domestic partnerships have been "a success" and are "accepted by Californians," so same-sex "marriage" will be too.[102]

Amici Council for Secular Humanism, et al. go so far as to say that the will or opinion of even an overwhelming majority of Californians is "irrelevant" when it comes to preventing "religious-based laws from officially discriminating against same-sex couples."[103] Echoing Professor Choper's call for creation of a judicial oligarchy, the Humanists declare that "it is not up to popular majorities and legislative bodies to determine the extent to which society will base its laws on religion."[104] They imply that it is up to this Court

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[101] Brief of Amicus Curiae San Francisco Bar Association, at p. 3.

[102] Brief of Amici Curiae Legislators, at p. 22.

[103] Brief of Amici Curiae Council for Secular Humanism, et. al., at pp. 23-24.

[104] *Id.*

to make that determination, apparently choosing to ignore the concept of separation of powers, or even the preambles to the United States and California Constitutions, which begin "We the people," not "We the judiciary." U.S. Const. pmbl; Cal. Const. pmbl.[105]

Amici's claims are even more egregious in light of Art. 4, §1 of the California Constitution, in which "the people reserve to themselves the powers of initiative and referendum." This Court has said that "[t]he right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter." *McFadden v. Jordan* (1948) 32 Cal.2d 330, 332 [196 P.2d 787]. When a majority of California voters enacted what is now Family Code §308.5, one of the statutes being challenged in this case, they were exercising this precious right. Amici are now asking this Court to not only abandon its commitment to zealously protect that right, but to actually discard the right as "irrelevant." Remarkably, Amicus

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[105] The United States Constitution's preamble reads: "We the people of the United States, in order to form a more perfect union, establish justice insure domestic tranquility, provide for the common defense, promote the general welfare and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America." California's preamble reads: "We, the People of the State of California, grateful to Almighty God for our freedom, in order to secure and perpetuate its blessings, do establish this Constitution."

SPLC refers to voters' approval of Proposition 22 as a "tyranny of the majority."[106] However, SPLC does not adopt that terminology for the Legislature's approval of a same-sex "marriage" statute against the express will of the people and in spite of a previous veto by Governor Schwarzenegger. That selective use of political rhetoric demonstrates that although SPLC claims that "deep personal feelings" should not be permitted to cloud the constitutional issue, SPLC is permitting its "personal feelings" about same-sex couples to cloud the discussion.

As Defendants' Amicus Judicial Watch states, the concept of separation of powers in both the United States and California constitutions means that the courts should not adopt Plaintiffs' perspective and become a "super-legislature." [107] As Justice Mosk said, the judiciary's authority "is only a negative – never an affirmative – force. It cannot create, it cannot initiate, it cannot put into action any governmental policy of any kind." *Kopp v. Fair Political Practices Commission* (1995) 11 Cal. 4th 607, 673 (Mosk, J. concurring).

That is what Plaintiffs and their Amici are asking this Court to do – create a new right to same-sex "marriage." Since long before California

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[106] Brief of Amicus Curiae SPLC, at p. 12.

[107] Brief of Amicus Curiae Judicial Watch, at pp. 5-6.

became a state marriage has been universally defined as the union of one man and one woman, not the union of any people who love each other. If same-sex couples are permitted to "marry," then marriage would no longer be the universal social institution it has been for millennia. Instead, there would be a relationship called "marriage" in California that is a union of people who love each other, and the universal social institution of marriage everywhere else (except in Massachusetts). This Court would be creating a new legal entity and implementing a new governmental policy in direct contravention of the powers granted to it under the Constitution.

This Court must decline Plaintiffs' and their Amici's invitation to become the new social engineer for California. Instead, this Court should continue to zealously protect the rights of initiative and referendum by upholding the definition of marriage as one man and one woman.[108]

CONCLUSION

Marriage is not a lump of clay to be re-molded to accommodate

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[108] This argument also applies to the arguments raised by Amici Curiae Out & Equal Workplace Advocates, et. al., who ask that this Court become a social engineer for the sake of making California more attractive to potential homosexual employees. *See Brief of Amici Curiae Out & Equal, et. al.*, at p. 2. In addition, the rights of initiative and referendum reserved by the people mean that the California Constitution requires a different statutory analysis than does even the United States Constitution, and certainly different from any foreign constitutions that Amici might wish that this Court emulate. *See* Brief of Amici Curiae Professors of International Law, at p. 3.

changing social mores and the desires of political interest groups. It is a universal social institution that this Court has consistently recognized is the very foundation of society. For millennia, marriage has been defined in virtually every human society as the union of one man and one woman. This is true not only in Western countries or what Plaintiffs might call patriarchal societies, but also in matriarchal societies and even in cultures where the father is not believed to be biologically related to the child. The definition of marriage as the union of one man and one woman has survived millennia of social and cultural change because it acknowledges the biological and social truths about human reproduction and child-rearing.

This Court should deny Plaintiffs' challenge to the marriage laws and uphold the Court of Appeal's finding that defining marriage as the union of one man and one woman does not violate the California Constitution.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply Brief has been prepared using proportionately double-spaced 13 point Times New Roman font. According to the "word count" feature of WordPerfect, which was used to prepare this document, the total number of words including footnotes but excluding the Table of Contents, Table of Authorities and this Certificate, is 11,778 words.

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

Executed on November 9, 2007 at Lynchburg, Virginia.

_____
Mary E. McAlister

PROOF OF SERVICE

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

On November 9, 2007, I served the Brief in Response to Amicus Curiae Briefs on the interested parties in this action in the manner indicated below:

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

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct; that this declaration is executed on November 9, 2007, in Lynchburg, Virginia.

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