Case No. S147999

IN THE SUPREME COURT OF THE STATE 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

RESPONDENTS' CONSOLIDATED REPLY BRIEF ON THE MERITS

STEPHEN V. BOMSE (BAR NO. 40686)
CHRISTOPHER F. STOLL (BAR NO. 179046)
DAVID J. SIMON (BAR NO. 241501)
HELLER EHRMAN LLP
333 Bush Street
San Francisco, CA 94104-2878
T: (415) 772-6000 / F: (415) 772-6268

SHANNON MINTER (BAR NO. 168907)
VANESSA H. EISEMANN (BAR NO. 210478)
MELANIE ROWEN (BAR NO. 233041)
CATHERINE SAKIMURA (BAR NO. 246463)
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market Street, Suite 370
San Francisco, CA 94102
T: (415) 392-6257 / F: (415) 392-8442

Additional Counsel Listed on Next Page:
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
ACLU FOUNDATION OF NORTHERN CALIFORNIA
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
LAW OFFICE OF DAVID C. CODELL

Attorneys for Respondents Joshua Rymer and Tim Frazer, et al. in No. A110451; Respondent Equality California in No. A110450; Respondent Del Martin and Phyllis Lyon, et al. in Nos. A110651 and A110652

Additional Attorneys for

Respondents 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, and
Phyllis Lyon and Del Martin, Our Family Coalition, and
Equality California in No. A110451;

Respondent Equality California in No. A110450; and

Respondents 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 in Nos. A110651 and A110652

JON W. DAVIDSON (BAR NO. 89301)
JENNIFER C. PIZER (BAR NO. 152327)
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
3325 Wilshire Boulevard, Suite 1300
Los Angeles, CA 90010
T: (213) 382-7600 / F: (213) 351-6050

PETER J. ELIASBERG (BAR NO. 189110)
CLARE PASTORE (BAR NO. 135933)
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1616 Beverly Boulevard
Los Angeles, CA 90026
T: (213) 977-9500 / F: (213) 250-3919

TAMARA LANGE (BAR NO. 177949)
ALAN L. SCHLOSSER (BAR NO. 49957)
ACLU FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, CA 94111
T: (415) 621-2493 / F: (415) 255-8437

DAVID C. CODELL (BAR NO. 200965)
LAW OFFICE OF DAVID C. CODELL
9200 Sunset Boulevard, Penthouse Two
Los Angeles, CA 90069
T: (310) 273-0306 / F: (310) 273-0307

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Statutes and Legislative Materials

INTRODUCTION

These cases ask, in the most direct and profound sense, whether the California Constitution embraces lesbians and gay men as equal citizens who are entitled to the dignity of full membership and participation in society. The present litigation is one of several efforts brought in state courts around the country in which same-sex couples have challenged the constitutionality of state laws that prevent lesbians and gay men from marrying. These cases have reached varying conclusions. Unlike some of those other states, however, California already has recognized the importance of providing same-sex couples with many of the tangible benefits provided to married couples and has acknowledged that the California Constitution requires an end to discrimination based on sex and sexual orientation in its domestic relations law. It is thus not surprising that, though defending the exclusion of same-sex couples from marriage, the Attorney General (hereafter State) and Governor Schwarzenegger (hereafter the Governor) have not embraced many of the demeaning stereotypes that have been the hallmarks of most of the opposition to same-sex couples marrying. Respondents appreciate these important steps.

Nevertheless, the recently transformed backdrop of California law puts into sharp relief what is at stake here. Marriage is not simply a bundle of legal entitlements. It is about something far more fundamental, profound, and transcendent. Domestic partnerships do not and cannot provide what marriage affords, and that is why Respondents have maintained this litigation and why others have resisted it fiercely.

Marriage is a cherished status from which many people strongly wish to exclude lesbian and gay couples for reasons that have nothing to do

with the ability of such couples to form lasting commitments and strong families and everything to do with some people's, perhaps even the majority's, fervent desire not to concede that lesbian and gay couples and their families are equal to heterosexual couples and their families. California's Constitution, however, guarantees "equal protection of the laws" to everyone; our respected charter does not promise only "substantially similar" or "virtually equal" protection. In the recent debate about whether same-sex couples may be relegated to domestic partnership and excluded from marriage, "parallel" apparently has become the new "separate," but the history of our nation leaves no doubt that anything short of equal is *not* equal.

If the California Constitution does not provide lesbians and gay men with the right to marry, then it will have failed them in the profoundest possible respects. It will tell them that they are not entitled to have their love and their commitment ratified by the state except in a pale simulacrum of marriage, known as domestic partnerships – a status that is not merely separate, but inexorably inferior in every way that matters most to them as human beings.

These cases present an opportunity similar to that presented to this Court in *Perez v. Sharp* (1948) 32 Cal.2d 711 and to the United States Supreme Court in *Loving v. Virginia* (1967) 388 U.S. 1: to reject distortions of legal doctrine based on arguments about purported "equal application" of discriminatory measures – and to face head on – relying on the settled principles of our most revered constitutional jurisprudence – the blatant discrimination that the marriage statutes continue to accomplish. Now that Respondents' constitutional claims are squarely before it, this Court should remedy that discrimination now, so that another generation of lesbian and gay Californians is not deprived of the joys, comforts, and dignity that marriage alone can provide.

ARGUMENT

I. THIS COURT SHOULD SUBJECT THE CHALLENGED MARRIAGE RESTRICTION TO SEARCHING CONSTITUTIONAL REVIEW.

In an extraordinary plea for judicial abdication, the State and other Appellants assert that this Court should not engage in a searching constitutional analysis of the challenged restriction on marriage, but instead should defer the question of whether California must to permit lesbian and gay couples to marry to the political process. Appellants cloak this argument in the garments of "judicial restraint" and "prudence"; however, they do not assert that this case is non-justiciable. To the contrary, Appellants ask this Court, as a matter of "deference" to the legislative branch, to *affirm the constitutionality of the marriage statutes* so that the issue of marriage by couples of the same sex can be left for the political branches to deal with in whatever manner and upon whatever timetable those branches may deem appropriate. This argument is not so much a call for judicial restraint as a doctrinally insupportable plea for this Court to refrain from discharging (or to approach with less than full vigor) its obligation to interpret and apply California's Constitution — a duty that is the very essence of the judicial function and one that involves principles deeply rooted in the structure of our government and the role of the judiciary within it.

This Court has not previously shirked the obligation to decide vital constitutional questions properly before it on the ground that they involve matters of social or political sensitivity as to which many of this State's citizens may be deeply divided. There is nothing remotely unusual about the role that the judiciary is being asked to play in this case. Respondents,

who have a direct and cognizable stake in the outcome, have called upon the Court to decide an actual case and controversy involving interpretation and application of various portions of the California Constitution in accordance with established legal principles of constitutional interpretation. If the proper application of those principles calls for the ban on marriage by same-sex couples to be struck down (as Respondents have established), then neither "restraint" nor fear of adverse political reaction has any legitimate role to play in the process of the Court's adjudication of the issues before it.

To be clear, rather than suggesting that this Court should decline to exercise the judicial function at all — for example, by dismissing for lack of standing, mootness or based on other abstention principles (none of which apply here) — Appellants urge this Court to *reach* the constitutional issues and yet refrain from subjecting the challenged restriction to meaningful constitutional review. No precedents support that argument, including those to which Appellants cite.[1]

The concerns raised by Justice Frankfurter's dissenting opinion in *Baker v. Carr* (1962) 369 U.S. 186 do not have any application in this case. (See State's Answer Br. at p. 49.) Justice Frankfurter asserted that federal courts should refrain from adjudicating federal challenges to state

---

[1] Appellants' argument that this Court should affirm the validity of the marriage ban on the ground of "judicial minimalism" is based on a dangerous conflation of scholarly arguments urging courts to exercise caution in accepting certain types of sensitive cases for review in the first place with the very different – and improper – notion that courts should decide cases based on political concerns. The most preeminent constitutional scholars have roundly condemned such an approach. (See, e.g., Choper, Judicial Review And The National Political Process: A Functional Reconsideration Of The Role Of The Supreme Court (1980) p. 167 ["[T]he Court should review individual rights questions unabated by its judgment about whether a particular result will be subject to criticism, hostility, or disobedience"].)

legislative districts because, in his view, such claims raised inherently non-justiciable questions. (*Baker*, *supra*, 369 U.S. at pp. 277-278 (dis. opn. of Frankfurter, J.).) This case, however, does not involve the need to avoid "federal judicial involvement in matters traditionally left to [state] legislative policy making." (*Ibid.*) Nor does it present "the difficulty . . . of drawing on or devising judicial standards for judgment" or pose "problems of finding appropriate modes of relief." (*Ibid.*) Rather, this case simply asks this Court to determine the validity of a California statute under the California Constitution. In fact, in *Lockyer*, this Court indicated that this question *is* an appropriate one for this Court to decide in the context of a challenge to the marriage restriction brought by lesbian and gay couples who are directly affected by it. (*Lockyer v. City & County of San Francisco* (2004) 33 Cal.4th 1055, 1099 (hereafter *Lockyer*).).[2]

The State also misstates the views of Chief Justice Traynor, the author of this Court's decision in *Perez v. Sharp* (1948) 32 Cal.2d 711 (hereafter *Perez*). The State's selective quotations from the former Chief Justice's scholarship misleadingly suggest that he was reluctant to have the state's judiciary engage in a searching constitutional review of legislative actions. In fact, however, the most prominent themes in Chief Justice Traynor's legal scholarship are the need for California courts to keep pace with changing social conditions and to vigorously safeguard individual freedoms. (Traynor, *Some Open Questions On The Work Of State Appellate Courts* (1957) 24 U.Chi L.Rev. 211, 219 [writing that "the law should keep pace with the times"]; see also Traynor, *The Limits of Judicial*

---

[2] Although the State urges this Court to defer to the Legislature, the State does not argue that the constitutionality of the marriage statutes is an inherently "political question" that this Court is prohibited from addressing. Nor would it have any basis for doing so. (See, e.g., *American Federation of Labor v. Eu* (1984) 36 Cal.3d 687 [discussing the extremely narrow applicability of the "political question" doctrine].)

Creativity (1978) 29 Hastings L.J 1025, 1030 [referring to the term "'judicial activism'" as a "misbegotten catchphrase"].)[3]

Finally, the State suggests that no searching judicial review is needed because "all signs indicate that the legislative process is working to protect the rights of same-sex couples." (State's Answer Br. at p. 51.) Even if that were so, it would not justify requiring those whose *constitutional* rights are being denied to wait until the other branches of government deign to recognize them. It is factually inaccurate, as well. In fact, the constitutional questions presented by this case have brought the legislative process to an impasse. The Legislature already has determined that, in its view, as a matter of both policy and proper understanding of California's Constitution, same-sex couples should be allowed to marry. (Assem. Bill No. 849 (2005-2006 Reg. Sess.) §3, subd. (f) (hereafter AB 849) ["California's discriminatory exclusion of same-sex couples from marriage violates the California Constitution's guarantee 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 Governor

---

[3] The State's reliance on *Werner v. Southern California Associated Newspapers* (1950) 35 Cal.2d 121, is misplaced. That case involved a challenge to a cap on the damages available in defamation suits against newspapers or radio stations. This Court was loathe to "choose between conflicting policies" that protect the public's interest in a free press and the interest of individuals in deterring the press from publicizing false information, given that both such interests found express protection in the California Constitution. (*Werner, supra*, 35 Cal.2d at p. 129; see Cal. Const., art. I, § 9 ["Every citizen may freely speak, write, and publish his sentiments on all subjects, *being responsible for the abuse of that right*; and no law shall be passed to restrain or abridge the liberty of speech or of the press." (italics added)].) In contrast, this case does not involve a question of how to balance competing constitutional policies, but rather whether a statute excluding a particular class of people from marriage violates fundamental constitutional guarantees as to that class. Permitting lesbian and gay couples to marry does not implicate constitutionally protected interests of heterosexual people.

vetoed the Legislature's effort to end this exclusion, based in part on the pendency of this very litigation. (See Governor's veto message to Assem. on Assem. Bill. No. 849 (Sept. 29, 2005) Recess Journal No. 4 (2005-2006 Reg. Sess.) p. 3737-38.) As a result, California's lesbian and gay couples now confront a potential stalemate among the three co-equal branches of Californian's government. As the final arbiter of what the California Constitution means, this Court has the authority, and the responsibility, to resolve these constitutional questions.

This Court has a long and noble tradition of protecting individual liberty in compliance with the Constitution. Respondents here do not seek special favor. They seek only the Court's fair-minded, diligent application of provisions of the California Constitution, as is mandated by the abiding and foundational principles of checks and balances and separation of powers.

II. THE MARRIAGE RESTRICTION IS SUBJECT TO STRICT SCRUTINY BECAUSE IT VIOLATES THE FUNDAMENTAL RIGHT TO MARRY PROTECTED BY THE STATE CONSTITUTIONAL GUARANTEES OF PRIVACY, DUE PROCESS, AND INTIMATE ASSOCIATION.

A. Being Relegated To Domestic Partnership Rather Than Being Permitted To Marry Significantly Infringes Upon The Fundamental Privacy, Autonomy, And Associational Interests Of Persons In Same-Sex Relationships.

Appellants assert that same-sex couples do not have a fundamental right to marry under the due process, privacy or associational guarantees of the California Constitution because marriage, by definition, includes a man and a woman. But that assertion is not an argument; rather, it is a conclusion that assumes the very issue to be decided.

The essential question presented by this case is whether the constitutional right to marry may be withheld from persons who are in committed same-sex relationships and who wish to marry a beloved same-sex partner. To answer that question, it is necessary to determine what marriage means: that is, what are the constitutionally essential attributes of marriage, and do those attributes turn upon the sex of the spouses?

As an initial matter, a fundamental right typically is not defined by the identity of the parties who seek to exercise it. This core constitutional principle animated this Court's holding in *Perez* that the right to marry does not depend upon the race of the individuals seeking to exercise it. It also has informed this Court's holdings in other fundamental rights cases, as well, including those involving minors, persons with disabilities, prisoners, and so-called "non-traditional" families. (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 341-342; *Conservatorship of Valerie N.* (1985) 40 Cal.3d 143, 161-162; *Thor v. Superior Court* (1993) 5 Cal.4th 725, 744-746; *City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, 134.)

To be sure, a party's identity and circumstances may be relevant to assessing the impact of the challenged statute and the legitimacy of any competing State interests. But that is vastly different than asserting that the right, as such, is defined by the personal characteristics of the person seeking to exercise it. A categorical assertion that a lesbian or gay person's interests in marriage are qualitatively different from those of a heterosexual person entirely omits any analysis of "the nature and importance of the constitutional right at issue . . . and the degree to which the right is actually threatened by the challenged statutory scheme" (*Com. to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 274 (hereafter

Myers).).[4] Nor, contrary to Appellants' assertion, is it accurate that only women have a fundamental right to reproductive autonomy. (See, e.g., *Skinner v. State of Okla. ex rel. Williamson* (1942) 316 U.S. 535 [holding that men have a fundamental right to procreative choice]; *Myers*, *supra*, 29 Cal.3d at pp. 274-275 [explaining that, while both men and woman have a fundamental right to procreative freedom, deprivation of the right generally will have a greater impact on women because women are more directly and profoundly affected by an unwanted pregnancy].)[5]

---

[4] See also Tribe, *Lawrence v Texas: The "Fundamental Right" That Dare Not Speak Its Name* (2004) 117 Harv. L.Rev. 1893, 1955 (cautioning that fundamental rights analysis is not "an ad hoc naming game focused on identifying discrete and essentially unconnected individual rights").

[5] Respondents' claims in this litigation are founded on the California Constitution, not the United States Constitution. Respondents' citations to federal caselaw in support of their arguments are for the persuasiveness of the reasoning and are not intended to suggest that federal constitutional decisions or reasoning are binding on this Court's interpretation of California's independent constitutional provisions. Consistent with guidance that the U.S. Supreme Court has offered, Respondents respectfully request that this Court make clear in its opinion in these cases that the Court's holdings are based on independent and adequate state-law grounds so that there will be no doubt that this Court's decision in these cases is final and not potentially subject to review by the U.S. Supreme Court. (See *Michigan v. Long* (1983) 463 U.S. 1032, 1033 ["If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent state grounds, this Court will not undertake to review the decision"]; *Ohio v. Robinette* (1996) 519 U.S. 33, 44 (conc. opn. of Ginsburg, J.) ["It is incumbent on a state court, therefore, when it determines that its State's laws call for protection more complete than the Federal Constitution demands, to be clear about its ultimate reliance on state law. Similarly, a state court announcing a new legal rule arguably derived from both federal and state law can definitively render state law an adequate and independent ground for its decision by a simple declaration to that effect"].)

Respondents also wish to highlight that the Ninth Circuit recently affirmed the decision of the U.S. District Court for the Central District of California to abstain from deciding an Orange County

It also is incorrect to claim, as Proposition 22 Legal Defense and Education Fund (hereafter Fund) and Campaign for California Families (hereafter CCF) assert, that "the nature of the underlying interest that marriage protects is the procreation and raising of children" and that same-sex couples have no stake in this interest. (Fund Answer Br. at p. 36; see also Campaign Answer Br. at pp. 54-73; Fund Answer Br. at pp. 42-44) Same-sex couples have the same interest in procreation and in protecting their children as heterosexual parents.[6] (See, e.g., Assem. Bill No. 205 (2003-2004 Reg. Sess.) (hereafter AB 205); *Sharon S. v. Superior Court* (2003) 31 Cal.4th 417; *Elisa B. v. Superior Court* (2005) 37 Cal.4th 108.) Moreover, the law does not support the proposition that the fundamental right to marry is *exclusively* about procreation, to the exclusion of other equally fundamental and independent interests – including emotional support and commitment, religious expression, and sexual intimacy. (See *Turner v. Safley* (1987) 482 U.S. 78, 95-96.) Thus, even if same-sex couples did not have an equal interest in creating families and protecting their children – which as a matter of settled law and policy in California

---

couple's federal-law challenges to the California marriage statutes (challenges not joined in by any of the Respondents to this litigation) pending this Court's resolution of the state-law challenges in these Marriage Cases. (*Smelt v. County of Orange* (9th Cir. 2006) 447 F.3d 673, 678-682, 686.) Unless this Court invalidates California's marriage statutes in these Marriage Cases, that federal litigation may resume.

[6] As this Court is aware, many same-sex couples have children through adoption and assisted reproduction. Many same-sex couples are also raising children who were conceived through sexual intercourse in the course of a prior relationship. Thus, even if the purpose of marriage were to provide stability *only* for children who are born through sexual intercourse, this would not be a reason to exclude same-sex couples. More fundamentally, however, all children have an equal interest in being protected, regardless of how they were conceived or whether their parents are lesbian, gay, bisexual, or heterosexual.

they clearly do – lesbians and gay men still would have a fundamental right to marry, just as elderly persons, infertile persons, or others who cannot procreate have a fundamental right to marry.

In contrast to the Campaign and the Fund, the State appropriately concedes that marriage encompasses a range of underlying fundamental interests (not just those related to procreation). (State's Answer Br. at pp. 57-58.) The State also concedes that same-sex couples have an equal stake in "the profound human rights . . . encompassed by the shorthand phrase 'right to marry.'" (State's Answer Br. at p. 62.) Yet having made those unremarkable concessions, the State then turns the law on its head by asserting that, because the right to procreate and to sexual privacy are no longer confined exclusively to marriage, there is no fundamental right to marriage per se. (State's Answer Br. at pp. 55, 60-61, 63.) But the fact that unmarried couples possess many of the constitutionally protected interests that once were legally protected only for married persons, including the right to procreative freedom and sexual privacy, in no way detracts from the continuing vitality or importance of marriage as a unique legal and social status in which all individuals have a fundamental right to participate, if they so choose, on equal terms. (See *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 844-845 & fn. 5 (hereafter *Koebke)*; *Sharon S. v. Superior* Court, *supra*, 31 Cal.4th at p. 438; *Marvin v. Marvin* (1976) 18 Cal.3d 660, 683-684.)

The State asserts that "there is no right, benefit, privilege, or responsibility that can be accomplished by a marriage contract that cannot be accomplished by a domestic partnership," and that "all of the personal and dignity interests that have traditionally informed the right to marry have been given to same-sex couples through the Domestic Partnership Act." (State's Answer Br. at pp. 55-56.) These assertions are not merely legally erroneous but reflect a sad and demeaning attempt to divest

marriage of its emotive power and majesty.[7] Marriage is of course a legal relationship, and it is indisputably a type of contract. But to speak, or think, of marriage only in those formal terms is to drain marriage of its essence – and of the reasons marriage is protected as a fundamental liberty. A right as sterile as the one described by the State is not the right that engages the passion of people on both sides in this litigation, nor is it the way this Court should regard, or analyze, marriage in seeking to resolve the vital questions now before it.

What goes with "marriage" – as Frank Sinatra once reminded people who are now of a certain age – is "love." (Cahn & Van Huesen (1955) "Love and Marriage") That courts and lawyers are called upon to address this issue in judicial proceedings, confronting and attempting to resolve a profound legal issue, should not obscure that reality – or all that flows from it in constitutional, as well as human, terms. For the uniquely intimate bond that marriage embodies and protects is the answer to the crucial question of what marriage "means." Marriage is the formal legal recognition that the State is obliged to bestow upon people who are profoundly committed to one another through the ineffable and mystical bonds of personal attachment that have thrilled, beguiled, and occupied humankind for all time. Recognition of this essential reality is not beside the point of legal analysis. Rather, this recognition informs the fundamental question that confronts this Court: the right to marry compels the State to sanction and support a unique expression of personal

[7] In fact, as explained in Respondents' Supplemental Brief, domestic partnership falls significantly short of providing the same tangible rights and protections of marriage under state law. In this respect, domestic partnership is inferior even to civil union laws that have been enacted in some other states. (*Lewis v. Harris* (N.J. 2006) 908 A.2d 196, 219 & fn. 22 [recognizing that California's domestic partnership scheme does not provide all the rights and benefits afforded under civil union laws].)

commitment, and that personal commitment is not the exclusive province of those who love someone of a different sex.

Contrary to the State's argument, the right to marry is not simply "about freedom from governmental interference in personal relationships." (State's Answer Br. at p. 62.) It also includes an affirmative autonomy right encompassing recognition and respect for certain intimate relationships, including an affirmative right to enter into the state-sanctioned institution of civil marriage. In *Loving* and *Zablocki*, for instance, the Court did not hold that the government's constitutional obligations would be satisfied by permitting the petitioners in those cases simply to live with their chosen partners, while withholding the formal status of marriage. Rather, the Court held that they must be permitted to *marry*. (*Loving*, *supra*, 388 U.S. at p. 12 (hereafter *Loving*); *Zablocki v. Redhail* (1978) 434 U.S. 374, 386 (hereafter *Zablocki*).) In *Perez*, the relief granted by this Court was a writ requiring the County of Los Angeles to issue a marriage license – not an order permitting Andrea Perez and Sylvester Davis to conduct their personal lives as they saw fit or even to call themselves "married." (*Perez*, *supra*, 32 Cal.2d at p. 731.) Likewise, in *Turner*, the Supreme Court required the State of Wisconsin to issue marriage licenses and permit incarcerated persons to solemnize their marriages. (*Turner v. Safley*, *supra*, 482 U.S. at pp. 99-100 (hereafter *Turner*).) Likewise here, Respondents seek the right to participate in the state-sanctioned status of civil marriage.

The State's argument that domestic partnership provides the same substantive constitutional protection as marriage ignores both the public validation and the unique quality and degree of protection afforded by the *status* of marriage, as well as the personal and social value of that status to individuals. The freedom to marry is a fundamental aspect of each person's right to control his or her own "social role and personal destiny" (*American*

Academy of Pediatrics v. Lungren, *supra*, 16 Cal.4th at p. 333) and to act on his or her own "deeply held personal beliefs and core values." (*Koebke*, *supra*, 36 Cal.4th at p. 843.) Unlike their heterosexual counterparts, who are free to make choices about marriage that reflect their own authentic values and beliefs, current California law completely deprives a lesbian or gay person of that choice – and of all the aspirations, opportunities, and experiences that flow from the decision of whether and whom to marry.

Being "domestic partners" rather than spouses also limits social recognition and support, which in turn restricts the couple's ability to be seen and respected as a family in day to day interactions with others. By design, domestic partnership is a functional status for providing legal benefits to same-sex couples while withholding the unique government approbation and support conveyed by marriage. Predictably, this creates a barrier that makes it difficult for others to understand, to respect, or to see lesbian and gay men's committed relationships as similar to their own. As the Court of Appeal rightly observed, "the Legislature has not . . . . granted domestic partners the same statutes as married spouses.". (*Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 19, 30.)

Even with regard to sexual privacy, domestic partnership does not provide the same protection as marriage. To the contrary, by placing all lesbian and gay couples in a separate legal class with a separate name and status, the domestic partnership law highlights their sexual orientation and places the sexuality of those couples in a constant, unwelcome spotlight that perpetuates the invidious stereotype that same-sex relationships are primarily about sexual gratification rather than loving commitment. (See Ross, *Sex, Marriage and History: Analyzing the Continued Resistance to Same-Sex Marriage* (2002) 55 SMU L.Rev. 1657, 1672 ["Marriage offers relief from the obsession that causes the public to latch onto one part of gay lives and place leering attention on it"].)

Being excluded from marriage and consigned to domestic partnership also limits the freedom of same-sex parents to raise their children as they wish. Same-sex couples who believe that their commitment to one another should be expressed through legal marriage, and who wish to encourage their children to follow their example, are unable to do so. Parents who wish to protect their children's privacy regarding their family structure and to shelter their children, to the extent possible, from the stigma of being seen as "different" because their parents are lesbian or gay, are hampered in their ability to do so by being excluded from marriage. Rather than simply being able to refer to his or her parents as married, a child of registered domestic partners must shoulder the difficult task – which is daunting even for many adults – of explaining the concept of domestic partnership to his or her classmates, teachers, and friends. The law should not saddle any group of children with this burden. (See, e.g., *Darces* v. *Woods* (1984) 35 Cal.3d 871, 893 [laws that penalize children because of the circumstances of the child's birth, over which the child has no control, are presumptively unconstitutional].)

What, then, of "tradition"? What is enduring about the right to marry as it has been understood and defined in American constitutional law is its respect for a uniquely rich, intimate and enduring personal commitment – what often is called, necessarily in imprecise shorthand, "love." Just as marriage between individuals of different races once confounded tradition, so, too, have many other aspects of marriage changed over time. Appellants fail to explain why the particular aspect of marriage restricting it to individuals of different sexes is more essential than other features of marriage that have changed over time – such as the requirement that a woman must give up her separate legal existence when she marries or that marriage must be for life. These aspects of marriage were just as deeply rooted in history and tradition as the current requirement that

marriage must consist of a man and a woman, and yet California has eliminated them while preserving marriage as a fundamental right. (Compare *Sesler v. Montgomery* (1889) 78 Cal. 486, 487 [holding that California follows "the general common-law rule that the civil existence of the wife is merged in that of her husband"], with *Estate of Hartman* (1937) 21 Cal.App.2d 266, 269 [holding that "the common-law rule that regarded a husband and wife as a single entity and made the wife subject to the will of the husband. . . . has long since been abandoned in this state"]; Compare *Estate of Laveaga* (1904) 142 Cal. 158, 171 [holding that marriage is a union "for life"], with *In re Marriage of Dawley* (1976) 17 Cal.3d 342, 352 [holding that the validity of a premarital agreement "does not turn on whether the parties contemplated a lifelong marriage"].)

Tradition may be used to help determine whether a particular fundamental right exists, but it may not be invoked to justify exclusionary practices, however longstanding, when there are no independent or legitimate bases for the exclusion.

B. Regardless Of Whether The State Must Provide Civil Marriage, Once It Does So, It Must Do So Equally.

The State's attempt to cast doubt on the continued existence of a fundamental right to marry is not persuasive. (State's Answer Br. at pp. 55-63.) As explained above, the status of marriage provides unique protections that simply cannot be replicated by domestic partnership or any other separate status. In addition, contrary to the State's argument (State's Br. at p. 60), there is nothing "unique" about marriage simply because some restrictions on marriage are subject only to rational basis review. In *Zablocki*, the Supreme Court "reaffirm[ed] the fundamental character of the right to marry" while clarifying that not "every state regulation which relates in any way to the incidents of or prerequisites for marriage must be

subjected to rigorous scrutiny . . . . " (*Zablocki*, *supra*, 434 U.S. at p. 386.) This distinction – between laws that directly burden a fundamental right and thus are subject to strict scrutiny and laws that only indirectly burden the right and thus are subject only to rational basis review – applies to all fundamental rights. For example, while interstate travel is a fundamental right, "[i]ndirect or incidental burdens on travel resulting from otherwise lawful governmental action are not impermissible infringements . . . and . . . strict scrutiny is not required." (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1101; see also *Associated Home Builders of the Greater East Bay, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 602-603 [same].) Similarly, parents have a fundamental right to the care and custody of their children, but state actions that do "not substantially affect a parent's control over his or her child or 'inject [the state] into the private realm of the family'" are subject only to rational basis review. (*Williams v. Superior Court* (2007) 147 Cal.App.4th 36, 50 [quoting *In re Marriage of Harris* (2004) 34 Cal.4th 210, 224].)

The State also erroneously suggests that the right to marry is subject to a less exacting standard of constitutional protection than other fundamental rights because the State has plenary power to regulate marriage. While the State indeed can be said to have plenary power over marriage, it is well settled that the State must exercise that power consistently with the Constitution. (See, e.g., *Perez*, *supra*, 32 Cal.2d at p. 715.) In addition, the State's power to regulate in areas affecting other fundamental rights is comparably broad. For example, even though parental rights are fundamental, the "state has a wide range of power for limiting parental freedom" and thus "may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways." (*Prince v. Massachusetts* (1944) 321 U.S. 158, 166-167; see also *Troxel v. Granville* (2000) 530 U.S. 57, 66-69.)

Regardless of whether the fundamental right to marry requires the State to provide affirmative recognition to certain intimate relationships by establishing civil marriage as a legal institution (as Respondents contend), once it does so, it must do so equally. (*Myers*, *supra*, 29 Cal.3d pp. 256-258, 263-272 [holding that, even though the State had no obligation to fund abortions, once it decided to fund medical services for poor women who choose to bear a child, it must provide those services equally to those who choose abortion].) The right to marry is at least similar in this respect to the right to vote and the right to public education, which, if afforded, must be afforded equally. (See *Choudhry v. Free* (1976) 17 Cal.3d 660 [right to vote and to run for office]; *Serrano v. Priest* (1976) 18 Cal.3d 728 [right to equal education]; *Brown v. Bd. of Education of Topeka, Shawnee County, Kan.* (1954) 347 U.S. 483, 493 ["[Education] . . . , where the state has undertaken to provide it, is a right which must be made available to all on equal terms."].) The State cannot make access to marriage conditional upon the waiver of a constitutionally protected freedom to enter into an intimate relationship with a person of the same sex, nor can it discriminatorily withhold marriage from individuals who exercise that freedom. (*Myers*, *supra*, 29 Cal.3d pp. 256-257, 263). The current statutory scheme violates this constitutional requirement of governmental neutrality by withholding the right to marry only from those in same-sex relationships.

This requirement of neutrality is mandated by the state privacy clause itself, as well as by the guarantee of equal protection. (*Myers*, *supra*, 29 Cal.3d at p. 276 fn. 22, 284) Certainly, the marriage restriction violates equal protection because it treats the class of lesbian and gay persons differently from the class of heterosexual persons and because it expressly classifies based on sex. But the marriage restriction also violates the state privacy clause because it treats the same individual differently depending

on whether he or she exercises his or her right to marry in a manner which the government approves.

In order to sustain the constitutionality of a scheme that violates this requirement of neutrality under the California Constitution, the State must show that (1) the imposed conditions relate to the purpose of the legislation that confers the benefit, (2) the utility of imposing the conditions manifestly outweighs any resulting impairment of constitutional rights, and (3) there are no less offensive alternatives for achieving the state's objective. (*Myers*, *supra*, 29 Cal.3d at pp.257-258); see also *Long Beach City Employees Assn. v. City of Long Beach* (1986) 41 Cal.3d 937, 959.) The state cannot meet this test. First, the exclusion of same-sex couples from marriage is antithetical to the purpose of the marriage statutes to "provid[e] an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society." (*Elden v. Sheldon* (1988) 46 Cal.3d 267, 274-275; see also *Koebke*, *supra*, 36 Cal.4th at p. 844.) Second, the benefits of this restriction do not manifestly outweigh the impairment of constitutional rights. Indeed, the state has not identified *any* substantive benefits that are even allegedly served by this restriction. The only benefit the State has identified – accommodation of the majority's desire to retain the status of marriage for themselves (State's Answer Br. at pp. 36-37.) – is not a legitimate state interest. Absent a legitimate purpose, there is no permissible alternative. For the reasons described in Respondents' Opening Brief, creating a separate status for same-sex couples compounds rather than solves the constitutional problems caused by excluding same-sex couples from marriage; it is not a constitutionally adequate remedy.

III. THE MARRIAGE RESTRICTION SHOULD BE SUBJECT TO STRICT SCRUTINY BECAUSE IT DISCRIMINATES BASED ON SEXUAL ORIENTATION.

A. The Marriage Restriction Classifies Based On Sexual Orientation.

The Court of Appeal in this case and other appellate courts that have recently considered the issue have found that laws barring same-sex couples from marriage discriminate based on sexual orientation. (Opn. p. 39; see also *Hernandez v. Robles* (N.Y. 2006) 855 N.E.2d 1, 11; *Lewis v. Harris* (N.J. 2006) 908 A.2d 196, 215-217; *Andersen v. King County* (Wash. 2006) 138 P.3d 963, 974-976.) None of Appellants' arguments warrant a contrary conclusion. Appellants' principal contention is that California's marriage law does not discriminate based on sexual orientation because California permits everyone, regardless of his or her actual sexual orientation, to marry a person of the opposite sex. That contention ignores both what it means to be a lesbian or a gay man — to love a person of the same sex — and the meaning of marriage as the union of two persons in a chosen, committed, and intimate relationship. (See *Perez*, *supra*, 32 Cal.2d at p. 725 ["Human beings are bereft of worth and dignity by a doctrine that would make them . . . interchangeable"].)[8] Appellants' argument is meritless, as well as demeaning to lesbian and gay people and to marriage itself.

---

[8] In *Lawrence*, the U.S. Supreme Court rejected an argument based on the same faulty reasoning used by the Appellants here — that the Texas sodomy law did not discriminate based on sexual orientation because it barred same-sex intimacy for everyone. (*Lawrence v. Texas* (2003) 539 U.S. 558, 567 (hereafter *Lawrence*); see also *id.* at p. 583 (conc. opn. of O'Connor, J.) [explaining that prohibitions on same-sex conduct are "directed toward gay persons as a class"].)

Contrary to Appellant's arguments, the marriage statutes discriminate *on their face* based on sexual orientation even though the statutes employ the words "man" and "woman" to accomplish their discrimination, rather than the words "gay," "lesbian," or "sexual orientation." What is pertinent is the *meaning* of the marriage statutes in conjunction with the meaning of sexual orientation. By definition, the union of a man and a woman is a heterosexual relationship. A statutory restriction of marriage to such unions expressly classifies based on sexual orientation. This is so even though California's marriage law would permit a lesbian to marry a man or a gay man to marry a woman. California's marriage restriction expressly bars lesbians and gay men from marrying consistent with their sexual orientation and categorically excludes lesbian and gay *couples*.

Moreover, Appellants essentially concede that the marriage statutes have a disparate impact on lesbian and gay people and that this disparate impact was intentional. With respect to discriminatory impact, the State observes that the marriage statutes' restriction "falls virtually exclusively on gay men and lesbians." (State's Answer Br. at p. 23.) There is no warrant for the qualifier "virtually." The marriage restriction prevents all lesbian and gay people from marrying consistent with their sexual orientation. The impact of the restriction is also exclusive when viewed from the perspective of *couples*: all gay and lesbian couples are prevented from marrying, and the restriction to different-sex couples does not prevent any heterosexual couples from marrying.

Where, as here, a statute's discriminatory effect is more than "merely *disproportionate* in impact," but rather affects everyone in a class and "does not reach anyone outside that class," courts have treated the statutes in the same manner as facially discriminatory statutes without requiring a showing of discriminatory intent. (See *M.L.B. v. S.L.J.* (1996)

519 U.S. 102, 126-128 [finding equal protection violation without requiring a showing of discriminatory intent where challenged statutory sanction was "wholly contingent on one's ability to pay," and thus "appl[ied] to all indigents and d[id] not reach anyone outside that class"].) The marriage statutes' exclusive discriminatory impact on lesbian and gay couples also warrants such treatment.

In any event, Appellants have not rebutted Respondents' showing of the discriminatory intent that lay behind Family Code sections 300 and 308.5. The State misapprehends the issue in arguing that the marriage ban does not "discriminate" because it was not based on any "invidious intent." (State's Answer Br. at p. 23.) A classification need not be based on a desire to harm or punish in order to constitute "discrimination" for the purpose of equal protection review; rather, it simply must intentionally classify upon a particular basis. (*Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 833.) Even under a disparate impact standard, a litigant alleging a violation of equal protection simply must show that the government established the challenged classification "'at least in part' because of, 'not merely' in spite of, 'its adverse effects upon an identifiable group.'" (*Id.* at p. 837 [quoting *Wayte v. United States* (1985) 470 U.S. 598, 610].) Here, the Legislature amended Family Code section 300 in 1977 for the express purpose of ensuring that "homosexual" couples would be excluded. (*Lockyer*, *supra*, 33 Cal.4th at p. 1076, fn. 11.) The ballot materials for Family Code section 308.5 were similarly frank regarding that measure's purpose of ensuring that California would not treat as valid or otherwise recognize marriages of same-sex couples entered into outside California. (Respondents' Appendix, Case No. A110652, vol. I, p. 98 ["UNLESS WE PASS PROPOSITION 22, LEGAL LOOPHOLES COULD FORCE CALIFORNIA TO RECOGNIZE 'SAME-SEX MARRIAGES' PERFORMED IN OTHER STATES."].) No further showing is required.

Finally, Appellants' contentions that the challenged marriage statutes cannot be shown to have a discriminatory intent because they did not result in a substantive change in the law (State's Answer Br. at pp. 23-24; Fund's Answer Br. at p. 65) are meritless. "Discriminatory purpose" exists where a "decisionmaker . . . selected *or reaffirmed* a particular course of action" based at least in part on its impact on a particular group. (*Baluyut v. Superior Court*, *supra*, 12 Cal.4th at p. 837, italics added, internal quotation marks omitted.); see also *Personnel Administrator of Mass. v. Feeney* (1979) 442 U.S. 256, 279 [rejecting equal protection claim where "nothing in the record demonstrate[d] that [a challenged] preference for veterans was originally devised *or subsequently re-enacted* because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place . . . " (italics added)].) Moreover, Family Code section 308.5 changed how California law treats marriages entered outside California by same-sex couples. The ballot materials for Proposition 22 acknowledged that if same-sex couples were permitted to marry outside California, "California m[ight] have to recognize new kinds of marriages." (Respondents' Appendix, Case No. A110652, vol. I, p. 99.)

In sum, Appellants have offered no reason for this Court to reject the conclusion that common sense requires: the marriage statutes discriminate against lesbians and gay men on the basis of sexual orientation.

B. Laws That Classify Based On Sexual Orientation Require Strict Scrutiny.

The State concedes that a person's sexual orientation is utterly irrelevant to his or her ability to participate in and contribute to society, that lesbians and gay men have suffered an appalling history of discrimination, and that sexual orientation is immutable. (State's Answer Br. at pp. 24-

25.)[9] Under this Court's settled approach to suspect classifications, those factors should establish beyond any doubt that laws that discriminate based on sexual orientation are subject to strict scrutiny. Nonetheless, the State argues that there is no need to apply strict scrutiny to classifications based on sexual orientation because "the gay and lesbian community in California" purportedly "is . . . able to wield political power in defense of its interests." (State Answer Br. at p. 25.) As explained below, the State's attempted elevation of political powerlessness into a talismanic test for strict scrutiny would eviscerate other important components of the suspect class analysis and has no support in this Court's jurisprudence. Rather, given the history of discrimination against lesbians and gay men and the irrelevance of sexual orientation to one's ability to participate in society and family life, there is every reason for the courts to regard with suspicion – and therefore to subject to strict scrutiny – measures that classify based on sexual orientation.

This Court has explained that strict scrutiny is required when "[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 (hereafter *Bowens*) [quoting *San Antonio School Dist. v. Rodriguez* (1973) 411 U.S. 1, 28] italics added, bracketed modifications in original; internal quotation marks omitted].) The purpose of these indicia is to identify classifications that are likely to be based on invidious rather than legitimate bases, such that a court's normal deference to legislative decision making is not warranted. (*Sail'er*

[9] In light of these concessions by the State, Respondents rely on their discussion of these factors in Respondents' Opening Brief at pages 28-39.

Inn, Inc. v. Kirby (1971) 5 Cal.3d 1, 18-19 (hereafter *Sail'er Inn*).) While a group's relative lack of political power may be relevant to that assessment in a particular case, this Court has never held that it is an absolute pre-requisite, nor is there any principled or logical reason to treat it as such.[10] To the contrary, political powerlessness is only one of several considerations that logically prompt a court to regard a classification as suspect and therefore examine a measure employing such classification more closely.

For example, when legislation is based on a characteristic that "frequently bears no relation to ability to perform or contribute to society . . . courts must look closely at classifications based on that characteristic lest outdated social stereotypes result in invidious laws or practices." (*Sail'er Inn*, *supra*, 5 Cal.3d at p. 18.) Similarly, when a law targets a group that has "historically labored under severe legal and social disabilities," courts have reason to look more closely to determine whether the law imposes or perpetuates "the stigma of inferiority and second class citizenship." (*Id.* at p. 19.) In addition, while not treating immutability as a necessary factor, courts logically may consider whether a targeted characteristic is immutable, based on a recognition that disadvantaging a class of people based on a characteristic that they cannot change, especially one that is not related to ability to participate in society, violates fundamental notions of fairness. (*Id.* at p. 18; see also *Darces v. Woods*, *supra*, 35 Cal.3d at p. 893.) As this Court has recognized, each of these considerations, standing alone, constitutes a logically sufficient reason to subject a law to strict scrutiny.

---

[10] In fact, alienage is the *only* classification that either this Court or the United States Supreme Court has declared to be suspect based in significant part on a lack of political power. (See *Raffaelli v. Com. on Bar Examiners* (1972) 7 Cal.3d 288, 292 (hereafter *Raffaelli*); *Foley v. Connelie* (1978) 435 U.S. 291, 294.)

Contrary to Appellants' argument (see State's Answer Br. at pp. 29-33), California decisions after *Sail'er Inn* have not abandoned this approach or focused on political power as a necessary factor. For example, in *Bowens*, this Court found that the challenged classification did not meet *any* of the "traditional indicia of suspectness," and indicated in its discussion, as quoted above, that any of those traditional indicia of suspectness would be cause for strictly scrutinizing a classification. (*Bowens*, *supra*, 1 Cal.4th at p. 42.) In *Hansen*, while this Court concluded that nonresident taxpayers do not lack political power, it focused on this factor only because it was the sole basis of the asserted claim. (*Hansen v. City of San Buenaventura* (1986) 42 Cal.3d 1172, 1189.) In *Raffaelli,* this Court held that classifications based on alienage are suspect in part because aliens lack political power; however this Court placed greater emphasis on "the ever-present risk of prejudice" and the history of prejudice directed at "particular alien groups and aliens in general." (*Raffaelli*, *supra*, 7 Cal.3d at p. 292; see also *Purdy & Fitzpatrick v. State of California* (1969) 71 Cal.2d 566, 578-579 (hereafter *Purdy*).) The other California cases cited by Appellants likewise do not rely upon political power as a significant factor.

Appellants assert that, in order to demonstrate political powerlessness, a targeted group must be completely unable to secure any legal protections through the political process. (State's Answer Br. at pp. 30-31.) This misstates the governing standard and, were it adopted, would preclude virtually every classification that is now subject to strict scrutiny. For example, when the U.S. Supreme Court first labeled race classifications as "suspect" in 1944, there had been federal laws banning race discrimination for decades. (See, e.g., 42 U.S.C. §§ 1981, 1982.) In 1952, when this Court recognized national origin as a suspect classification (see *Fujii v. State* (1952) 38 Cal.2d 718, 730-31), and in 1969, when this Court recognized alienage as a suspect classification (see *Purdy*, *supra*, 71 Cal.2d

at p. 579), statutes already banned both forms of discrimination. (See, e.g., 42 U.S.C. § 1981; 6 C.F.R. § 957 (1941) [Exec. Order No. 8802]; *Prowd v. Gore* (1922) 57 Cal.App. 458, 461.) And, in 1971, when this Court recognized sex classifications as suspect, sex discrimination was already unlawful. (See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e; Equal Pay Act of 1963, 29 U.S.C. § 206; Title IX of the Education Amend. of 1972, 20 U.S.C. § 1681; Cal. Fair Employment & Housing Act, Stats. 1970, ch. 1508, § 2, p. 2994.) Indeed, this Court recently reaffirmed that classifications based on sex warrant strict scrutiny in the course of describing a statute as having been enacted to "serve[] the compelling state interest of eliminating gender discrimination" (*Catholic Charities of Sac., Inc. v. Superior Court* (2004) 32 Cal.4th 527, 564.) Classifications based on sex continue to require strict scrutiny despite the existence of scores of state-law measures protecting against discrimination on the basis of gender and despite women's and men's relatively equal representation in the electorate.

Clearly, "political powerlessness" does not and cannot – short of a complete revision of existing law – mean what the State claims it does. Instead, when courts consider whether a classification should be subject to strict scrutiny, courts are seeking to identify groups whose ability to participate fully and effectively in the political process is limited by insularity, prejudice, historical discrimination, or other factors. (See, e.g., *U.S. v. Carolene Products Co.* (1938) 304 U.S. 144, 152, fn. 4 [noting that prejudice is one factor that "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities"]; Karst, *The Supreme Court 1976 Term Foreword: Equal Citizenship Under The Fourteenth Amendment* (1977) 91 Harv. L.Rev. 1, 24-25 [political powerlessness must be construed broadly to include barriers based on "stigma and stereotype"].) Thus, regardless of whether or not lesbians and

gay men are considered politically powerless, laws that discriminate based on sexual orientation must be considered suspect and be subjected to strict scrutiny.

C. Sexual Orientation Bias Continues To Pervade Political Processes In California And Justifies Strict Scrutiny Of Laws That Discriminate Based On Sexual Orientation.

The State's political power argument is not only analytically flawed, but it is also divorced from the reality that sexual orientation bias continues to pervade political processes in California and present obstacles to equality for lesbian and gay Californians. The legislative gains that gay people have managed to obtain are recent, precarious, and subject to ongoing repeal efforts by opponents. For these reasons, among others, laws that discriminate based on sexual orientation should be scrutinized closely.

California's history of active, official discrimination against gay men and lesbians is long, while its record of protecting gay men and lesbians, and recognizing their families, remains brief. Starting with its first penal code in 1850, California criminalized same-sex sexual intimacy, which forced same-sex relationships underground and presented a formidable barrier to political organizing. (See Assem. Bill No. 489 (1975-1976 Reg. Sess.) [repealing sodomy laws]; Summersgill, Sodomy Laws, California (March 8, 2006) <http://www.sodomylaws.org/usa/california/california.htm> [as of August 13, 2007].) For well over a century thereafter, the state used moral turpitude laws and police raids on social and political gatherings to deter lesbian and gay people from assembling or engaging in organized political activity. (See, e.g., *Stouman v. Reilly* (1951) 37 Cal.2d 713, 716 [reversing suspension of bar's liquor license because "persons of known homosexual tendencies . . . used said premises as a meeting place"]; Berube, Coming Out Under Fire (1990) pp. 124-125

[recounting crackdowns in the 1940s on gay bars in San Francisco and San Diego]; Nakatani, *1960s-Era Judge Sparked Gay-Rights Battle That Continues Today*, S.F. Daily J. (June 13, 2006) p. 8 [describing a 1965 San Francisco police raid of a fundraising event for the Council on Religion and the Homosexual].)

A statewide bill seeking to prohibit discrimination based on sexual orientation in employment was not introduced until 1979, many years after similar legislation protecting other minority groups had been enacted. (See Assem. Bill No. 1 (1979-1980 Reg. Sess.).) For the next thirteen years, the bill repeatedly was rejected and twice vetoed, as late as 1991, before finally being enacted into law in 1992. (Assem. Bill No. 2601 (1991-1992, Reg. Sess.) [expressly adding sexual orientation to the Labor Code]; Assem. Bill No. 1, vetoed by Governor Deukmejian, 1984 (1983-1984 Reg. Sess.); Assem. Bill No. 101, vetoed by Governor Wilson (1991-1992 Reg. Sess.).)

Affirmative legal protections for same-sex couples have met with even greater resistance. Even in San Francisco, a city correctly regarded today as a beacon of tolerance for lesbians and gay men, then-Mayor Diane Feinstein vetoed the city's first effort to enact a local domestic partnership law in 1982. (See Bishop, *San Francisco Grants Recognition To Couples Who Aren't Married*, N.Y. Times (May 31, 1989) p. A17.) When San Francisco reenacted the measure in 1989, it was repealed through a popular referendum. (Zonana, *Gay Agenda Takes Beating--Even in San Francisco*, L.A. Times (Nov. 9, 1989).) At the state level, the Legislature did not enact any formal protections for same-sex couples until a statewide domestic partnership registry, which initially included only minimal protections, and went into effect in 2000. (Assem. Bill No. 26 (1999-2000 Reg. Sess.).) Although the Legislature attempted to pass a law enabling same-sex couples to marry in 2005, the Governor vetoed it. (AB 205 (2003-2004 Reg. Sess.); AB 849, vetoed by Governor, Sept. 29, 2005 (2005-2006 Reg.

Sess.).) Same-sex couples are unable to marry and do not have all of the rights and protections linked to marriage under state law. (See Respondents' Supplemental Br., response to Question 1.)

When lesbians and gay men have achieved some legislative success, they often have faced efforts to use the initiative process either to over-ride their gains or to preempt any future progress. For example, initiatives repealing sexual orientation anti-discrimination laws and/or prohibiting their future enactment were proposed or passed in Riverside and Concord, California. (See *Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal.App.4th 1013, 1029, 1031 [describing local initiative measure intended to prevent adoption of municipal sexual orientation anti-discrimination ordinance]; Note, *Constitutional Limits on Anti-Gay-Rights Initiatives* (1993) 106 Harv. L.Rev. 1905, 1916, fn. 91 (citing *Jester v. City of Concord* (Super. Ct. Contra Costa County, 1992, No. C91-05455) [striking down initiative repealing gay rights ordinance]).)[11] In 2000, California voters approved an initiative intended to prevent California from recognizing out-of-state marriages of same-sex couples from other states *just two months after the state's domestic partnership registry went into effect*. (Fam. Code § 308.5.)[12] Currently, voters have submitted language

---

[11] Nationally, similar measures have been proposed or enacted in several states as well as many municipalities. (See *Romer v. Evans* (1996) 517 U.S. 620 [after Colorado municipalities adopted measures banning anti-gay discrimination, Colorado amended its constitution to ban such protections] (hereafter *Romer*); *Equality Foundation of Greater Cincinnati, Inc. v. Cincinnati* (6th Cir. 1997) 128 F.3d 289 [city charter amendment banning non-discrimination protections for gay people]; see generally Lambda Legal, Anti-Gay Ballot Initiatives Prior to *Romer v. Evans* (undated) <http://www.lambdalegal.org/our-work/publications/antigay-ballot-initiatives.html> [as of Aug. 13, 2007].).

[12] Similar pre-emptive amendments have passed in many other states as well.

for ballot initiatives that would repeal California's laws providing protections to registered domestic partners. (See Cal. Sect. of State, Initiative Update, July 16, 2007 <http://www.sos.ca.gov/elections/elections_j_071607.htm> [as of Aug. 13, 2007].)[13]

This pattern is not new. After legislatures began to pass laws prohibiting race discrimination in the 1960s, opponents of such measures proposed, and often passed, state constitutional amendments that prohibited laws barring racial discrimination in housing. (*See Mulkey v. Reitman* (1966) 64 Cal.2d 529, 544, aff'd (1967) 387 U.S. 369; *Hunter* v. *Erickson* (1969) 393 U.S. 385.) Majoritarian efforts to repeal these protections highlighted the political vulnerability of racial minorities and the need for close judicial scrutiny of such laws. Similarly, the likelihood of further initiatives designed to roll back the gains of lesbian and gay people highlights their continued political vulnerability and the need for heightened scrutiny of laws that discriminate based on sexual orientation.[14]

The political power of lesbians and gay men is significantly limited by their small numbers (See State's Answer Br. at p. 35 [noting that same-

---

[13] See also http://ag.ca.gov/cms_pdfs/initiatives/2007-07-16_07-0020_T&S.pdf; http://ag.ca.gov/cms_pdfs/initiatives/2007-05-01_07-0014_Initiative.pdf.

[14] The State's suggestion that recognizing sexual orientation classifications as suspect might harm the gay community by prompting reverse discrimination lawsuits by heterosexuals is baseless. (State's Answer Br. at p. 36.) California has only one law that excludes some heterosexuals from a benefit that it provides to gay people: domestic partnership. Respondents agree that the domestic partnership law's exclusion of heterosexuals under the age of 62 is a sexual orientation classification that should trigger strict scrutiny and that should be remedied by permitting heterosexual couples (if they wish) to register as domestic partners. That exclusion has been justified only by the fact that heterosexuals can marry, while same-sex couples cannot. Once that inequality is removed, the exclusion of heterosexuals from registering as domestic partners would surely fail strict scrutiny.

sex couples make up 1.4% of California couples]), and by the fact that many lesbians and gay men attempt to conceal their sexual orientation in order to avoid, stigma, discrimination and violence. As this Court has recognized, these negative incentives to disclosing one's identity poses a significant barrier to effective political organizing and activity. (*Gay Law Students Assn. v. Pacific Telephone & Telegraph Co.* (1979) 24 Cal.3d 458, 488 (hereafter *Gay Law Students*); see also Calabresi, *Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)* (1991) 105 Harv. L.Rev. 80, 97-98, fn. 51 [describing lesbian and gay people as an example of "a minority [who] . . . can sometimes only engage in the political process by identifying itself in ways that are physically or economically dangerous for it"].) In addition, because of the stigma attached to being lesbian or gay, many politicians and interest groups remain reluctant to ally with lesbian and gay groups for fear of being identified as gay or gay-friendly. (See Sunstein, *Homosexuality and the Constitution* (1994) 70 Ind. L.J. 1, 8.) As a result, even were political powerlessness a requirement for strict scrutiny of laws (like the marriage restriction) that discriminate based on sexual orientation, that test is met in this case.

Finally, Respondents cannot emphasize enough the degree to which the State's argument that lesbian and gay Californians can protect their interests sufficiently through the political process rings hollow to Respondents. Of the fifteen Respondent couples submitting this brief, twelve were together prior to 2000, when the state's first paltry domestic partnership legislation went into effect. Their families' invisibility to the law is a recent experience with continuing social and economic ramifications, not simply a relic of some distant past. (Respondents' Appendix Case No. A110451, pp. 68, 87, 94, 99, 112, 116, 120, 127, 133, 141, 148; Respondents' Motion to Augment Record (dated Apr. 2, 2007),

pp. 52, 55.) Respondents Del Martin and Phyllis Lyon have been together for more than half a century, living under state laws that refused to treat them as a family for all but a handful of those years, beginning with the domestic partnership laws' modest expansion in 2002. (Assem. Bill No. 25 (2001-2002 Reg. Sess.).) By no means should the precarious legislative gains that lesbian and gay couples have made in the last few sessions of the Legislature disqualify sexual orientation from treatment as a suspect classification. The State and other Appellants have not refuted the essential points that there is no legitimate reason for the State to draw lines based on sexual orientation and that there is every reason for the courts to regard such measures with the highest level of suspicion.

IV. THE MARRIAGE RESTRICTION IS SUBJECT TO STRICT SCRUTINY BECAUSE IT FACIALLY CLASSIFIES BASED ON SEX AND IS BASED ON IMPERMISSIBLE SEX STEREOTYPES.

There is no doubt that the marriage restriction, by expressly limiting a man's chosen spouse to a woman and a woman's chosen spouse to a man, on its face limits association based on the sex of the participants. Were such a limitation present in other contexts, no one would seriously question that such a statute facially discriminates based on sex. For example, the courts would not hesitate to find sex discrimination were a statute to require courts to appoint only women to be the conservators of other women and only men to be the conservators of other men, or to require courts to give custody of girls to mothers and boys to fathers, or to insist that business partners be of the same sex.[15] Appellants' arguments that there is no sex

[15] Remarkably, the Fund contends that a statute requiring courts to give custody of male children to fathers and female children to mothers "would not likely be sex discrimination . . . ." (Fund's Answer Br. at p. 50,

discrimination apparent here because the marriage restriction applies "equally" to men and women (by limiting everyone's choice of spouse to a person of a different sex) is based on reasoning that the courts have long and soundly rejected in the context of race. This Court should not be moved by Appellants' efforts to portray Respondents' sex discrimination claim as novel or merely formalistic. It is true that other courts have strived mightily, and unconvincingly, to reject the obvious conclusion, reached by the Superior Court in this case, that the marriage restriction classifies based on sex – and that the restriction *discriminates* against individual men and women based on sex. The failure of other courts to appreciate the sex discrimination claim is a symptom and a reflection of the law's longstanding shortsightedness regarding the nature of sexual orientation and regarding the seriousness of commitment between persons of the same sex. That shortsightedness has resulted in the invisibility of same-sex couples' families to the law in nearly all respects for most of history. It is therefore not surprising that courts have attempted similarly to treat as invisible the sex discrimination that is readily apparent on the face of the statutory restriction of marriage to different-sex couples.[16]

---

fn. 25.) Such a notion is anathema to settled California law (*In re Marriage of Carney* (1979) 24 Cal.3d 725) and demonstrates how radical the notion is that a statute does not discriminate based on sex if it purportedly "equally" limits the association of both men and women.

[16] This Court's rejection of the statutory sex discrimination claim in *Gay Law Students Assn.*, *supra*, 24 Cal.3d at pp. 490-491, was based on legislative intent. The Court's characterization of the claim as "semantic" did not take the claim as seriously as warranted and was likely a reflection of its time. (Cf. *Bowers v. Hardwick* (1986) 478 U.S. 186, 194 [labeling "facetious" the notion, which is now recognized as the law of the land, that the federal Due Process Clause protects consensual intimacy between persons of the same sex], overruled by *Lawrence*, *supra*, 539 U.S. 558 (hereafter *Bowers*).)

This Court has not recognized any "equal application exception" to the requirement of strict scrutiny for laws that facially classify based on sex, and for good reason: doing so in many instances would eviscerate the right to be free from invidious sex discrimination. Appellants' argument that the marriage restriction should not be subject to strict scrutiny because it does not favor either men or women *as groups* fails to acknowledge that the California equal protection clause also protects individuals. "It is the individual who is entitled to the equal protection of the laws . . . ." (*Perez*, *supra*, 32 Cal.2d at p. 717.) Contrary to the State's argument, from the perspective of the individual, the sex-based classification in Family Code Section 300 is no more "neutral" than the race-based classifications struck down in *Loving* and *Perez*. Although the basis of the discrimination is different (sex as opposed to race discrimination), the mechanism is identical.[17]

This Court has rejected Appellants' premise that a sex-based classification is not subject to strict scrutiny under the California equal protection clause unless it favors one sex as a group over the other. In *In re Marriage of Carney*, *supra*, 24 Cal.3d at p. 736, this Court unanimously held that courts may not base custody decisions on gender stereotypes even if such stereotypes are applied "equally" to both men and women and thus do not favor either sex as a group. The trial court in *Carney* removed custody from a father based on stereotypes that a man should engage in "vigorous sporting activities with his sons . . . ." (*In re Marriage of Carney*, *supra*, 24 Cal.3d at p. 736.) This Court noted that the application of such stereotypes "cuts both ways. . . . [I]n the next case a divorced

[17] As observed by Justice Blackmun, the "parallel" between laws that barred interracial marriage and laws that target same-sex intimacy is "uncanny." (*Bowers*, *supra*, 478 U.S. at p. 210, fn. 5 (dis. opn. of Blackmun, J.)

mother . . . could be deprived of her young daughters because she is unable to participate with them in embroidery, *haute cuisine*, or the fine arts of washing and ironing." (*Id*. at p. 737, fn. 9.) Rather than finding the equal application of such stereotypes permissible, however, this Court found it self-evident that government reliance on gender stereotypes is harmful and demeaning regardless of how "equally" they are applied. (*Ibid.* ["To state the proposition is to refute it"]; see also *Arp v. Worker's Compensation Appeals Bd.* (1977) 19 Cal.3d 395, 398-399 [invalidating a statute that automatically gave a death benefit only to widows but not widowers on the ground that it "denie[d] the equal protection of the laws to *both* widowers and employed women"]; *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 34 ["Men and women alike suffer from the stereotypes perpetrated by sex-based differential treatment"].)

In *J.E.B. v. Alabama ex rel T.B.*, the U.S. Supreme Court similarly held that the government may not strike potential jurors based on sex, even though such a practice, as a whole, does not favor one sex over the other. (*J.E.B. v. Alabama ex rel T.B.* (1994) 511 U.S. 127.) The Court's ruling was not based on any concern that either women or men would be systematically disadvantaged by sex-based peremptory strikes. Instead, the Court explained that the harm caused by sex-based peremptory strikes was the government's use and reinforcement of "traditional" notions of how men and women "ought" to think in the administration of state policies. As the Court explained, "When state actors exercise peremptory challenges in reliance on gender stereotypes, they ratify and reinforce prejudicial views of the relative abilities of men and women." (*Id*. at p. 140.)

In contrast, in the cases cited by Appellants (State's Answer Br. at pp. 18-19; Governor's Answer Br. at p. 23), courts found that there was no sex discrimination not because a sex classification burdened the sexes equally, but because the challenged statutes did not contain facial

classifications based on sex. (See *Hardy v. Stumpf* (1978) 21 Cal.3d 1 [rejecting challenge to facially neutral requirement that all police officers complete a physical agility test]; *Reece v. Alcoholic Beverage Control Appeals Bd.* (1976) 64 Cal.App.3d 675 [rejecting challenge to facially neutral statute providing that the spouse of a State employee who was disqualified from holding a liquor license was also disqualified].)[18] In contrast, by stating that only a man may marry a woman and only a woman may marry a man, section 300 incorporates a sex-based classification on its face.

The State's argument that section 300 does not discriminate is also at odds with judicial treatment of similar classifications in employment and public accommodations cases, where courts consistently have recognized that, when a law or policy targets a couple for disfavored treatment because the partners either share or do not share a protected trait, the discrimination is based on that protected trait. (See, e.g., *Bob Jones Univ. v. United States* (1983) 461 U.S. 574, 580, 605 [university admission policy that permitted "unmarried Negroes to enroll" but prohibited "interracial dating and marriage" discriminated based on race even though "a ban on intermarriage or interracial dating applies to all races"]; *Watson v. Nationwide Insurance Co.* (9th Cir. 1987) 823 F.2d 360, 361-362 [finding that Caucasian woman had stated valid race discrimination claim where she alleged adverse treatment based on her marriage to an African American man]; *Parr v. Woodmen of the World Life Insurance Co.* (11th Cir. 1986) 791 F.2d 888,

[18] The Governor also cites *Miller v. Cal. Com. on the Status of Women* (1984) 151 Cal.App.3d 693, which merely reiterated the settled rule that narrowly tailored government efforts to ameliorate past discrimination do not violate equal protection. (*Id.* at pp. 699-700.) That decision has no relevance here because neither the State nor any other party has suggested that the purpose of excluding same-sex couples from marriage is to ameliorate historical discrimination against either women or anyone else.

892 ["[W]here a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race" (emphasis in original)].)[19]

The same principle applies in this case. A law that discriminates based on a person's relationship with a same-sex rather than a different-sex partner discriminates based on sex, and therefore is subject to strict scrutiny.

Moreover, Appellants have failed to refute the marriage restriction's impermissible basis in sex stereotypes. Appellants fail to acknowledge that, when the Legislature amended the marriage statute in 1977, it expressly linked the exclusion of same-sex couples to an assumption that men "typically" are the primary breadwinners and that women "typically" stay home and raise children. (See Assem. Com. on Judiciary, Digest of Assem. Bill No. 607 (1977-78 Reg. Sess.) pp. 1-2.)[20] Treating all people in a particular group as if they possess characteristics considered "typical" of people in that group, when not everyone in that group does, is the essence of stereotyping.

The Campaign and the Fund, like many other advocates who oppose marriage for same-sex couples, unabashedly invoke sex stereotypes to support their claims. The Campaign, for example, relies on Professor Lynn Wardle, who argues that the purpose of marriage is to bridge an alleged

---

[19] Courts have applied the same analysis in asylum cases as well. (See, e.g., *Baballah v. Ashcroft* (9th Cir. 2003) 367 F.3d 1067, 1077 [persecution "for marrying between races, religions, nationalities, social group memberships, or . . . political opinion is . . . persecution on account of a protected ground" (citing *Maini v. Immigration and Naturalization Service* (9th Cir. 2000) 212 F.3d 1167, 1174-1177)].)

[20] The Fund argues that this Court should disregard the legislative history. (Fund's Answer Br. at p. 55.) This Court already has determined, however, that this legislative history is relevant to determine the purpose of the bill. (*Lockyer*, *supra*, 33 Cal.4th at p. 1076, fn. 11.)

"universe of gender differences — profound and subtle, biological and cultural, psychological and genetic — associated with sexual identity." (CCF's Answer Br. at p. 33 [quoting Wardle, *The "End" of Marriage* (2006) 44 Fam. Ct. Rev. 45, 53].) According to this view, "marriage is . . . defined [not only] by [purported] sexual complementarity . . . but also by "[s]ocial complementarity," which is allegedly "evident in the different ways that a mother and father relate to the nurture of young children." (Coolidge, *Same-Sex Marriage? Baehr v. Miike and the Meaning of Marriage* (1997) 38 S.Tex. L.Rev. 1, 29.)

What in California plainly is impermissible sex stereotyping has been accepted in others jurisdictions as the justification for denying same-sex couples the right to marry. For example, a concurring opinion in the New Jersey intermediate appellate court stated that marriage is based on a "'deep logic' of gender," concluding that "the 'specialness'" of marriage derives from "its opposite-sex feature." (*Lewis v. Harris* (N.J.Super.Ct.App.Div. 2005) 875 A.2d 259, 277-278 (conc. opn. of Parrillo, J.), revd. in part *Lewis v. Harris* (N.J. 2006) 908 A.2d 196.) In New York, the high court ruled that the Legislature could exclude lesbian and gay people from marriage in part because "a child benefits from having . . . models of what both a man and a woman are like." (*Hernandez v. Robles*, *supra*, 855 N.E.2d at p. 4.) And in Washington, the high court held that barring same-sex couples from marriage is justified in part by "the complementary nature of the sexes." (*Andersen v. Kings County*, *supra*, 138 P.3d at p. 1002.)[21] This Court has rejected such stereotypical notions of

[21] Appellants repeatedly cite these out-of-state cases, as if these decisions settle the points Appellants assert. That other courts have accepted stereotypical justifications for their marriage laws, however, is no reason for California to do the same. (See, e.g., *Sail'er Inn*, *supra*, 5 Cal.3d at p. 15, fn. 12 [declining to adopt reasoning of another court permitting legislation based on sex stereotypes]; *Koire v. Metro Car Wash*, *supra*, 40

family roles. (See, e.g., *Elisa B. v. Superior Court*, *supra*, 37 Cal.4th at p. 119 ["We perceive no reason why both parents of a child cannot be women"].)

Appellants also fail to acknowledge that barring marriage by lesbian and gay couples powerfully and purposefully reinforces gender stereotypes. By barring a man from marrying another man and a woman from marrying another woman, the law reinforces the stereotypical notion that a man must not "act like a woman" by being in an intimate relationship with another man, and that female sexuality exists solely for men and that a woman should not be independent of a man.

These stereotypes conflict with this Court's settled equal protection jurisprudence and with California's longstanding public policy of eliminating official sex discrimination in all aspects of economic, political, and family life. Indeed, if accepted by this Court, arguments based on the allegedly innate and complementary differences between men and women and the purported need to "integrate" those differences through marriage would constitute an almost unimaginable reversal of decades of California equal protection and family law. (See, e.g., *In re Marriage of Schiffman* (1980) 28 Cal.3d 640, 643-644 [describing dramatic evolution of family law "to abolish outmoded [gender] distinctions in the rights of spouses and parents"]; *In re Marriage of Carney*, *supra*, 24 Cal.3d at p. 735 [holding that courts may not base custody decisions on stereotypical generalizations about what men and women are like]; *Arp v. Worker's Compensation Appeals Bd.*, *supra*, 19 Cal.3d at p. 405 [holding that laws may not be based on an "assumption that married men support their families and married women do not"].)

Cal.3d at p. 34 [same]; *Perez*, *supra*, 32 Cal.2d at p. 716 [declining to adopt reasoning of other states' court permitting laws barring inter-racial marriage].)

At one time, permitting same-sex couples to marry might have posed significant practical and legal challenges due to differences in the legal rights and obligations of husbands and wives.[22] Today, however, the rights and duties of spouses do not vary in any way based on their sex. (See Respondents' Opening Br. at pp. 43-44.) In fact, the Legislature has already determined that permitting same-sex couples to marry would not require any substantive change in the marriage laws. (AB 849, vetoed by Governor, Sept. 29, 2005 (2005-2006 Reg. Sess.) § 3, subd. (k).) The sea-change in California's policies regarding sex discrimination in marriage has already occurred. It is natural that this Court should "look to the fact of such change as a source of guidance on evolving principles of equality." (*City of Cleburne, Tex. v. Cleburne Living Center* (1985) 473 U.S. 432, 466 (con. & dis opn. of Marshall, J.).) Respondents do not seek a "revolution," as the State suggests (State's Answer Br. at p. 44), but rather an end to one of the last official impediments to full equality in marriage, now that any substantive justification for the restriction has long since ceased to exist.

V. THE MARRIAGE RESTRICTION IS SUBJECT TO STRICT SCRUTINY UNDER THE FREE EXPRESSION CLAUSE OF THE CALIFORNIA CONSTITUTION.

Appellants fail to refute the principles that, because marriage is inherently expressive (*Turner v. Safley* (1987) 482 U.S. 78, 95 (hereafter T*urner*), restrictions on access to marriage are subject to strict scrutiny under the free expression clause of the California Constitution, and that

---

[22] See, e.g., *Singer v. Hara* (Wash. 1974) 522 P.2d 1187, 1192, fn. 7 ("[I]n divorce cases . . . a commonly cited rule is that the amount of alimony to be awarded, if any, 'depends upon the needs of the wife and the ability of the husband to pay . . .' [Citations] . . . In [a same-sex relationship], there is no 'wife' and therefore there can be no marriage.")

relegation of same-sex couples to domestic partnership compounds the problem of the State's denial to same-sex couples of the unparalleled expressive opportunity of marriage because it confirms that the marriage exclusion is based on government disapproval of the message that same-sex couples would convey by marrying. (Respondents' Opening Br. at pp. 66-70.)

The Fund argues that *Turner* is inapplicable because the *Turner* court simply listed expression as one of many reasons why someone might choose to marry. (*Id.* at pp. 71-73.) The Fund's interpretation of *Turner*, however, is contradicted by the straightforward language of the opinion, which identified the expressive function of marriage as one of its most important, indeed constitutionally protected, attributes. (*Turner v. Safley*, *supra*, 482 U.S. at pp. 95-96.)

The Campaign also argues that prohibiting same-sex couples from marrying does not implicate the right to freedom of expression because it is merely a regulation of conduct that has only an incidental effect on expression. (CCF's Answer Br. at pp. 84-85 [citing *Gaudiya Vaishnava Society v. City of Monterey* (N.D. Cal. 1998) 7 F.Supp.2d 1034 (hereafter *Gaudiya*).].)

The Campaign's argument fails for several reasons. First, as stated above, the statute at issue here *does* directly address expression — the expression inherent in marriage. By permitting heterosexual couples but not lesbian and gay couples to express their commitment through marriage, the State is engaging in "discriminatory, viewpoint-based suppression of expression." (Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name* (2004) 117 Harv. L.Rev. 1893, 1949 ["[B]y denying a same-sex couple a civil marriage license . . . a state tells the couple that they should keep their love behind closed doors rather than 'flaunt' that love by proclaiming marital intentions or pronouncing

marriage vows," while simultaneously and discriminatorily encouraging the very same public expressions of commitment through marriage by heterosexual couples].)

Second, it is well settled that even a law that regulates conduct violates free speech "if *government has adopted the speech restriction because of disagreement with the message it conveys."* (*Gaudiya*, *supra*, 7 F.Supp.2d at p. 1044, internal citations and quotations omitted, italics added.) Here, the government acknowledges that the purpose of the marriage restriction is to preserve the expressive meaning and value of "marriage" as a self-reference that only different-sex couples can use:

> [T]he state provides domestic partners with all of the same rights that it affords to married couples while withholding the word "marriage" to describe their relationship. (State's Answer Br. at p. 46.)
>
> The word "marriage" has a particular meaning for millions of Californians, and that common understanding of marriage is important to them. (Governor's Answer Br. at p. 29.)

In other words, the State concedes that the purpose of the marriage exclusion is to privilege one message over another, which violates the established test articulated in *Gaudiya*.

Nevertheless, Appellants argue that, because nothing prevents same-sex couples from publicly expressing their commitment to each other or even telling others that they are "married," the marriage ban does not infringe the right to free expression. (CCF's Answer Br. at pp. 83-84; Fund's Answer Br. at p. 70; State's Answer Br. at pp. 66-67.) But a state's restraints on speech are not justified simply because alternative forms of expression are available. (See, e.g., *Huntley v. Public Utilities Com.* (1968) 69 Cal.2d 67, 77.)

Moreover, it simply is not true that "defining marriage as the union of one man and one woman does not prevent [same-sex couples] . . . from . . . being able to tell others that they are married" (CCF's Answer Br. at pp. 83-84). In legal documents or forms, when under oath or in other legally policed settings, stating that one is "married," when the state has said that a relationship is not a *marriage,* would be legally false and might be considered perjury, fraud or grounds for impeachment. Even in non-legal settings, saying that one is married when he or she is only in a registered domestic partnership is always likely to be subject to the rejoinder: "but, not really."[23]

It is also untrue that saying one is in a registered domestic partnership carries the same expressive message or power as saying that one is married.[24] A legally recognized "marriage" has unique expressive connotations that simply cannot be duplicated by registering as domestic partners or simply announcing (inaccurately) that one is married. If one asks a couple who are married whether they would feel the same having to say they are in a "registered domestic partnership," they are likely to laugh

---

[23] See Cruz, "*Just Don't Call it Marriage": The First Amendment and Marriage as an Expressive Resource* (2001) 74 S.Cal. L.Rev. 925, 934 (describing the skepticism, confusion, and "cognitive dissonance" that typically result when same-sex couples describes themselves as married based on most people's knowledge that such couples cannot legally marry).

[24] See *Cohen v. California* (1971) 403 U.S. 15, 25-26 ("[W]e cannot overlook the fact . . . that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.").

or at least respond with puzzlement. Marriage has powerful symbolic, cultural and romantic connotations and associations that domestic partnership simply does not, and never will, express.

VI. EXCLUDING SAME-SEX COUPLES FROM CIVIL MARRIAGE DOES NOT SERVE A LEGITIMATE GOVERNMENTAL PURPOSE.

California's prohibition of marriage by same-sex couples should be subject to strict scrutiny because it infringes fundamental rights and discriminates on the basis of sexual orientation and sex. The State concedes that it has no compelling interest in excluding same-sex couples from marriage. (State's Answer Br. at p. 43 [asserting that the State's interest is "important" rather than compelling].)[25] This concession is significant because if this Court finds — as constitutional principles compel — that the challenged restriction is subject to strict scrutiny, the State has conceded that it lacks a sufficient justification. The State also concedes that, in light of the importance of the interests involved and the history of discrimination against lesbian and gay people, something more than rational basis review should apply. (State's Answer Br. at p. 42.)

Respondents agree with the State that the constitutionality of the restriction on marriage must be evaluated "in light of the entire statutory

[25] The State suggests that this Court consider an intermediate level of scrutiny for classifications based on sexual orientation. (State's Answer Br. at pp. 403-43.) Even were this Court to adopt the State's proposed intermediate scrutiny for classifications based on sexual orientation, the exclusion of same-sex couples from marriage still would be subject to strict scrutiny because the exclusion discriminates based on sex and based on the fundamental right to marry and the right of privacy, as explained above. Furthermore, the State has not articulated any legitimate, rational basis for excluding same-sex couples from marriage and thus has not established that the exclusion could survive any intermediate level of scrutiny.

scheme," i.e., in light of the availability of domestic partnership. (State's Answer Br. at pp. 45-46.) But the domestic partnership statutes, rather than ameliorating the constitutional deprivations imposed by the marriage restriction, actually highlight the restriction's invalidity. The domestic partnership statutes show: (1) that as a matter of policy and law, California recognizes that same-sex couples and different-sex couples are similarly situated with regard to their need for, and entitlement to, the rights and obligations of marriage and the public purposes of marriage (AB 205 (2003-2004 Reg. Sess.) § 1, subd. (c) and *Koebke*, *supra*, 36 Cal.4th at pp. 845-46); (2) that, despite this recognition that the two groups are similarly situated with respect to the purposes of marriage, the State has created a separate legal category for same-sex couples in order to maintain a legal, government-imposed distinction between heterosexual people on the one hand and lesbians and gay men on the other; and (3) that, under the current law, same-sex couples do not have equality even with regard to the tangible rights and duties of marriage under state law, much less with regard to the important intangible protections that flow from marriage.

Even under rational basis review, there is no adequate justification for denying same-sex couples the opportunity to marry and consigning their families to a separate legal status based on the sex and sexual orientation of the partners. As explained below, Appellants have not refuted Respondents' demonstration that the State's asserted interests – tradition and deference to majority will – are not legitimate (and hence are not rational, "important," or compelling).[26]

---

[26] The Campaign and the Fund have failed to explain how the purported "state" interests they assert as justifications for excluding same-sex couples from marriage – based on an alleged interest in privileging families headed by biological heterosexual parents over all others possibly can be legitimate in light of California's express law and public policy

A. Preserving A Tradition Of Exclusion Is Not An Independent or Legitimate State Interest.

Appellants contend that the restriction in Section 300 is justified simply because it is based on a "traditional definition." (State's Answer Br. at pp. 16-17, 45 [arguing that many Californians are resistant "to the idea of changing [the]. . . historically opposite-sex nature" of marriage].) But "tradition," without any underlying rationale to support it, fails the requirement that a "classification 'must involve something more than mere characteristics which will serve to divide or identify the class.'" (*Young v. Haines* (1986) 41 Cal.3d 883, 900) (quoting *Heckler v. Conter* (1933) 187 N.E. 878, 879.) Certainly, there are many circumstances under which respect for the past and a desire to preserve valued traditions are not only legitimate, but laudable. In this case, however, the purported "tradition" the State wishes to preserve is not marriage or any affirmative tradition, but merely the *exclusion* of a particular class of Californians from marriage. An interest in maintaining such an exclusion only restates the challenged classification; it does not supply an independent purpose.[27]

---

mandating equal treatment of same-sex parents and their children. (Respondents' Opening Br. at pp. 77-79.)

[27] It does not change this analysis to assert that the State's interest is in preserving marriage for heterosexual persons, not in excluding same-sex couples – just as it would have made no difference to the analysis in *Perez* if the State had asserted that the purpose of the challenged statute was to preserve marriage for same-race couples, not to exclude interracial couples. Excluding same-sex couples from marriage and restricting marriage to different-sex couples are simply different ways of describing the same classification. (See, e.g., *Myers*, *supra*, 29 Cal.3d at p. 270, fn. 19 ["the state cannot circumvent [the requirement of equality] . . . by defining the benefit offered in a constitutionally discriminatory fashion"].)

The independence requirement is essential, for when the challenged discrimination and the asserted purpose are the same, there is no meaningful way to assess the rationality of any relationship between them. Without an independent purpose, a law becomes "a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." (*Romer*, *supra,* 517 U.S. at p. 635.)

Appellants likewise have no answer to this Court's precedents, which establish that maintaining traditional distinctions among people is never in itself a legitimate state interest. As this Court said in *Sail'r Inn*, "mere prejudice, however ancient, common or socially acceptable" cannot justify discrimination. (*Sail'er Inn*, *supra*, 5 Cal.3d at 9 [interpreting Cal. Const., art. XX, § 18].) The State asserts that the marriage restriction is legitimate because it is based on the "tangible and psychological benefits that accrue to members of a society when they respect the teachings of their predecessors." (State Answer Br. at pp. 43-44.) The obvious difficulty with this argument is that it would justify any measure, no matter how invidious or harmful, so long as it embodied a past practice. (See, e.g., *Perez*, *supra*, 32 Cal.2d at p. 727 ["the fact alone that . . . discrimination has been sanctioned by the state for so many years does not supply . . . justification."].)

Recognizing the strength of Respondents' equal protection claims, the State urges this Court to retreat from the principles announced in *Sail'r Inn* and *Perez* rather than apply their reasoning here. (State's Answer Br. at pp. 7-8, fn. 8 ["Since Justice Traynor's opinion [in *Perez*] was not signed by four justices, propositions and principles contained in it lack precedential authority."], p. 25-31 [urging retreat from *Sail'r Inn* test for strict scrutiny].) To argue that cases at the very foundation of this Court's equal protection jurisprudence should be disregarded is to admit that the

challenged restriction cannot stand under a straightforward application of the settled constitutional principles of this State.

The legitimacy of a desire to preserve the tradition of marriage for everyone — because it is valuable to all and provides important benefits to all — must be distinguished from an impermissible desire to *exclude* a class of persons from that tradition. If the State wishes to provide Californians with the tangible and psychological and social benefits that come from respecting the institution of marriage and from following in the footsteps of one's parents and grandparents, it must do so for all.[28]

B. Deference To Majority Will Also Is Not An Independent or Legitimate State Interest.

Appellants likewise fail to address this Court's precedents that mere deference to majority will is not a legitimate interest under any standard of review. Even under rational basis review, a court must find that a classification has a legitimate rationale and must "undertake a serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals." (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1191.) Appellants assert that this Court should validate a law *simply because a majority enacted it*, without any further inquiry. But, to say that the majority may deprive a minority of rights it retains for itself – simply

[28] Many of the Respondent couples wish to marry so that they can follow the tradition that their parents enjoyed and share the tradition with their own children. For example, Respondents Rachel Lederman and Alexsis Beach planned for their two sons to play a role in their wedding ceremony. (Respondents' Appendix, Case No. A110451, pp. 143-144 (hereafter RA).) Many of the Respondent couple's parents feel the same way also want their children to enjoy the tradition of marriage that they have enjoyed. For example, Judy Baker, mother of Respondent Devin Baker explained, "a mother doesn't dream about helping to plan the celebration of her child's domestic partnership registration." (RA at p. 178)

because it wishes to do so – is inconsistent with the very notion of equal protection under the law.

CONCLUSION

For the reasons set forth in this brief and Respondents' Opening 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: August 17, 2007 Respectfully submitted,

SHANNON MINTER
VANESSA EISEMANN
MELANIE ROWEN
CATHY SAKIMURA
National Center for Lesbian Rights

STEPHEN V. BOMSE
CHRISTOPHER STOLL
DAVID J. SIMON
Heller Ehrman LLP

JON W. DAVIDSON
JENNIFER C. PIZER
Lambda Legal Defense and
Education Fund, Inc.

TAMARA LANGE
ALAN L. SCHLOSSER
ACLU Foundation of Northern California

PETER J. ELIASBERG
CLARE PASTORE
ACLU Foundation of Southern California

DAVID C. CODELL
Law Office of David C. Codell

By: _____
Shannon Minter

Attorneys for Respondents Joshua Rymer and Tim Frazer, et al. in No. A110451; Respondent Equality California in No. A110450; Del Martin and Phyllis Lyon, et al. in Nos. A110652 and A110651

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 Reply Brief, including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate, is 15,576 words as calculated using the word count feature of the computer program used to prepare the brief.

Dated: August 17, 2007 Respectfully submitted,

By: _____
Vanessa Eisemann