

SUPREME COURT OF THE STATE OF CALIFORNIA

Case No. S147999

**Coordination Proceeding Special Title (Rule 1550(b))  
IN RE MARRIAGE CASES**

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**BRIEF OF AMICI CURIAE JEWS OFFERING NEW  
ALTERNATIVES TO HOMOSEXUALITY (“JONAH”), PARENTS  
AND FRIENDS OF EX-GAYS & GAYS (“PFOX”), AND  
EVERGREEN INTERNATIONAL, IN SUPPORT OF  
PROPOSITION 22 LEGAL DEFENSE AND EDUCATION FUND**

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## **INTEREST OF *AMICI CURIAE***

*Amici* are non-profit organizations with professional and personal experience in human sexuality and orientation issues.

Jews Offering New Alternatives to Homosexuality (hereafter, “JONAH”) is an international organization dedicated to educating the world-wide Jewish community about the prevention, intervention, and healing of the underlying issues causing same-sex attractions.

Parents and Friends of Ex-Gays and Gays (hereafter, “PFOX”) was founded in 1998 to provide outreach, education, and public awareness in support of the ex-gay community and families touched by homosexuality. PFOX conducts public education and community-building activities to further individual self-determination, compassion and respect for all Americans.

Evergreen International is an information and resource organization that assists individuals experiencing unwanted same-sex attractions to live lives congruent with their religious values. Evergreen holds conferences, training workshops for therapists, and informational meetings for religious leaders.

Appellants and other amici have suggested to this Court that sexual orientation is an immutable characteristic analogous to race and sex, and that gay and lesbian people therefore are a class that should trigger strict scrutiny.

JONAH, PFOX and Evergreen International offer the Court information on the current state of scientific research on the nature and origin of sexual orientation that is directly relevant to the Court’s judgment on this issue. These *amici* also

offer a very personal experience of individuals who have changed their orientation at the level of their own self-identity and behavior. These *amici* would be negatively affected by a declaration of this Court that orientation is subject to strict scrutiny as an immutable trait, for it is tantamount to a declaration by this Court that these *amici* do not exist.

## INTRODUCTION

Appellants and their *amici* argue that the law of marriage discriminates against a fixed class and should be subject to strict scrutiny because: “For the great majority of people, sexual orientation is a deeply personal characteristic that is either impossible or very difficult to change, whatever its biological or genetic basis may be.” Appellant/Respondents’ Opening Brief on the Merits at pp. 37-38.<sup>1</sup>

As experts in matters of sexual orientation, JONAH, PFOX and Evergreen International offer scientific information that is directly relevant to assessing this claim, specifically: (1) there is no scientific consensus on what homosexuality is, and the number of people who fit in the class “gay and lesbian” varies widely, depending on which definition of homosexuality is used and (2) there is no scientific consensus that homosexuality is “innate” i.e. primarily genetic in origin. In fact, the most recent studies on identical twins cast increasing doubt on genetic explanations as the primary reason for sexual orientation.

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<sup>1</sup> Appellants argue that immutability is not necessary to a suspect classification analysis, but that sexual orientation is nonetheless immutable. Respondents’ Opening Brief on the Merits at pp. 35-36.

Orientation is a complex human phenomenon uniting a person's subjective experience of sexual and/or romantic desires (which may be difficult to change for many people but not necessarily for every person) with the choice of that individual person in how to respond to his or her sexual or romantic impulses in the construction of his or her personal identity, and in the actions he or she voluntarily takes regarding sex and intimate partnership. This in itself makes orientation as a classification different than race, gender, or other categories subjected to strict scrutiny by this Court. "Orientation" has never clearly been held to be a suspect class in California or any sister state. *Hinman v. Department of Personnel Administration* (1985) 167 Cal.App.3d 516, 526; *In re Marriage Cases* (2006) 143 Cal.App.4th 873. Especially in the absence of evidence that gays and lesbian people are politically powerless and thus in need of "extraordinary protection" from the majoritarian process, this Court should not issue the novel ruling that California's marriage laws trigger strict scrutiny on the grounds that orientation is legally analogous to race or gender.

## I

### **THERE IS NO SCIENTIFIC AGREEMENT ON THE DEFINITION OF HOMOSEXUALITY.**

A "primer" endorsed by the American Psychological Association and other professional organizations, describes sexual orientation as "an enduring emotional, romantic, sexual, or affectional attraction that a person feels toward another person." (*Just the Facts About Sexual Orientation and Youth* at p. 3 (n.d.))

<http://www.apa.org/pi/lgbcfacts.pdf> [as of September 25, 2007].) The document says that “[s]exual orientation falls along a continuum. In other words, someone does not have to be exclusively homosexual or heterosexual, but can feel varying degrees of attraction for both genders.” Id. An American Psychiatric Association publication says that “[s]ome people believe that sexual orientation is innate and fixed; however, sexual orientation develops across a person’s lifetime. Individuals maybe become aware at different points in their lives that they are heterosexual, gay, lesbian, or bisexual.” (*Healthy Minds, Healthy Lives: Gay, Lesbian and Bisexual Issues* (n.d.) <http://www.healthyminds.org/glbissues.cfm> [as of September 25, 2007].)

Another APA document notes that meanings of sexual orientation vary widely and may be difficult to quantify. They include quantifiable things like “sexual behavior” but also subjective factors like “feelings” or “self concept.” (*APA Online, Answers to Your Questions About Sexual Orientation and Homosexuality* (n.d.) <http://www.apa.org/topics/orientation.html> [as of September 25, 2007].)

These descriptions reflect our view of the current state of scientific evidence: homosexuality does not describe a fixed, easily discernable class of people.

In the scientific literature there are three basic definitions of sexual orientation, based on either (a) sexual behavior, (b) sexual attraction, or (c) self-ascribed social identity. Laumann, et al., *The Social Organization of Sexuality* (1994) p. 290.

Within each category there are also significant variations. For example, if homosexuality is defined behaviorally (*e.g.* “men who have sex with men”) does

the class of gay men include any man who reports ever having sex with a man? In the last year? Laumann, et al., *The Social Organization of Sexuality*, *supra*, pp. 294-295. In the last five years? If orientation is defined instead by desire or attraction, do we use physical or romantic attraction as the primary criterion? *Id.* at p. 297. In addition, attraction typically exists on a continuum with many individuals recognizing some degree of attraction to both sexes. If a man identifies himself as a “2” or a “3” on a scale in which 1 represents “only attracted to men” and 7 represents “only attracted to women” is he gay or straight or something else? Some studies suggest that a large number of women who identify themselves as lesbian, for instance, have had a sexual relationship with at least one man in their lifetimes. Diamant, *Lesbians’ Sexual History With Men* (1999) 159 *Archives of Internal Medicine* 2730.

These are not minor variations on a theme but fundamentally different ways of understanding what homosexuality is that produce large variations in estimates of who counts as a member of this class. Unlike race, gender or other categories subject to strict scrutiny in California, the class of people who count as “gay or lesbian,” far from being fixed and easily identifiable is shifting and fluid and will increase or decrease significantly depending on the equally scientifically legitimate classifications the scholar, or the government, or the court, chooses to adopt.

The clearest definition of homosexuality is self-ascription: people are gay or lesbian if they say they are, that is, if they adopt these as social identities. But

such a definition (rooted in a voluntary act of self-identification with a social construct, that neither the State nor any outside person has the power to detect or to refute) also makes orientation fundamentally different in kind than race or gender.

Laumann and colleagues faced the difficulties of definition in the highly-regarded scholarly “Chicago Sex Survey.” Their research, the authors report,

raises quite provocative questions about the definition of homosexuality. While there is a core group (about 2.4 percent of the total men and about 1.3 percent of the total women) in our survey who define themselves as homosexual or bisexual, have same-gender partners, and express homosexual desires, there are also sizable groups who do not consider themselves to be either homosexual or bisexual but have had adult homosexual experiences or express some degree of desire. . . . [T]his preliminary analysis provides unambiguous evidence that no single number can be used to provide an accurate and valid characterization or the incidence and prevalence of homosexuality in the population at large. In sum, homosexuality is fundamentally a multidimensional phenomenon that has manifold meanings and interpretations, depending on context and purpose.”

Laumann, et al., *The Social Organization of Sexuality*, *supra*, pp. 300-301.

How much difference do varying definitions of homosexuality make?<sup>2</sup> If we use the criteria of self-identification to 2000 Census data<sup>3</sup> (and assume national rates identified in the Chicago Sex Survey apply), 339,650 men and 174,881 women in California are gay or lesbian. If we define homosexuality by sexual attraction, however, 549,624 women and 752,081 men are gay and lesbian.

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<sup>2</sup> Laumann, et al., *The Social Organization of Sexuality*, *supra*, p. 293 (reports that “2.8 percent of the men and 1.4 percent of the women” surveyed in the U.S. “reported some level of homosexuality (or bisexual) identity”).

<sup>3</sup> Reporting 12,130,354 men and 12,491,465 women over the age of 18.

Laumann, et al., *The Social Organization of Sexuality*, *supra*, p. 297. Who is gay in California? The number of men varies from 339,650 to 752,081 and the number of women from 174,881 to 549,624. Thus the class of people who count as gay and lesbian may more than quadruple or be cut by three-fourths, depending on which of the equally scientifically legitimate and commonly used definitions are employed.

## II

**AS THE COURT OF APPEALS OF MARYLAND RECENTLY HELD,  
THERE IS NO SCIENTIFIC CONSENSUS THAT SEXUAL  
ORIENTATION IS PRIMARILY A GENETIC, INNATE  
CHARACTERISTIC LIKE RACE OR SEX.**

Many people believe that homosexuality is genetic in origin, and therefore structurally similar to race or gender. Of course, genetics have a wide influence on many traits, tastes, and behaviors. As a recent article noted: “Over the last quarter century, researches have illustrated that genes influence most if not all, behaviors and traits.” Turkheimer, et. al, *Analysis and Interpretation of Twin Studies With Measured Environments* (2005) 76 *Child Development* 1217-1218. There is, however, no scientific consensus on the point that one’s sexual orientation is genetically caused, and recent scientific research and opinion is moving away from genetics as the chief explanation. As two Columbia University sociologists suggest in a recent study, the efforts to establish genetic or hormonal effects on sexual orientation have been “inconclusive at best.” Bearman & Bruckner, *Opposite-Sex Twins and Adolescent Same-Sex Attraction* (2002) 107 *American*

Journal of Sociology 1179, 1180. As two scholars recently put it, “. . . [T]he assertion that homosexuality is genetic is so reductionistic that it must be dismissed out of hand as a general principle of psychology.” Friedman and Downey, *Sexual Orientation and Psychoanalysis: Sexual Science and Clinical Practice* (2002) p. 39. While there is some evidence that male homosexuality may be influenced by prenatal factors, for women the evidence is moving in the opposite direction, e.g., Peplau & Garnets, *A New Paradigm for Understanding Women’s Sexuality and Sexual Orientation* (2000) 56 *Journal of Social Issues* 329, 332 (“there is little evidence that biological factors are a major determinant of women’s sexual orientation”); Veniegas & Conley, *Biological Research on Women’s Sexual Orientations: Evaluating the Scientific Evidence* (2000) 56 *Journal of Social Issues* 267, 277 (“there is no evidence that biology plays a major role in determining whether women are heterosexual, lesbian or bisexual”).

Identical twin studies, used to tease out genetic influence, suffer from some of the same recruitment problems that other “convenience” samples face.

Identical twins who are more alike are more likely to volunteer for identical twin registries, for example, and several early studies rely on one twin’s estimates of their other twin’s orientation, reports which have been shown to be unreliable.

Columbia professors Bearman and Bruckner note that “[a]s samples become more representative, concordance on sexual behavior, attraction, and orientation, as expected, declines.” Bearman & Bruckner, *Opposite-Sex Twins and Adolescent Same-Sex Attraction*, *supra*, p. 1180, 1184.; see also Bailey et al., *Genetic and*

*Environmental Influences on Sexual Orientation and its Correlates in an Australian Twin Sample* (2000) 78(3) *Journal of Personality and Social Psychology* 524, 533 (“[C]oncordances from prior studies were [likely] inflated because of concordance-dependent ascertainment bias. In those studies, twins deciding whether to participate in a study clearly related to homosexuality probably considered the sexual orientation of their co-twins before agreeing to participate.”).

Concordance rates in orientation among identical twins have varied considerably from one study to the next, ranging from 13 percent to 100 percent in the eight small-scale studies (ranging in size from 5 to 71 identical twin pairs in which at least one twin was homosexual) in one recent review of the literature. Hershberger, *Biological Factors in the Development of Sexual Orientation in Lesbian, Gay, and Bisexual Identities and Youth: Psychological Perspectives* (D’Augelli & Pattersons, edits., 2001) p. 40.

For example 1991 and 1993 studies, involving twin pairs recruited through gay publications, reported a concordance rate (similarity across the twins) of approximately 50 percent, which would suggest some heritable influence. Bailey et al., *Heritable Factors Influence Sexual Orientation in Women* (1993) 50 *Archives of General Psychiatry* 217; Bailey & Pillard, *A Genetic Study of Male Sexual Orientation* (1991) 48 *Archives of General Psychiatry* 1089. However, even a 50 percent concordance rate among identical twins suggests that genetic influences cannot be primary (or if one twin were gay 100 percent of other

identical twins are gay, just as 100 percent of identical twins in which one twin is black or female, the other twin is black or female). Moreover, as sociologists Bearman and Bruckner note, using common heritability estimates suggests that many voluntary social actions show signs of genetic influence. They note a study that suggests “substantial heritability for caring for tropical fish (28%), and frequency of various behaviors such as purchasing folk music in the past year (46%), chewing gum (58%), and riding a taxi (38%).” Bearman & Bruckner, *Opposite-Sex Twins and Adolescent Same-Sex Attraction*, *supra*, p. 1185, fn. 8.

Bearman and Bruckner’s own study focused on “same-sex romantic attraction” in the Add-Health study, a large, nationally representative sample of teens in school. Concordance rates for identical twins were only 6.7 percent, about the same as for fraternal twins. (7.2 percent). Bearman & Bruckner, *Opposite-Sex Twins and Adolescent Same-Sex Attraction*, *supra*, p. 1197-1198. They conclude: “[W]e find no support for genetic influences on same-sex preference net of social structural constraints. . . . Finally, we find substantial indirect evidence in support of a socialization model at the individual level.” *Id.* at p. 1199.

Let us underscore this finding: While there is not yet any scientific consensus on the origins of sexual orientation for either men or women, one of the most recent and rigorous identical twins study (using large, nationally representative data) found no evidence of any genetic influence at all.

Additionally as Janet Jakobsen, director of the Center for Research on Women at Barnard College, and Ann Pellegrini, associate professor of Religious

Studies and Performance Studies at New York University point out: “Gay men, lesbians, and bisexuals are themselves hardly in agreement as to the ‘origins’ of their sexual desires and feelings. Some would say they experience their sexuality as innate; others understand their sexual orientation as a mixture of chosen and unchosen factors; and still others narrate their sexuality as volitional, perhaps reframing their sexual preferences as a question of political preferences.” Jakobsen & Pelligrini, *Love the Sin: Sexual Regulation and the Limits of Religious Tolerance* (2004) p. 96.

These realities were recently noted by the Court of Appeals of Maryland in its decision rejecting claims that marriage should be available to same-sex couples. The court stated: “Based on the scientific and sociological evidence currently available to the public, we are unable to take judicial notice that gay, lesbian, and bisexual persons display readily-recognizable, immutable characteristics that define the group such that they may be deemed a suspect class for the purposes of determining the appropriate level of scrutiny to be accorded the statute in the present case.” *Conaway v. Deane* (Md.Ct.App., Sept. 18, 2007, No. 44) \_\_\_ Ap.2d. \_\_\_ WL 2702132 [pp. 66-67] <<http://mdcourts.gov/opinions/coa/2007/44a06.pdf>> [as of September 20, 2007]. The Maryland Court of Appeals cites to numerous studies in support of its holding on this point. *Id.* at pp. 68-69, fn. 57.

### III

#### **THERE IS LITTLE SERIOUS SCIENTIFIC QUESTION THAT INDIVIDUAL IDENTITY AS STRAIGHT, GAY OR LESBIAN CAN AND DOES CHANGE**

Moreover, research that asks individuals to rate themselves on the homosexuality continuum finds considerable flux in self-identification, with some individuals reporting they are more “gay” and some becoming less “gay” in their own estimation over time. “[W]e realize that homosexuality is not some monolithic construct one moves toward or from in a linear way; . . . We also acknowledge that changes in sexual feelings and orientation over time occur in all possible directions.” Stokes et al., *Predictors of Movement Toward Homosexuality: A Longitudinal Study of Bisexual Men* (1997) 43 *Journal of Sex Research* 304, 305; see also Baumeister, *Gender Differences in Erotic Plasticity: The Female Sex Drive as Socially Flexible and Responsive* (2000) 126 *Psychological Bulletin* 347; Peplau & Garnets, *A New Paradigm for Understanding Women’s Sexuality and Sexual Orientation* (2000) 56 *Journal of Social Issues* 329.

Lesbian self-identification appears particularly vulnerable to fluctuations over time, and scholars increasingly uncover many women who insist their lesbian self-identity is in fact a personal choice, rather than an innate constraint. Diamond & Savin-Williams, *Explaining Diversity in the Development of Same-Sex Sexuality Among Young Women* (2000) 56 *Journal of Social Issues* 297. As found by

Diamond and Savin-Williams, “. . . 50% of the respondents had changed their identity label more than once since first relinquishing their heterosexual identity.” *Id.* at p. 301. Charbonneau and Lander interviewed 30 women who had spent half their lives as heterosexuals, married, and had children and then in midlife became lesbian. Some of these women explained their lesbianism as a process of self-discovery. But a “second group of women . . . regarded their change more as a choice among several options of being lesbian, bisexual, celibate or heterosexual.” Bridges & Croteau, *Once-Married Lesbians: Facilitating Changing Life Patterns* (Nov./Dec. 1994) 73 *Journal of Counseling and Development* 134, 135 (describing Charbonneau and Lander, *Redefining Sexuality: Women Becoming Lesbian in Mid-Life* in *Lesbians at Mid-Life* (B. Sang, et al. editors, 1991) p. 35). Other studies make similar findings. See Diamond, *Development of Sexual Orientation Among Adolescent and Young Adult Women* (1998) 34 *Developmental Psychology* 1085; Rosenbluth, *Is Sexual Orientation a Matter of Choice?* (1997) 21 *Psychology of Women Quarterly* 595, 605-607; Dworkin, *Treating the Bisexual Client* (2001) 57 *Journal of Clinical Psychology* 671; Diamond, *Was It a Phase? Young Women’s Relinquishment of Lesbian/Bisexual Identities Over a 5-Year Period* (2003) 84 *Journal of Personality and Social Psychology* 352.

Recent scientific research also suggests that at least a few strongly motivated individuals can voluntarily change their orientation. Spitzer, *Can Some Gay Men and Lesbians Change Their Sexual Orientation? 200 Participants Reporting a Change from Homosexual to Heterosexual Orientation* (2003) 32 *Archives of*

Sexual Behavior 403; see also Throckmorton, *Initial Empirical and Clinical Findings Concerning the Change Process for Ex-Gays* (2002) 33 Professional Psychology: Research and Practice 242.

Society's increasing protections for gay and lesbian persons has been part of a more general process of protecting adult sexual intimacy and choices generally, and of social tolerance for diversity generally. There is no good scientific reason to short-circuit this process of social adaptation and growing commitment to gay rights by artificially elevating "orientation" to the same level of constitutional protection as race or gender, which are so different in nature than orientation as a category.

**IV**  
**RULING THAT GAYS AND LESBIANS ARE AN IMMUTABLE OPPRESSED CLASS UNNECESSARILY STIGMATIZES THE SMALL MINORITY OF CALIFORNIANS WHO HAVE CHANGED THEIR SELF-UNDERSTANDING OF THEIR ORIENTATION**

*Amici* offer here the testimony of a journalist and author, who may stand for many other individuals:

My name is David Benkof. I am the author (as David Bianco) of *Modern Jewish History for Everyone* (History For Everyone, 1997) and *Gay Essentials: Facts for Your Queer Brain* (Alyson, 1999). I am currently pursuing a Ph.d in history from New York University in New York City. I have both an undergraduate degree and a Masters Degree in Jewish history from Stanford University, and lived and worked in California for many years. I came out as a gay man at age 18.

After graduation, I started writing a "gay history" column, which I sold to gay and lesbian newspapers. Its success prompted me to start a newspaper syndicate, "the Q syndicate" which grew into the largest provider of content to the gay and lesbian press (more than 80 newspapers).

As my religious identity as a Jew became more important to me, I began to question many aspects of the way I was choosing to live, including the fact that I wasn't keeping Shabbat and I was having sex with men. After beginning to keep Shabbat, it became easier to imagine not having sex with men. After all, if God could tell me what to do on a Saturday, couldn't he also tell me what I should do with my bedroom life? On New Year's Eve in 2002, I was in Las Vegas, I had sex with a man and I said: "I'm not going to do that again." With the help of a therapist (who was very gay-friendly but was willing to help me bring my life into accord with my values), I changed my own self-understanding and behavior.

From my perspective, for this Court to rule that "orientation" is like race or gender would suggest that I was born with a category that stuck with me my whole life, and that just didn't happen. Everyone has a unique sexual and erotic universe includes what hair color one finds attractive, or whether men or women dominate one's desires. Our contemporary way of boxing sexuality into two or three orientations just isn't true across cultures. If the California Supreme Court declared homosexuality a suspect class like race or gender, they'd be saying people like me don't exist, that somehow my life story of change and choice in identity and behavior (if not always in attraction) is less real or true than another person, who shapes their identity around their dominant sexual attractions in a more direct way.

Email interview by Maggie Gallagher with David Benkof, Institute for Marriage and Public Policy, Mannassas, VA (June 20, 2007).

Scientific testimony might tell us how large or tiny this minority of people is. But people like David Benkof indisputably do exist (and indeed are testified to throughout the scientific literature, especially in the study of lesbians, noted above). It is not necessary to stigmatize the David Benkofs of the world as non-existent to provide equal protections for gay and lesbian people. Gay and lesbian people have shown themselves fully capable of participating in the normal civil and legislative processes, and benefiting from normal and ordinary civil rights,

without the need of the “extraordinary protections” of this Court implicit in declaring orientation a suspect class.

## V

### **GAY PEOPLE ARE NOT “POLITICALLY POWERLESS”**

Nor can gay and lesbian people, in spite of the acknowledged past and present difficulties, realistically be considered the kind of “politically powerless” class who need the “extraordinary protection” of this Court “from the majoritarian political process.”

*Bowens v. Superior Court* (1991) 1 Cal.4th 36, 42.

Unlike race or gender, previous laws that subjected gay and lesbian to penalties were not based on our modern understanding of “orientation” as a classification, but prescribed specific sexual behaviors that certainly had a harsh and disparate impact on gay and lesbian people. But recent history suggests that precisely as government and society began to understand “orientation” in the modern sense—as a characteristic of people and not as a description of particular behavior—gays and lesbians ceased to be subjected to the unequal treatments majorities once used purposively and deliberately to subjugate blacks and women, legally and politically.

Unlike sex and race, sexual orientation was not used as a condition for granting access to education (*Brown v. Board of Education* (1954) 347 U.S. 483) or to the ballot box (U.S. Const., 19th Amend.). Indeed, the history of the marriage law being challenged in this case illustrates the very real political power of gay people in the state of California.

When California Family Code §308.5 was enacted by ballot initiative, its opponents secured 38.6 percent of the vote, a not insignificant showing. California Secretary of State, *2000 Primary Election, State Ballot Measures* (n.d.) <[http://www.ss.ca.gov/elections/sov/2000\\_primary/measures.pdf](http://www.ss.ca.gov/elections/sov/2000_primary/measures.pdf)> [as of September 25, 2007]. Subsequently, the state legislature has created a comprehensive domestic partnership scheme whereby same-sex couples can access the incidents of marriage. California Family Code §297. In September 2006, the California Legislature approved a bill, “Gender-neutral marriage” that would have defined marriage as “a personal relation arising out of a civil contract between two persons.” Assembly Bill 849 (2005-2006 Session) <[http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab\\_0801-0850/ab\\_849\\_bill\\_20050907\\_enrolled.pdf](http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_0801-0850/ab_849_bill_20050907_enrolled.pdf)> [as of September 25, 2007]. The Governor vetoed the bill since it conflicted with Proposition 22 without being submitted for approval in a general election (See Assembly Bill 849 Complete Bill History at <[http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab\\_0801-0850/ab\\_849\\_bill\\_20060223\\_history.html](http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_0801-0850/ab_849_bill_20060223_history.html)> [as of September 25, 2007].) Another bill to redefine marriage has been approved in the Assembly this year (See Assembly Bill 43 Complete Bill History at [http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab\\_0001-0050/ab\\_bill\\_20070606\\_history.html](http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0001-0050/ab_bill_20070606_history.html)) [as of September 25, 2007].)

Sexual orientation is an enumerated basis for statutory protection from discrimination in California law. California Civil Code §51. California’s state law prohibits sexual orientation discrimination and violence in its school policy. California Education Code §220.

The people of California have given ample evidence of their desire to provide equal civil rights and protections to gay and lesbian people while reserving the right to retain their traditional understanding of marriage as one that is consistent not only with our own traditions, but those of 48 of her sister states and indeed most of humanity. Gays and lesbians do not stand in need of “extraordinary protections” from the majoritarian process, and the Court will be shortsighted in short-circuiting the ongoing normal, evolutionary social processes inherent in petitioning their fellow citizens, through the legislature, to adapt their understanding of marriage.

**VI**  
**WITHOUT REQUIRING IMMUTABILITY OR POLITICAL  
POWERLESSNESS, AS INDICATORS OF SUSPECT CLASS STATUS,  
APPLYING HEIGHTENED SCRUTINY HERE WOULD CIRCUMVENT  
THE CONSTITUTIONAL LAWMAKING PROCESS**

Plaintiffs, perhaps recognizing the lack of evidence as to the immutability of sexual orientation, have tried to downplay its significance as part of the test for invoking heightened scrutiny. Thus, although they argue that sexual orientation is immutable, they also argue that gay and lesbians deserve suspect class status regardless of immutability. Other *amici* have demonstrated that immutability is an important element of California’s test for heightened scrutiny. *See* Brief of *Amicus Curiae* Knights of Columbus. Also, given the fact that plaintiffs cannot demonstrate that they are part of a politically powerless minority (especially that they have been denied equal access to the vote), even if immutability were ignored, heightened scrutiny would not be appropriate here.

There are good reasons to retain the immutability portion of the heightened scrutiny analysis particularly where, as here, the group seeking heightened scrutiny is not politically powerless in the constitutional sense. In this case, the group plaintiffs claim to represent has been able to secure by legislation almost every tangible incident of the result they seek in this case. The structure created by the California Constitution (requiring reversal of a ballot initiative only by another initiative measure), however, makes difficult the specific relief sought in this case. That ought to end the matter until plaintiffs can muster sufficient popular support to reverse Proposition 22. If plaintiffs can secure, in this case, a ruling that they belong to a suspect class that merits heightened scrutiny when touched by a legislative classification, they may be able to circumvent the normal constitutional process.

This is so because, lacking any ability to demonstrate immutability, the only characteristic of the group allegedly involved in this case that is being urged as evidence of a need for heightened scrutiny is their failure to obtain a legal redefinition of marriage through the traditional constitutional process (here, by means of a ballot initiative measure).<sup>4</sup> If this line of thinking were adopted, the failure to secure a favored result in a political contest would be *de facto* evidence of the existence of a suspect class. This would effectively nullify the constitutional

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<sup>4</sup> It is important to note that no ballot measure to reverse the current definition of marriage has been proposed or voted on, so the belief that one would be unsuccessful is still speculative.

lawmaking process since ballot losers would gain special constitutional status just by virtue of losing.

If a failure to win politically were the appropriate determinant for suspect class status, the proponents of Proposition 22 would have qualified since they were unable to secure the legal result they sought through the legislative process, thus leading them to seek a ballot measure. Perhaps plaintiffs believe that the ability to secure a desired objective through the legislative process says nothing about political power; only failure to win a ballot measure is relevant. That would differentiate plaintiffs from Proposition 22's supporters but it would moot the initiative power outlined in the Constitution.

This Court should not adopt a new test for suspect class status in this case in order to accommodate the objectives of plaintiffs lest in doing so, the entire rationale for the traditional lawmaking process be undercut.

## VII

### CONCLUSION

There is no scientific consensus that orientation is a genetic trait; scientific research suggests individuals' identity as gay, straight or bisexual may shift over time, and some gay people describe their orientation as a chosen identity, not an immutable characteristic. Moreover, depending on equally scientifically legitimate and commonly used definitions, the size of the class of people who count as gay in California may vary by as much as 400 percent. Some individuals have experienced changes in their sexual orientation. Unlike, race and sex, sexual

orientation has not been the basis of enforced political powerlessness in California. All of this makes orientation fundamentally different in character from race or gender.

Society is moving towards greater acceptance of and accommodations for the legitimate social needs of gay and lesbian individuals at a rapid rate. It would be a mistake for this court to freeze into law a view of sexual orientation as a fixed class that may well not hold up under future scientific scrutiny, or to strike down California's marriage laws on this basis.

Dated: September 25, 2007

Respectfully submitted,

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