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NEWS RELEASE

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California Supreme Court Rules in Marriage Cases

Opinion Available on California Courts Web Site

San Francisco — The California Supreme Court today held that the California legislative and initiative measures limiting marriage to opposite-sex couples violate the state constitutional rights of same-sex couples and may not be used to preclude same-sex couples from marrying. (*In re Marriage Cases*, S147999.)

The court concluded that permitting opposite-sex couples to marry while affording same-sex couples access only to the novel and less-recognized status of domestic partnership improperly infringes a same-sex couple's constitutional rights to marry and to the equal protection of the laws as guaranteed by the California Constitution.

The decision directs state officials who supervise the enforcement of the state's marriage laws to ensure that local officials comply with the court's ruling and permit same-sex couples to marry. The decision becomes final in 30 days unless that period is extended by court order.

The 121-page majority opinion, which sets forth the decision of the court, was authored by Chief Justice Ronald George, and was signed by Justices Joyce Kennard, Kathryn Werdegar, and Carlos Moreno; Justice Kennard also wrote a separate concurring opinion. Justice Marvin Baxter authored a concurring and dissenting opinion that was signed by Justice Ming Chin, and Justice Carol Corrigan wrote a separate concurring and dissenting opinion. Both concurring and dissenting opinions disagree with the majority's conclusion that the marriage statutes are unconstitutional. All opinions are available online at http://www.courtinfo.ca.gov/cgi-bin/opinions.cgi .

Today's ruling resolves several lawsuits that were filed in 2004 by the City and County of San Francisco and a number of same-sex couples after the California Supreme Court determined that, in the absence of a

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judicial determination that statutes limiting marriage to opposite-sex couples are unconstitutional, San Francisco officials lacked authority to issue marriage licenses to same-sex couples.

In April 2005, Judge Richard Kramer of the San Francisco Superior Court issued a decision holding that the current California marriage statutes contravene the California Constitution insofar as they limit marriage to opposite-sex couples. The State of California and the other parties defending the marriage statutes appealed from the trial court decision, which was stayed pending appeal.

In October 2006, the Court of Appeal, in a two-to-one decision, reversed the trial court, concluding that the marriage statutes are constitutionally valid. The Supreme Court then granted review. The parties and numerous amici curiae filed extensive briefs. The Supreme Court heard oral argument on March 3, 2008, and issued its decision today, reversing the judgment of the Court of Appeal, which had upheld the marriage statutes.

The California Supreme Court majority opinion notes at the outset that the court held in *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, that San Francisco officials had acted unlawfully by issuing marriage licenses to same-sex couples in the absence of a judicial determination that the California statutes, by limiting marriage to opposite-sex couples, are unconstitutional. The opinion explains, however, that the *Lockyer* decision emphasized that the question of the constitutional validity of the marriage statutes was not before the court at that time, and that its decision in that case did not reflect any view on that substantive constitutional issue. The *In re Marriage Cases* proceeding squarely presents the constitutional question that was not addressed in *Lockyer.*

Majority Opinion Addresses Distinct Legal issues

In considering that constitutional question, the majority opinion discusses a number of distinct legal issues.

First, the opinion analyzes the scope of Family Code section 308.5, the statutory provision enacted by the voters' approval of Proposition 22 at the March 2000 election. The parties challenging the marriage statutes asserted that the limitation on marriage embodied in section 308.5 was intended, and should be interpreted, to apply only to marriages performed outside of California — leaving the Legislature free to authorize the marriage of same-sex couples within California. The majority opinion rejects the challengers' contention on this point, concluding that the provisions of section 308.5 properly must be interpreted to impose a limitation on marriages performed in California as well as on out-of-state marriages.

Second, the opinion addresses the nature and scope of the constitutional right to marry under the California Constitution. The opinion observes that although, as an historical matter, civil marriage and the rights associated with it have been afforded in California only to opposite-sex couples, the California Supreme Court's landmark 1948 decision in *Perez v. Sharp,* 32 Cal.2d 711 — which found that the California statutory provisions prohibiting

interracial marriage were inconsistent with the fundamental constitutional right to marry, even though those statutes had existed since the founding of the state — demonstrates that "history alone is not invariably an appropriate guide for determining the meaning and scope of this fundamental constitutional guarantee."

Upon reviewing the numerous past California decisions that examine the underlying bases and significance of the constitutional right to marry, the opinion explains that the core substantive rights embodied in the right to marry "include, most fundamentally, the opportunity of an individual to establish — with the person with whom the individual has chosen to share his or her life — an *officially recognized and protected family* possessing mutual rights and responsibilities and entitled to the same respect and dignity accorded a union traditionally designated as marriage." The opinion then observes that "in contrast to earlier times, our state now recognizes that an individual's capacity to establish a loving and long-term committed relationship with another person and responsibly to care for and raise children does not depend upon the individual's sexual orientation, and, more generally, that an individual's sexual orientation — like a person's race or gender — does not constitute a legitimate basis upon which to deny or withhold legal rights."

The opinion concludes that "in view of the substance and significance of the fundamental right to form a family relationship, the California Constitution properly must be interpreted to guarantee this basic civil right to all Californians, whether gay or heterosexual, and to same-sex couples as well as to opposite-sex couples."

Furthermore, although the opinion acknowledges that the recent comprehensive domestic partnership legislation enacted in California affords same-sex couples most of the substantive elements embodied in the constitutional right to marry, the opinion concludes that by assigning a different name for the family relationship of same-sex couples while preserving the historic and honored designation of "marriage" only for opposite-sex couples, the California statutes threaten to deny the family relationship of same-sex couples dignity and respect equal to that accorded the family relationship of opposite-sex couples and thereby impinge upon a same-sex couple's right to marry as protected by the California Constitution.

Third, the majority opinion addresses the equal protection issue raised by the case. In considering whether the assignment of a different name for the official family relationship of same-sex couples as contrasted with the name for the family relationship of opposite-sex couples violates the state equal protection clause, the opinion initially examines whether the different treatment between opposite-sex and same-sex couples should be evaluated under the deferential "rational basis" test that is applied to ordinary statutory classifications, or under the more exacting "strict scrutiny" standard that is applicable when a statute's differential treatment rests upon a "suspect classification" or impinges upon a fundamental right.

In addressing this point, the opinion first rejects the contention of those challenging the marriage statutes that in treating same-sex couples differently from opposite-sex couples,

the marriage statutes embody an instance of discrimination on the basis of sex or gender and are subject to strict scrutiny on that basis. Nonetheless, the opinion concludes that the strict scrutiny standard is applicable in this case (1) because the statutes discriminate on the basis of sexual orientation, a characteristic the majority determines represents — like gender, race, and religion — a constitutionally suspect basis upon which to impose differential treatment, and (2) because the different statutory treatment impinges upon a same-sex couple's fundamental interest in having their family relationship accorded the same respect and dignity enjoyed by an opposite-sex couple.

Finally, in applying the strict scrutiny standard, the majority opinion determines the challenged statutes do not satisfy that standard, because the state interest underlying the marriage statutes' differential treatment of opposite-sex and same-sex couples — the interest in retaining the traditional and well-established definition of marriage — cannot properly be viewed as a *compelling* state interest for purposes of the equal protection clause, or as *necessary* to serve such an interest.

The opinion explains that the exclusion of same-sex couples from the designation of marriage clearly is not *necessary* to protect all of the rights and benefits currently enjoyed by married opposite-sex couples: permitting same-sex couples access to the designation of marriage will not deprive opposite-sex couples of any rights and will not alter the legal framework of the institution of marriage inasmuch as same-sex couples who choose to marry will be subject to the same obligations and duties that are currently imposed on married opposite-sex couples. The opinion further observes that retaining the traditional definition of marriage and affording same-sex couples only a separate and differently named family relationship will, as a realistic matter, impose appreciable harm on same-sex couples and their children, because denying such couples access to the familiar and highly favored designation of marriage is likely to cast doubt on whether the official family relationship of same-sex couples enjoys dignity equal to that of opposite-sex couples, and may perpetuate a more general premise that gay individuals and same-sex couples are in some respects "second-class citizens" who may be treated differently from, and less favorably than, heterosexual individuals or opposite-sex couples. Under these circumstances, the opinion finds that retaining the traditional definition of marriage cannot be considered a compelling state interest.

Consequently, the majority opinion holds that the marriage statutes are unconstitutional.

The opinion also explains: "[A]ffording same-sex couples the opportunity to obtain the designation of marriage will not impinge upon the religious freedom of any religious organization, official, or any other person; no religion will be required to change its religious policies or practices with regard to same-sex couples, and no religious officiant will be required to solemnize a marriage in contravention of his or her religious beliefs."

Concurring Opinion by Justice Kennard

In her separate concurring opinion, Justice Kennard explains how the majority's decision in this case is consistent with its decision in the earlier *Lockyer* matter. The concurring opinion also reiterates the position that Justice Kennard set forth in her separate opinion in *Lockyer*, in which she concluded that the court in that case should not have declared void all of the marriages of same-sex couples that had been performed in San Francisco prior to this court's issuance of a stay, but rather should have reserved the question of the validity of those marriages until after the constitutionality of the California marriage statutes was authoritatively resolved through judicial proceedings.

At the same time, the concurring opinion recognizes that the decision in *Lockyer* finally and conclusively invalidated those earlier marriages of same-sex couples and that the decision in the current case does not alter the voiding of those marriages. Finally, the concurring opinion emphasizes why, in Justice Kennard's view, "the constitutionality of the marriage laws' exclusion of same-sex couples is an issue particularly appropriate for decision by this court, rather than a social or political issue inappropriate for judicial consideration," explaining that "[t]he architects of our federal and state Constitutions understood that widespread and deeply rooted prejudices may lead majoritarian institutions to deny fundamental freedoms to unpopular minority groups, and that the most effective remedy for this form of oppression is an independent judiciary charged with the solemn responsibility to interpret and enforce the constitutional provisions guaranteeing fundamental freedoms and equal protection."

Concurring and Dissenting Opinion by Justice Baxter

In his concurring and dissenting opinion, joined by Justice Chin, Justice Baxter explains that although he agrees with several of the majority's conclusions, he disagrees with the majority's holding that the California Constitution invalidates the statutes — including an initiative measure recently adopted by the voters — that define marriage as an opposite sex union. In reaching this decision, Justice Baxter contends, the majority "violates the separation of powers, and thereby commits profound error." Citing the legislative progress that gays and lesbians have already achieved in California, Justice Baxter urges that the future definition of marriage should also be decided by the democratic process, not by the courts.

Justice Baxter criticizes the majority's mode of analysis in reaching its constitutional conclusion, stating that the majority "relies heavily on the *Legislature's* adoption of progressive civil rights protections for gays and lesbians to find a *constitutional* right to same-sex marriage. In effect, the majority gives the Legislature *indirectly* power that body does not *directly* possess to amend the Constitution and repeal an initiative statute." Emphasizing that "there is no deeply rooted tradition of same-sex marriage, in the nation or in this state," Justice Baxter concludes that there is no constitutional right to same-sex marriage "because marriage is, as it always has been, the right of a woman and an unrelated man to marry each other."

The concurring and dissenting opinion also disagrees with the majority's equal protection analysis in a number of respects, concluding (1) that "same-sex couples and opposite-sex couples are not similarly situated with respect to the valid purposes of" the current marriage statutes, (2) that the state, by assigning different labels to same-sex and opposite-sex legal unions, does not discriminate directly on the basis of sexual orientation, and (3) that, in any event, sexual orientation is not properly considered a suspect classification because "gays and lesbians in this state currently lack the insularity, unpopularity, and consequent political vulnerability upon which the notion of suspect classifications is founded."

Concluding that the normal rational basis test — rather than strict scrutiny — is applicable to evaluating the validity, under the California equal protection guarantee, of the distinction drawn between opposite-sex and same-sex couples by the current marriage and domestic partnership statutes, Justice Baxter concludes that there are ample grounds for upholding the assignment of a name other than marriage to same-sex couples.

Concurring and Dissenting Opinion by Justice Corrigan

In her concurring and dissenting opinion, Justice Corrigan states at the outset that although "[i]n my view, Californians should allow our gay and lesbian neighbors to call their unions marriage," "a majority of Californians hold a different view, and have explicitly said so by their vote."

Justice Corrigan believes the court's ruling exceeds the bounds of judicial authority: "This court can overrule a vote of the people only if the Constitution compels us to do so. Here, the Constitution does not." In explaining her position, Justice Corrigan notes that, under California law, domestic partners have virtually all of the substantive legal benefits and privileges available to traditional spouses, and states, "I believe the Constitution requires this as a matter of equal protection."

Her separate opinion goes on to explain, however, that "the single question in this case is whether domestic partners have a constitutional right to the name of 'marriage,' " and on that point Justice Corrigan disagrees with the majority's conclusion, finding that the majority improperly denigrates domestic partnership by describing it "as 'only a novel alternative designation . . . constituting significantly unequal treatment' and 'a mark of second-class citizenship.' "

Indicating that her view "on the question of terminology rests on both an equal protection analysis and a recognition of the appropriate scope of judicial authority," Justice Corrigan concludes first that, as a matter of equal protection, "while plaintiffs are in the same position as married couples when it comes to the substantive legal rights and responsibilities of family members, they are not in the same position with regard to the title of 'marriage.' " With respect to the question of the proper scope of judicial authority, Justice Corrigan finds that the majority fails to exercise appropriate judicial restraint, maintaining that "[i]nstead of presuming the validity of the statutes defining marriage and establishing domestic

partnership, in effect the majority *presumes them to be constitutionally invalid* by characterizing domestic partnership as a 'mark of second-class citizenship.' " Her concurring and dissenting opinion concludes: "We should allow the significant achievements embodied in the domestic partnership statutes to continue to take root. If there is to be a new understanding of the meaning of marriage in California, it should develop among the people of our state and find its expression at the ballot box."