No. S147999

In the Supreme Court of California

In re Marriage Cases

Judicial Council Coordination Proceeding No. 4365

After a Decision of the Court of Appeal
First Appellate District, Division Three

Nos. A110449, A110450, A110451, A110463, A110651, A110652
San Francisco Superior Court Nos. JCCP4365, 429539, 429548, 504038
Los Angeles Superior Court No. BC088506
Honorable Richard A. Kramer, Judge

Brief *Amicus Curiae* of the Knights of Columbus in Support of the State Defendants

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Statement of the Interest of the *Amicus*

The Knights of Columbus is a Catholic fraternal benefit society based in Connecticut. The Knights were founded in New Haven in 1882 by Fr. Michael J. McGivney to care for and strengthen oppressed Catholic families and specifically to support men and women as husbands and wives in raising their families. Since then the Knights have grown into the world's largest Catholic lay charitable and family-based fraternal service organization, with more than 1.7 million members, who meet regularly in 12,000 local councils. Defending family life lies at the heart of who we are. In 2005, our members, 62,744 of whom live in California, donated nearly $140 million and 64 million hours to charity, and raised and donated more than $10 million to aid people devastated by Hurricanes Katrina and Rita.

For more than eighty years, the Knights have defended marriage and family in the public square, beginning with *Pierce v. Society of Sisters* (1925), the landmark Supreme Court decision vindicating the superior rights of mother and father, as against the State, to educate their children. Since then we have participated as *amicus curiae* in many cases in state and federal courts, including *Kerrigan v. Comm'r* (Connecticut Supreme Court) and *Deane v. Conaway* (Maryland Court of Appeals), the challenges to the Connecticut and Maryland laws reserving marriage to opposite-sex couples. We have defended marriage at both the state and federal level by supporting state ballot initiatives preserving traditional marriage, as well as the federal Marriage Protection Act. As the solemn union of one man and one woman, marriage is the foundation of society and promotes the common good. Now, in this Court, we seek to defend once again the traditional view of marriage. Reserving marriage to opposite-sex couples does not discriminate on the basis of sex or sexual orientation in violation of the California Constitution.

I.

RESERVING MARRIAGE TO OPPOSITE-SEX COUPLES DOES NOT DISCRIMINATE ON THE BASIS OF SEX IN VIOLATION OF ART. I, § 7(a), OF THE CALIFORNIA CONSTITUTION.

Petitioners contend that §§ 300 and 308.5 of the Family Code discriminate on the basis of sex in violation of art. I, § 7(a), of the California Constitution.[1] Article I, § 7(a), provides, in pertinent part, that "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws . . . ." CAL. CONST. art. I, § 7(a) (West 2002). *Amicus* replies that §§ 300 and 308.5 do not discriminate on the basis of sex because the reservation of marriage to opposite-sex couples treats both men and women in the same manner.

This Court has determined that "discrimination based on gender violates the equal protection clause of the California Constitution (art. I, § 7, subd. (a)), and triggers the highest level of scrutiny." *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527, 564 (2004), citing *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 17-20 (1971). " '[D]iscriminate,' " in turn, "means 'to make distinctions in treatment; show partiality (*in favor of*) or prejudice (*against*).' " *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537, 559-60 (2000), quoting WEBSTER'S NEW WORLD DICTIONARY (3d college ed. 1988), p. 392 (emphases in original). The "threshold inquiry in assessing an equal protection claim is whether the law, in fact, accords 'disparate treatment' to similarly situated persons." *People v. Guzman*, 35 Cal. 4th 577, 584 (2005), quoting *People v. Raszler*, 169 Cal.

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[1] *See* Lambda/ACLU (hereinafter Lambda) Br. at 17, 39-50; City and County of San Francisco (hereinafter CCSF) Br. at 72-82; Clinton Br. at 25-29; Tyler Br. at 11-13, 24-25. In this brief, *amicus* shall refer collectively to the parties challenging the statutes as "petitioners."

App. 3d 1160, 1166-67 (1985). *See also Michelle W. v. Ronald W.*, 39 Cal. 3d 354, 364-65 (1985) (same).

Petitioners have overlooked this "threshold inquiry." If California allowed a man to marry either a woman or another man, but prohibited a woman from marrying another woman, or, conversely, allowed a woman to marry either a man or another woman, but prohibited a man from marrying another man, then petitioners would have a valid sex discrimination claim. *See Singer v. Hara*, 522 P.2d 1187, 1192 n. 8 (Wash. Ct. App. 1974). California, however, does *not* permit either men or women to marry anyone of the same sex. "Obviously," as the Court of Appeal observed, "the opposite-sex requirement for marriage applies regardless of the applicant's gender. The laws treat men and women exactly the same, in that neither group is permitted to marry a person of the same gender." *Op*. at 33-34.

The difficulty with petitioners' sex discrimination argument, as the Vermont Supreme Court has noted, is that "the marriage laws are facially neutral; they do not single out men or women as a class for disparate treatment, but rather prohibit men and women equally from marrying a person of the same sex." *Baker v. State*, 744 A.2d 864, 880 n. 13 (Vt. 1999). "[T]here is no discrete class subject to differential treatment solely on the basis of sex; each sex is equally prohibited from precisely the same conduct." *Id*.[2] Other state courts have also rejected the claim that "defining marriage as the union of one man and one woman discriminates on the basis of sex." *Id.* citing *Baker v. Nelson*, 191 N.W.2d 185, 186-87 (Minn. 1971),

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[2] The Vermont Supreme Court's decision requiring the State to recognize either marriage or its legal equivalent (civil unions) between members of the same sex was based upon a provision of the Vermont Constitution for which there is no analog in the California Constitution.

appeal dismissed for want of a substantial federal question, 409 U.S. 810 (1972); *Singer*, 522 P.2d at 1191-92.[3] The New York Court of Appeals and the Washington Supreme Court recently have added their voices to the chorus of state reviewing courts holding that laws reserving marriage to opposite-sex couples do not discriminate on account of sex.[4] And federal courts reviewing challenges to the Federal Defense of Marriage Act, 1 U.S.C. § 7 (2005), 28 U.S.C. § 1738C (Supp. 2005), are in accord with these decisions.[5] In sum, the marriage statutes "do[] not subject men to different treatment from women; each is equally prohibited from the same

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[3] *See also Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1983); *Dean v. District of Columbia*, 653 A.2d 307, 363 n. 2 (D.C. App. 1995) (Op. of Steadman, J.).

[4] *Hernandez v. Robles*, 855 N.E.2d 1, 10-11 (N.Y. 2006) (plurality op.) ("[w]omen and men are treated alike–they are permitted to marry people of the same sex, but not people of their own sex"); *id*. at 20 (Graffeo, J., concurring) ("neither men nor women are disproportionately disadvantaged or burdened by the fact that New York's Domestic Relations Law allows only opposite-sex couples to marry–both genders are treated precisely the same way"); *Andersen v. King County*, 138 P.3d 963, 988 (Wash. 2006) (plurality op.) ("DOMA [the state Defense of Marriage Act] does not make any classification by sex, and it does not discriminate on account of sex" in violation of the state equal rights amendment because "[m]en and women are treated identically under DOMA; neither may marry a person of the same sex") (citation and internal quotation marks omitted); *id*. at 1010 (J.M. Johnson, J., concurring in judgment only) (same).

[5] *Wilson v. Ake*, 354 F.Supp. 2d 1298, 1307-08 (M.D. Fla. 2005) ("DOMA does not discriminate on the basis of sex because it treats women and men equally"); *Smelt v. County of Orange*, 374 F.Supp. 2d 861, 877 (C.D. Cal. 2005) (same), *aff'd in part*, *vacated in part and remanded with directions to dismiss for lack of standing*, 447 F.3d 673 (9th Cir. 2006); *In re Kandu*, 315 B.R. 123, 143 (Bankr. W.D. Wash. 2005) ("DOMA . . . does not single out men or women as a discrete class for unequal treatment").

conduct." *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 991 (Mass. 2003) (Cordy, J., dissenting).[6]

Apart from a smorgasbord of unreviewed trial court decisions and selected concurring and dissenting opinions in other cases, petitioners' only contrary authority is the Hawaii Supreme Court's decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). Lambda Br. at 45; CCSF's Br. at 74 n. 29; Clinton Br. at 26. In *Baehr*, two judges expressed the view that a law reserving marriage to members of the opposite sex discriminates on the basis of sex in violation of the Hawaii Constitution. 852 P.2d at 57-63 (op. of Levinson, J., in which Moon, C.J., concurs). These two judges voted to vacate the circuit court's order granting the defendant's motion for judgment on the pleadings and dismissing the plaintiffs' complaint with prejudice, and to remand the case for an evidentiary hearing on the validity of the law under the "strict scrutiny" standard of judicial review. *Id.* at 68. A third judge, without joining the plurality opinion, agreed to remand the case to the circuit court, but for a different and more limited purpose, to wit, to conduct a hearing to determine whether a person's sexual orientation is "biologically fated." *Id*. at 68-70 (Burns, J., concurring in the result). Judge Burns expressed the view that if sexual orientation is not "biologically fated," then "the Hawaii [C]onstitution may permit the State to encourage heterosexuality and discourage homosexuality, bisexuality, and asexuality by permitting opposite-sex . . . [m]arriages and not permitting same-sex . . . [m]arriages." *Id*. at 70. The fourth and fifth judges dissented. *Id*. at 70-74

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[6] Justice Cordy was addressing an *alternative* argument raised by the plaintiffs but not reached by the majority in their opinion invalidating the Commonwealth's marriage statute, specifically, whether the statute violated the state equal rights amendment.

(Heen, Hayashi, JJ., dissenting). A majority of the court did *not* hold that the state law reserving marriage to opposite-sex couples was subject to the strict scrutiny standard of review applicable to sex-based classifications. The plurality opinion in *Baehr* is an unreliable guide to sex discrimination analysis and should not be followed.[7]

Relying upon *Loving v. Virginia*, 388 U.S. 1 (1967), and *Perez v. Sharp*, 32 Cal. 2d 711 (1948), which struck down anti-miscegenation statutes, petitioners argue that the "equal application" of the marriage statutes to men and women does not preserve them from constitutional challenge. *See* Lambda Br. at 47; CCSF Br. at 74-78; Clinton Br. at 27-28. The analogy to *Loving* and *Perez* is unconvincing at several levels.

First, as the Court of Appeal noted, *Op*. at 36-37, *Loving* and *Perez* both dealt with race, not sex. The two characteristics are not fungible for purposes of constitutional analysis. For example, although it is clear that public high schools and colleges may not field sports teams segregated by *race*, *see Louisiana High School Athletic Ass'n v. St. Augustine High School*, 396 F.2d 224 (5th Cir. 1968), they *may* field teams segregated by *sex* (at least where equal opportunities are afforded to males and females on

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[7] One scholar has described *Baehr* as "an affront to both law and language that well deserves its place on the list of worst decisions." Bernard Schwartz, A BOOK OF LEGAL LISTS at 182 (Oxford University Press 1997). "The *Baehr* decision is so contrary to both established law and common sense that one is almost speechless before this patent reductio ad absurdum of equal protection jurisprudence." *Id*. at 183. Following adoption of an amendment to the state constitution giving the legislature "the power to reserve marriage to opposite-sex marriage," HAW. CONST. art. I, § 23 (Michie 2005), the Hawaii Supreme Court held that the circuit court's decision on remand striking down the marriage statute had to be reversed and judgment entered in favor of defendant. *Baehr v. Miike*, No. 20371, Summary Disposition Order, Dec. 9, 1999, 1999 Haw. Lex. 391.

separate teams) without violating either the Equal Protection Clause of the Fourteenth Amendment or a state equal rights provision.[8] Indeed, a school district may go so far as to provide identical sets of single-gender public schools without running afoul of the Equal Protection Clause, *Vorchheimer v. School District of Philadelphia*, 532 F.2d 880, 885-88 (3d Cir. 1976), *aff'd mem. by an equally divided Court*, 430 U.S. 703 (1977), which is precisely what the State of California has done on a statewide experimental basis with the Single Gender Academies Pilot Program Act of 1996. EDUC. CODE § 58520 *et seq*. (West 2003). Although, since *Brown v. Board of*

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[8] *See Force by Force v. Pierce City R-VI School District*, 570 F.Supp. 1020, 1026 (W.D. Mo. 1983) (noting that "a number of courts have held that the establishment of separate male/female teams in a sport is a constitutionally permissible way of dealing with the problem of potential male athletic dominance"). In *Attorney General v. Massachusetts Interscholastic Athletic Ass'n, Inc*., 393 N.E.2d 284 (Mass. 1979), the Massachusetts Supreme Judicial Court held that an athletic association rule, which provided that no boy could play on a girls' team, although a girl could play on a boys' team if that sport was not offered for girls, violated the state equal rights amendment. The court minimized the impact of its decision, however, stating: "It can be expected that the present decision will make little practical difference in the traditional conduct of interscholastic athletic competition, for that will proceed in the great majority of instances on a basis of 'separate but equal' teams whose validity is assumed here." *Id*. at 296. *See also O'Connor v. Board of Education of School District No. 23*, 645 F.2d 578, 582 (7th Cir. 1981) (in dissolving a preliminary injunction directing a school board to permit a junior high school girl to try out for the boys' basketball team, the Seventh Circuit commented that it was "highly unlikely" that the plaintiff could demonstrate that the school board's policy of "separate but equal" sports programs for boys and girls violated either the Equal Protection Clause or the equal rights provision of the Illinois Constitution); *cf. Darrin v. Gould*, 540 P.2d 882, 893 (Wash. 1975) (striking down rule barring girls from playing on high school football team, but suggesting that result might have been different if the school had fielded both boys' and girls' teams).

Education, 347 U.S. 483 (1954), classifications based on race have been subjected to strict scrutiny review without regard to whether a given classification may have had equal application to members of different races, *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964) (striking down laws that criminalized interracial cohabitation), "the laws in which the Supreme Court has found sex-based classifications have all treated men and women differently." *Smelt*, 374 F.Supp. 2d at 876.[9]

Second, anti-miscegenation statutes were intended to keep persons of *different* races *separate.* Marriage statutes, on the other hand, are intended to bring persons of the *opposite* sex *together*. Statutes that mandated *segregation* of the *races* with respect to marriage cannot be compared in any relevant (or even intelligible) sense to statutes that promote *integration* of the *sexes* in marriage, as one jurist has noted:

> The *Loving* analogy is inapt on purely logical grounds. The statutes struck down in *Loving* (as well as those in *Perez*) prohibited marriages between members of *different* races, not between members of the *same* race. The equivalent, in the

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[9] Citing *United States v. Virginia*, 518 U.S. 515, 519-20 (1996) (law prevented women from attending military college); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 719 (1982) (law excluded men from attending nursing school); *Craig v. Boren*, 429 U.S. 190, 191-92 (1976) (law allowed women to buy low-alcohol beer at a younger age than men); *Frontiero v. Richardson*, 411 U.S. 677, 678-79 (1973) (law imposed a higher burden on female servicewomen than on male servicemen to establish dependency of their spouses); *Reed v. Reed*, 404 U.S. 71, 73 (1971) (law created an automatic preference of men over women in the administration of estates). Whether a statute *discriminates* on the basis of sex is analytically distinct from the *standard of review* applicable to such discrimination, a distinction that appears to be lost on the petitioners. *See* CCSF's Br. at 76. Thus, the fact that the Supreme Court applies a less rigorous standard to sex discrimination than does this Court has no bearing on whether a classification may be said to discriminate on the basis of sex.

> area of sex, of an anti-miscegenation statute would not be a statute prohibiting *same*-sex marriages, but one prohibiting *opposite*-sex marriages, an absurdity which no State has ever contemplated. The equivalent, in the area of race, of a statute prohibiting same-sex marriage, would be a statute that prohibited marriage between members of the *same* race. Laws banning marriages between members of the same race would be unconstitutional, not because they would "segregate the races and perpetuate the notion that blacks are inferior to whites," *Lawrence v. State*, 41 S.W.2d [349,] 357 [(Tex. App. 2001, *writ ref'd*) (*en banc*), *rev'd on other grounds, Lawrence v. Texas*, 539 U.S. 558 (2003)], but because there could be no possible rational basis prohibiting members of the same race from marrying. Laws against same-sex marriage, on the other hand, are supported by multiple reasons . . . .

Hernandez v. Robles, 805 N.Y.S.2d 354, 370-71 (N.Y. App. Div. 2005) (Catterson, J., concurring) (emphases in original), *aff'd*, 855 N.E.2d 1 (New York 2006) (those reasons are discussed in Argument II, *infra*).

Third, unlike the history of the anti-miscegenation statutes struck down in *Loving* and *Perez*, which stigmatized blacks as inferior to whites,[10]

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[10] The statutes challenged in *Loving* and *Perez* did not prohibit all interracial marriages, but only marriages between "white persons" and "non-white persons." *Loving*, 388 U.S. at 11 & n. 11; *Perez*. 32 Cal. 2d at 721 (prohibiting marriage "only between 'white persons' and members of certain other so-called races," allowing "all other 'races' [to] intermarry freely"). Interracial marriages between "non-whites," *e.g.*, blacks and Asians, were not banned in either State. Noting that "Virginia prohibits only interracial marriages involving white persons," the Supreme Court determined in *Loving* that "the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy." 388 U.S. at 11 & n. 11. That "justification," the Court concluded, was patently inadequate: "We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." *Id*. at 11-12. The obvious (and impermissible) "race prejudice" underlying

"there is *no* evidence that laws reserving marriage to opposite-sex couples were enacted with an intent to discriminate against either men or women. Accordingly, such laws cannot be equated in a facile manner with anti-miscegenation laws." *Hernandez*, 805 N.Y.S.2d at 370 (Catterson, J., concurring) (emphasis in original).[11] "No evidence indicates California's opposite-sex definition of marriage was intended to discriminate against males or females, and petitioners do not argue that the purpose of the definition is to discriminate against either gender." *Op*. at 37.[12]

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the statute struck down in *Perez*, 32 Cal. 2d at 725, was reflected in the respondent's argument in *Perez* that "the prohibition of intermarriage between Caucasians and members of the specified races prevents the Caucasian race from being contaminated by races whose members are by nature physically and mentally inferior to Caucasians." *Id*. at 722.

[11] With the exception of the aberrant plurality opinion in *Baehr v. Lewin*, 852 P.2d at 59-63 & nn. 23-25, and a passing reference in *Goodridge*, 798 N.E.2d at 958 & n. 16, no state reviewing court has found the equal protection analysis set forth in *Loving* to be applicable to laws reserving marriage to opposite-sex couples. *See Baker v. Nelson*, 191 N.W.2d at 187; *Lewis v. Harris*, 875 A.2d 259, 272 (N.J. Super Ct. App. Div. 2005), *aff'd as modified*, 908 A.2d 196, 210 (N.J. 2006); *Hernandez*, 855 N.E.2d at, 8, *id*. at 19-20 (Graffeo, J., concurring); *Hernandez*, 805 N.Y.S.2d at 370-71 (Catterson, J., concurring); *Samuels v. New York State Dep't of Health*, 811 N.Y.S.2d 136, 144 (N.Y. App. Div. 2006), *aff'd*, 855 N.E.2d 1 (N.Y. 2006); *Baker v. State*, 744 A.2d at 880 n. 13, 887; *Andersen,* 138 P.3d at 989, *id*. at 1001 (J.M. Johnson, J., concurring in judgment only); *Singer*, 522 P.2d at 1195-96. *See also Smelt*, 374 F.Supp. 2d at 876-77.

[12] As in *Goodridge*, which was decided on other grounds, petitioners have presented no evidence that in reserving marriage to opposite-sex couples, the Legislature and the People were "motivated by sexism in general or a desire to disadvantage men or women in particular." 798 N.E.2d at 992 (Cordy, J., dissenting). Nor have they identified "any harm, burden, disadvantage, or advantage accruing to either gender as a consequence," *id*., of adopting §§ 300 and 308.5 of the Family Code.

The conclusion that the marriage laws do not discriminate against either men or women is not affected by evidence that, "during the last century, California has abolished or altered many marriage-related laws because they were based on improper sex-role stereotypes." *Op*. at 37.[13] "[T]his history does not demonstrate that the definition of marriage as male-female can itself be traced to a discriminatory purpose." *Id*. at 38:

> It is one thing to show that long-repealed marriage statutes subordinated women to men within the marital relation. It is quite another to demonstrate that the authors of the marriage laws excluded same-sex couples because of incorrect and discriminatory assumptions about gender roles or anxiety about gender-role confusion. That evidence is not before us.

Baker v. State, 744 A.2d 880 n. 13.

Petitioners have not cited a single case interpreting the California Constitution that struck down, on the basis of art. I, § 7(a) (or art. I, § 8), a state statute, local ordinance, common law doctrine or public policy that treats men and women equally, or subjects them to the same restrictions or disabilities. All of the cases in which a constitutional violation has been found involved *some* form of discrimination against either men or women.[14]

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[13] *See* Lambda Br. at 43 (noting that "California law has eliminated gender stereotypes in marital and parenting law"); CCSF Br. at 78 (noting that "much has . . . changed" from "[t]raditional marriage laws and practices [that] ascribed very different roles to men and women").

[14] *Sail'er Inn*, 5 Cal. 3d at 20 (striking down statute prohibiting females from tending bar except in certain situations); *Arp v. Workers Compensation Appeal Board*, 19 Cal. 3d 395, 400 (1977) (striking down statute establishing conclusive presumption that widows were totally dependent upon their deceased husbands, but requiring widowers to prove that they were totally dependent upon their deceased wives); *Molar v. Gates*, 98 Cal. App. 3d 1, 12-20 (1979) (striking down policy of providing minimum security jail facilities for male prisoners but not for female

"[U]nequal treatment is always the touchstone of an equal protection analysis." *Op*. at 35.[15] And the same is true with respect to cases interpreting the Unruh Civil Rights Act, CIV. CODE § 51 *et seq*. (West 1982 & 2007 Supp.). *Koire v. Metro Car Wash*, 40 Cal. 3d 24, 33 (1985) ("public policy in California mandates the equal treatment of men and women").[16]

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prisoners); *Fenske v. Board of Administration*, 103 Cal. App. 3d 590, 596-97 (1980) (extending benefits to female employees on the same basis on which they were available to male employees).

[15] Petitioners have cited "no controlling authority imposing strict constitutional scrutiny on a law that merely mentions gender, without treating either group differently." *Id*. In *Connerly v. State Personnel Board*, 92 Cal. App. 4th 16 (2001), cited by petitioners, Lambda Br. at 49, CCSF Br. at 75, the Court of Appeal stated, in reference to racial classifications, that a law need not "confer a preference" for strict scrutiny to apply. *Id*. at 44. After explaining why racial classifications are immediately suspect, however, the court clarified that strict scrutiny is not required "merely because [a law] is 'race conscious.' " *Id*. at 45, quoting *Shaw v. Reno*, 509 U.S. 642, 630 (1993). The court added that, because "the guarantee of equal protection is an individual right, where the operation of the law does not differ between one individual and another based upon a suspect classification, strict scrutiny is not required even though the law might mention matters such as race or gender." *Id.*

[16] *Id*. at 38 (Act prohibits sex-based price discounts); *Isbister v. Boys' Club of Santa Cruz, Inc*., 40 Cal. 3d 72, 91 (1985) (local boys' club could not exclude girls from membership); *Easbe Enterprises, Inc. v. Alcoholic Beverage Control Appeals Board*, 141 Cal. App. 3d 981, 986 (1983) ("Ladies Only" night at business establishment with liquor license featuring male dancers violated the Act); *Warfield v. Peninsula Golf & Country Club*, 10 Cal. 4th 594, 630 (1995) (private country club operating as a "business establishment" could not exclude women from proprietary memberships); *Rotary Club of Duarte v. Board of Directors of Rotary International*, 178 Cal. App. 3d 1035, 1059 (1986) (international organization could not revoke local club's charter for admitting women members in violation of the organization's policies limiting membership to men), *aff'd*, 481 U.S. 537 (1987).

Laws that impose the same limitations on men and women cannot be said to constitute sex discrimination. In *Ex parte Maki*, 56 Cal. App. 2d 635 (1943), the Court of Appeal rejected a challenge to a local ordinance that prohibited masseurs from giving massages to women and masseuses from giving massages to men. The court held that there was no discrimination. *Id*. at 639-40. And in abrogating common law rules that affected men and women equally, this Court has not cited or relied upon any constitutional principle. *See Self v. Self*, 58 Cal. 2d 683 (1962) (abolishing common law doctrine of interspousal tort immunity with respect to intentional torts); *Klein v. Klein*, 58 Cal. 2d 692 (1962) (same with respect to negligent torts).

Sections 300 and 308.5 of the Family Code, which treat men and women equally, do not discriminate on the basis of sex. Accordingly, the Court of Appeal properly rejected petitioners' sex discrimination claim.

II.

RESERVING MARRIAGE TO OPPOSITE-SEX COUPLES DOES NOT DISCRIMINATE ON THE BASIS OF SEXUAL ORIENTATION IN VIOLATION OF ART. I, § 7(a) OF THE CALIFORNIA CONSTITUTION.

Petitioners also contend that §§ 300 and 308.5 of the Family Code discriminate on the basis of sexual orientation in violation of art. I, § 7(a).[17] *Amicus* responds that §§ 300 and 308.5 do not, on their face, discriminate on the basis of a person's sexual orientation; that, although §§ 300 and 308.5 may have a disparate impact on homosexuals, that impact is not constitutionally cognizable in the absence of evidence of an intent to discriminate against homosexuals; that there is no evidence that in adopting

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[17] *See* Lambda Br. at 26-39; CCSF Br. at 60-72; Clinton Br. at 29-33; Tyler Br. at 26-28.

§§ 300 and 308.5, the Legislature or the People intended to discriminate against homosexuals, as opposed to maintaining the traditional definition of marriage; that even if there was such an intent, homosexuals are not a suspect class and, therefore, an intent to discriminate against them does not render either provision unconstitutional so long as that intent was not their sole purpose; that in adopting §§ 300 and 308.5, the Legislature and the People had legitimate reasons for reserving marriage to opposite-sex couples; that, regardless of the motivations underlying §§ 300 and 308.5, an anti-homosexual animus cannot fairly be attributed to more than a score of other provisions of the Family Code that envision marriage as a relationship that may exist only between a man and a woman and which have not been challenged in this litigation; and that state equal protection jurisprudence requires not *identical* treatment of similarly situated classes of persons, but only *equality of treatment*, which is afforded by the Domestic Partner Act.

Sections 300 And 308.5 Of The Family Code Do Not Facially Discriminate On The Basis Of Sexual Orientation.

Laws reserving marriage to opposite-sex couples do not, on their face, discriminate on the basis of a person's sexual orientation. *Baker v. State*, 744 A.2d at 890 (Dooley, J., concurring) ("[t]he marriage statutes do not facially discriminate on the basis of sexual orientation"); *id*. at 905 (Johnson, J., concurring in part and dissenting in part) (noting that "sexual orientation does not appear as a qualification for marriage under the marriage statutes," and the State "makes no inquiry into the sexual practices or identities of a couple seeking a license"). "The classification is not drawn between men and women or between heterosexuals and homosexuals, any of whom can obtain a license to marry a member of the opposite sex; rather, it is drawn between same-sex couples and opposite-sex couples."

Goodridge, 798 N.E.2d at 994 (Cordy, J., dissenting).[18] "It is . . . more accurate to refer to 'same-sex' or 'opposite-sex' unions, rather than a moniker [heterosexual marriages or homosexual marriages] that assumes facts about the sexual orientation of the participants." *Op.* at 12, n. 9. For purposes of analytical clarity, therefore, it is important to recognize, as even the plurality opinion in *Baehr v. Lewin* did, that " '[h]omosexual' and 'same-sex' marriages are not synonymous; by the same token, a 'heterosexual' same-sex marriage is, in theory, not oxymoronic. . . . Parties to 'a union between a man and a woman' may or may not be homosexuals. Parties to a same-sex marriage could theoretically be either homosexuals or heterosexuals." 852 P.2d at 51 n. 11.[19]

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[18] As previously noted, *see* n. 6, *supra*, Justice Cordy was discussing an alternative argument not reached by the majority in its decision requiring the Commonwealth to recognize same-sex marriage. Both the California Court of Appeal and reviewing courts in other States agree that classifications drawn between same-sex couples (or persons) and opposite-sex couples (or persons) are reviewable under the rational basis standard. *See People v. Silva*, 27 Cal. App. 4th 1160, 1168-71 (1994) (upholding statute that criminalized domestic violence between opposite-sex couples, but not between same-sex couples); *Snetsinger v. Montana University System*, 104 P.3d 445, 449-52 (Mont. 2004) (reviewing state university employee benefits policy); *State v. Limon*, 122 P.3d 22, 29-30 (Kan. 2005) (reviewing criminal classification); *State v. John M.*, 894 A.2d 376, 385-89 (Conn. Ct. App. 2006) (same), *certification granted*, 899 A.2d 622 (Conn. 2006).

[19] *Id.* at 71 (Heen, J., dissenting) ("[t]he effect of the statute is to prohibit same sex marriages on the part of professed or non-professed heterosexuals, homosexuals, bisexuals, or asexuals"). *See also Dean*, 653 A.2d at 363 n. 1) (Op. of Steadman, J.) (agreeing with *Baehr* that "just as not all opposite-sex marriages are between heterosexuals, not all same-sex marriages would necessarily be between homosexuals"); *Goodridge*, 798 N.E.2d at 953 n. 11 (same); *Smelt*, 374 F.Supp. 2d at 874 (same) (interpreting DOMA).

In his concurring opinion in *Andersen v. King County*, Justice J.M. Johnson noted that the state DOMA "does not distinguish between persons of heterosexual orientation and homosexual orientation," 138 P.3d at 997 (J.M. Johnson, J., concurring in judgment only), and identified a recent case in which a man and a woman, both identified as "gay," entered into a valid opposite-sex marriage. *Id*. at 991 n. 1, 996, citing *In re Parentage of L.B.*, 89 P.3d 271, 273 (Wash. Ct. App. 2004), *aff'd in part*, *rev'd in part on other grounds*, 122 P.3d 161 (Wash. 2005). It is apparent, therefore, that the right to enter into an opposite-sex marriage "is not restricted to (self-identified) heterosexual couples," *id*. at 991 n. 1, but extends to all adults without regard to "their sexual orientation." *Id*. at 997.

The same is true of the Family Code provisions challenged here which, as the Court of Appeal noted, "make no . . . reference to sexual orientation." *Op*. at 12, n. 9. "California law does not prohibit gays and lesbians from marrying, so long as they marry a person of the opposite sex." *Id*. "Homosexuals *may* marry persons of the *opposite* sex, and heterosexuals may *not* marry persons of the *same* sex." *Hernandez*, 805 N.Y.S.2d at 371 (Catterson, J., concurring). "The equality of the Constitution is the equality of right, and not of enjoyment." *Watson v. State Division of Motor Vehicles*, 212 Cal. 279, 284 (1931). Opposite-sex marriage is available to all on an equal basis, as the Court of Appeal recognized. *Op*. at 28 ("everyone has a fundamental right to enter a public union with an opposite-sex partner").

Although §§ 300 And 308.5 May Have A Disparate Impact On Homosexuals, That Impact Is Not Constitutionally Cognizable In The Absence Of Evidence Of An Intent To Discriminate Against Homosexuals.

Admittedly, reserving marriage to opposite-sex couples may have a

"disparate impact on gay and lesbian individuals." *Op.* at 39. *See also Hernandez*, 855 N.E.2d at 20 (Graffeo, J., concurring) (same). Nevertheless, "disparate impact alone is insufficient to invalidate a statute, even with respect to suspect or quasi-suspect classifications such as race and gender. Under well-established federal equal protection doctrine, a facially neutral law (or other official act) may not be challenged on the basis that it has a disparate impact on a particular race or gender unless that impact can be traced back to a discriminatory purpose or intent." *Hernandez*, 805 N.Y.S.2d at 371 (Catterson, J., concurring). The challenger must show that "the law was enacted [or the policy adopted] *because of*, not *in spite of*, its foreseeable discriminatory impact." *Id*. citing *Washington v. Davis*, 426 U.S. 229, 238-48 (1976) (rejecting an equal protection challenge to police department's use of a job-related employment test to evaluate verbal skills of employment applicants on which a higher percentage of blacks than whites failed where there was no showing that racial discrimination entered into the establishment or formulation of the test); *Village of Arlington Heights v. Metropolitan Housing Development Corp*., 429 U.S. 252, 264-71 (1977) (municipality's refusal to amend zoning ordinance to allow multi-family, low income housing in village where single family homes predominated did not violate the Equal Protection Clause, even though such refusal to rezone had a disproportionate impact on blacks, where there was no evidence of discriminatory intent); and *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 271-80 (1979) (upholding a hiring preference for veterans in state employment despite its disproportionate impact on women where there was no evidence that the statute conferring the preference was enacted with an intent to discriminate against women, as opposed to non-veterans of either sex).

California constitutional doctrine is in accord with these principles. In the absence of evidence that a facially neutral law is being administered in an intentionally discriminatory manner (which is not alleged here), evidence that the law has a disproportionate effect on a class of persons does not even raise a state equal protection issue unless that impact can be traced back to a discriminatory purpose in enacting the law. *Baluyut v. Superior Court*, 12 Cal. 4th 826, 837 (1996) (citing *Davis*, *Village of Arlington Heights* and *Feeney*).[20] This applies not only to laws that may have a disproportionate effect on one sex or the other,[21] but also to laws that may have a disproportionate effect on homosexuals. In *Koebke v. Bernardo Heights Country Club*, 36 Cal. 4th 824, 854 (2005), this Court held that an officially neutral policy distinguishing between married and unmarried persons could not be challenged under the Unruh Civil Rights Act solely on the basis of its disproportionate effect on homosexuals. If a neutral policy

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[20] The only California case that appears to stand for a contrary proposition, although decided on federal, not state grounds, is *Boren v. Dep't of Employment Development*, 59 Cal. App. 3d 250 (1976). *See* Tyler Br. at 33-34. In *Boren*, the Court of Appeal held that a statistical disparity alone, without any proof of discriminatory intent, provided a sufficient basis on which to challenge a facially neutral statute. *Boren*, however, predated the Supreme Court's decision in *Feeney*, which clearly rejected disparate impact as a constitutional standard for challenging facially neutral laws, as the Fourth Circuit Court of Appeals observed in distinguishing *Boren*. *See Austin v. Berryman*, 955 F.2d 223, 227 (4th Cir. 1992).

[21] *Hardy v. Stumpf*, 21 Cal. 3d 1, 7 (1978) (disproportionate impact of a facially neutral policy, standing alone, does not constitute sex discrimination under the state constitution) (interpreting art. I, § 8). *See also Kim v. Workers' Compensation Appeals Board,* 73 Cal. App. 4th 1357, 1361 (1999) (same). The same is true for cases brought under the Unruh Civil Rights Act. *Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142, 1170-75 (1991) (plaintiff must prove intentional discrimination).

that has a disproportionate effect on homosexuals does not, without more, violate the Unruh Civil Rights Act, then it necessarily follows that a facially neutral statute enacted by the State that has the same effect does not violate the California Constitution, either.

There Is No Evidence That In Adopting §§ 300 And 308.5 That Either The Legislature Or The People Intended To Discriminate Against Homosexuals, As Opposed To Maintaining The Traditional Definition Of Marriage.

Contrary to petitioners' arguments, *see* Lambda Br. at 26-28, neither § 300 nor § 308.5 of the Family Code was adopted *for the purpose of* discriminating against homosexuals, as opposed to maintaining the traditional definition of marriage. As the Court of Appeal noted, *Op*. at 13, § 300 was added to the Family Code in 1977 at the request of the County Clerks Association to eliminate any uncertainty as to the legality of same-sex "marriages" under California law. The purpose was simply to clarify existing law which, properly interpreted, did not then (and does not now) allow same-sex marriage.[22] Section 308.5, enacted as the result of the adoption of Proposition 22 in 2000, was, at a minimum, intended to ensure that same-sex marriages lawfully contracted in other States would not be recognized as valid in California, *see Armijo v. Miles*, 127 Cal. 4th 1405, 1422-24 (2005); *Knight v. Superior Court*, 128 Cal. App. 4th 14, 18 (2005), an entirely legitimate purpose. Even assuming that Proposition 22 had the additional purpose of not permitting same-sex marriages from being contracted in California, *see Knight*, 128 Cal. App. 4th at 23-24, it merely "reaffirm[ed] the [existing] definition of marriage in § 300, by stating that only marriage between a man and a woman shall be valid and recognized in California." *Id*. at 23. Although both the Legislature in 1977 and the People

[22] *See* the discussion at pp. 36-40, *infra*.

in 2000 certainly *knew* that §§ 300 and 308.5 would have a disparate impact on those homosexuals who might wish to marry someone of the same sex (just as Massachusetts knew in *Feeney* that offering veterans' preferences in state employment would disproportionately benefit men over women), that was not the *intent* of the legislation or the initiative. Rather, their intent was to clarify California law reserving marriage to opposite-sex couples.

In *Andersen v. King County*, the Washington Supreme Court rejected the argument that the state Defense of Marriage Act was enacted because of "anti-gay sentiment." 138 P.3d at 981. After reviewing the legislative history, the court concluded that "the far more likely explanation for the majority, if not all [of the legislators' votes in favor of DOMA], is that they were not motivated by anti-gay sentiment in 1998 but instead were convinced for other reasons that marriage should not be extended to same-sex couples." *Id*. Those "other reasons" included, *inter alia*, "traditional and generational attitudes toward marriage." *Id.* n. 15. Petitioners have failed to show that §§ 300 and 308.5 of the Family Code were adopted *for the purpose of* discriminating against homosexuals, as opposed to maintaining the traditional definition of marriage.

Homosexuals Are Not A Suspect (Or Quasi-Suspect) Class And, Therefore, Even Assuming That The Legislature And The People Had An Intent To Discriminate Against Them, That Intent Does Not Render §§ 300 And 308.5 Unconstitutional So Long As That Intent Was Not Their Sole Purpose.

This Court has held that a statutory classification may not be considered "suspect" for purposes of equal protection analysis unless three requirements are met: The characteristic defining the class must be based upon "an immutable trait," it must "bear[] no relation to [a person's] ability to perform or contribute to society," and it must be associated with a "stigma of inferiority and second class citizenship," manifested by the

group's history of legal and social disabilities. *Sail'er Inn,* 5 Cal. 3d at 18-19. Without disputing whether homosexuals satisfy the second and third requirements, the Court of Appeal said that whether they satisfy the first requirement–immutablity–is "more controversial." *Op*. at 44. Whether "sexual orientation is immutable presents a factual question," which should not be resolved "without benefit of a trial record with the right kind of expert testimony, subject to cross-examination." *Id*. at 44-45 (citation and internal quotation marks omitted). But the superior court "did not conduct an evidentiary hearing, and no clear factual record was developed addressing the three suspect classification factors." *Id*. [23] Without guidance from this Court or other Courts of Appeals "and lacking even a finding from the trial court on the issue," the Court of Appeal "decline[d] to forge new ground . . . by declaring sexual orientation to be a suspect classification for purposes of equal protection analysis." *Id*. at 45.

Petitioners argue that immutability is not a prerequisite to a finding of a suspect class and that, in any event, sexual orientation should be regarded as an immutable characteristic as a matter of law. Lambda Br. at 35-39; CCSF Br. at 60, 64-69. Petitioners are wrong on both counts.

First, consistent with its holding in *Sail'er Inn*, this Court *has* denied suspect classification status solely on the basis that the class in question did not possess an immutable trait. *See Meredith v. Workers' Compensation Appeals Board*, 19 Cal. 3d 777, 781 (1977) ("status of a prisoner following conviction as the result of legal processes is not an immutable trait"). Petitioners, however, cite religion, poverty (of school districts and their

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[23] This quotation is from the October 5, 2006, majority opinion, as modified by the order entered on November 6, 2006.

residents), illegitimacy and alienage as characteristics that have been determined to be "suspect," but are not immutable. *See* Lambda Br. at 35; CCSF Br. at 64-66. Those examples miss the mark.

Discrimination based on religion is subject to judicial review under the strict scrutiny standard because such discrimination interferes with the fundamental state (and federal) constitutional right of free exercise.[24] So, too, discrimination in educational opportunities based on a school district's relative poverty is subject to strict scrutiny because such discrimination implicates the fundamental state interest in education.[25] For the reasons set forth by the Court of Appeal, however, *see Op*. at 23-33, discrimination based on sexual orientation, at least with respect to marriage, involves no fundamental right, in particular no fundamental right to enter into a same-sex marriage. Although illegitimates may be legitimated, discrimination against them, *as illegitimates*, is based on an immutable characteristic, to wit, their illegitimacy *at the time of their birth*.[26] Similarly, while an alien

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[24] CAL. CONST. art. I, § 4 (West 2002), which provides, in part, that "Free exercise and enjoyment of religion *without discrimination or preference* are guaranteed." Emphasis added. The intent of the italicized language is "to ensure that free exercise of religion is guaranteed regardless of the nature of the religious belief professed, and that the [S]tate neither favors nor discriminates against religion." *East Bay Asian Local Development Corp. v. State of California*, 24 Cal. 4th 693, 719 (2000).

[25] *See Serrano v. Priest*, 18 Cal. 3d 728, 763-66 (1976) (recognizing education as a fundamental interest under the state constitution) (citing CAL. CONST. art. IX, §§ 1, 5, and art. XVI, § 8 (West 1996)).

[26] *See Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 176 (1972) ("the Equal Protection Clause . . . enable[s] us to strike down discriminatory laws relating to the status *of birth*") (emphasis added); *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (same).

may acquire citizenship through naturalization, discrimination based on alienage is often a subterfuge for discrimination based on national origin (or ancestry), *see Takahashi v. Fish and Game Comm'n*, 334 U.S. 422 (1948) (Murphy, J., concurring), which *is* an immutable characteristic. Moreover, one cannot be an "alien" unless one is of foreign birth which, again, is an immutable characteristic.

Second, neither Lambda nor San Francisco has cited controlling, or even persuasive, legal authority–state or federal–that sexual orientation *is* a suspect classification.[27] Ten of the thirteen federal circuit courts of appeals have held that homosexuals do not constitute a suspect or quasi-suspect class requiring greater than rational basis scrutiny under the Equal Protection Clause,[28] and an eleventh circuit has applied rational basis

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[27] Petitioners rely principally on the concurring opinion of Judge Norris in *Watkins v. United States Army*, 875 F.2d 699, 725-26 (9th Cir. 1989) (Norris, J., concurring). *See* Lambda Br. at 36, 37, 38; *see also* CCSF Br. at 66. Petitioners fail to note that his earlier opinion in *Watkins*, *see* 847 F.2d 1329 (9th Cir. 1988), which *did* hold that sexual orientation is a suspect classification, *see id.* at 1345-49, was withdrawn on rehearing *en banc*. *See Watkins*, 875 F.2d at 711. San Francisco also relies on *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084 (9th Cir. 2000), CCSF's Br. at 67-68, *see also* Clinton Br. at 30, which is discussed below. *See* n. 35, *infra*.

[28] *Thomasson v. Perry*, 80 F.3d 915, 927-28 (4th Cir. 1996) (*en banc*); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (*en banc*); *Scarborough v. Morgan County Board of Education*, 470 F.3d 250, 261 (6th Cir. 2006); *Equality Foundation of Greater Cincinnati, Inc. v. Cincinnati*, 54 F.3d 261, 265-68 & n. 2 (6th Cir. 1995), *vacated and remanded*, 518 U.S. 1001 (1996), *on remand*, 128 F.3d 289, 292-93 & nn. 1-2 (6th Cir. 1997), *cert. denied*, 525 U.S. 943 (1998)*; Schroeder v. Hamilton School District*, 282 F.3d 946, 950-51, 953-54 (7th Cir. 2002), *id*. at 957 (Posner, J., concurring); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-65 & n. 8 (7th Cir. 1989); *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 866-69 (8th Cir. 2006); *Richenberg v.*

review without deciding whether a higher standard would be warranted.[29]

San Francisco attempts to dismiss the significance of these cases on the ground that they relied on the Supreme Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), later overruled in *Lawrence v. Texas*, 539 U.S. 558 (2003), holding that there is no right to engage in homosexual sodomy. CCSF's Br. at 70-72. It must be noted, however, that of the twenty-one cases cited, three (*Baker*, *Rich* and *National Gay Task Force*) were decided *before Bowers* and, therefore, could not have been based on the Court's opinion in that case; and eleven others (*Able*, *Johnson*, *Scarborough*, *Equality Foundation*, *Schroeder*, *Citizens for Equal Protection*, *Richenberg*, *Flores*, *Holmes*, *Philips* and *Lofton*) were decided *after* the Supreme Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996), which clearly, if only by implication, cast a long shadow on the continuing vitality of *Bowers*. *See Romer*, 517 U.S. at 636 (Scalia, J., dissenting) (Court's "holding that homosexuality cannot be singled out for disfavorable

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Perry, 97 F.3d 256, 260 & n. 5 (8th Cir. 1996); *Flores v. Morgan Hill Unified School District*, 324 F.3d 1130, 1137 (9th Cir. 2003); *Holmes v. California National Guard*, 124 F.3d 1126, 1132-33 (9th Cir. 1997); *Philips v. Perry*, 106 F.3d 1420, 1424-25 (9th Cir. 1999); *High Tech Gays v. Defense Industrial Services Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990); *Jantz v. Muci*, 976 F.2d 623, 630 (10th Cir. 1992); *Rich v. Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984); *National Gay Task Force v. Board of Education of the City of Oklahoma City*, 729 F.2d 1270, 1273 (10th Cir. 1984), *aff'd mem. by an equally divided Court*, 470 U.S. 903 (1985); *Lofton v. Secretary of the Dep't of Children & Family Services*, 358 F.3d 804, 818 & n. 16 (11th Cir. 2004); *Steffan v. Perry*, 41 F.3d 677, 684 n. 3 (D.C. Cir. 1994) (*en banc*); *Padula v. Webster*, 822 F.2d 97, 103-04 (D.C. Cir. 1987); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989).

[29] *Able v. United States*, 155 F.3d 628, 632 (2d Cir. 1998). The First and Third Circuits have not addressed the issue.

treatment . . . contradicts a decision, unchallenged here, pronounced only 10 years ago"), citing *Bowers*. And four of these cases (*Johnson*, *Scarborough*, *Citizens for Equal Protection* and *Lofton*) were decided after the Supreme Court overruled *Bowers*.

Moreover, although the Supreme Court overruled *Bowers* in *Lawrence*, *Lawrence* used the rational basis standard of review, the same standard that was used in the pre-*Lawrence* authorities cited above. Those authorities remain relevant precedents in suggesting the appropriate standard of review this Court should employ in deciding the instant cases. *See Loomis v. United States*, 68 Fed. Cl. 503, 518, 522 (2005) (noting continuing vitality of pre-*Lawrence* cases holding that classifications based on homosexuality are not subject to heightened judicial review).

In addition to the foregoing federal authorities, six state reviewing courts have held that neither *Romer* nor *Lawrence* requires more than rational basis review of state statutes reserving marriage to opposite-sex couples, even assuming that such statutes discriminate on the basis of sexual orientation.[30] And neither *Goodridge* nor either of the other two state supreme court decisions requiring the State to recognize same-sex marriages (or their equivalent) held that classifications based on sexual orientation are subject to heightened scrutiny.[31]

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[30] *Standhardt v. Superior Court*, 77 P.3d 451, 456-57, 464-65 (Ariz. Ct. App. 2003); *Lewis v. Harris*, 875 A.2d at 272-73; *Hernandez*, 855 N.E.2d at 9-10, 11; *Hernandez*, 805 N.Y.S.2d at 361; *Samuels,* 811 N.Y.S.2d at 144; *Andersen*, 138 P.3d at 975-76, *id*. at 996-98 (J.M. Johnson, J., concurring in judgment only).

[31] *Goodridge*, 798 N.E.2d at 961 n. 21 (not deciding "whether 'sexual orientation' is a suspect classification"); *Baker v. State*, 744 A.2d at 878 & n. 10 (refusing to characterize classifications based on sexual

Both this Court and the Court of Appeal have recognized that arbitrary discrimination against homosexuals violates constitutional and statutory norms.[32] Neither this Court nor the Court of Appeal, however, has held that homosexuals belong to a suspect or quasi-suspect class for purposes of equal protection review,[33] as petitioners have admitted.

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orientation as suspect or quasi-suspect); *Lewis v. Harris*, 908 A.2d at 220 (not characterizing classifications based on sexual orientation as suspect or quasi-suspect). *See also Baehr*, 852 P.2d at 53 n. 14 & 58 n. 17 (not deciding whether homosexuality is an "immutable trait" or whether homosexuals constitute a "suspect class" for purposes of state equal protection analysis).

[32] *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 24 Cal. 3d 458, 469 (1979) ("arbitrary exclusion of qualified individuals from employment opportunities by a state-protected public utility . . . violate[s] the state constitutional rights of the victims of such discrimination"), relying on art. I, §§ 7(a), 8; *People v. Garcia*, 77 Cal. App. 4th 1269, 1271-72, 1281 (2000) (use of peremptory challenges); *Citizens for Responsible Behavior v. Superior Court*, 1 Cal. App. 4th 1013, 1025 (1991) (denying writ of mandate to compel city to place on the ballot a proposed ordinance that would have repealed existing ordinances relating to homosexual rights, required voter approval for any future ordinances on the subject and prohibited funding for AIDS or for individuals or groups who advocated homosexual rights); *Curran v. Mount Diablo Council of the Boy Scouts of America*, 147 Cal. App. 3d 712, 733-34 (1983) (local boy scouts' council could not expel scout from membership solely because he was a homosexual), *appeal dismissed for want of a final judgment*, 468 U.S. 1205 (1984); *Hubert v. Williams*, 133 Cal. App. 3d Supp. 1, 5 (1982) (homosexuals are a class protected by the Unruh Civil Rights Act); *Stoumen v. Reilly*, 37 Cal 2d 713, 716 (1951) (same) (*dictum*).

[33] *Gay Law Students Ass'n*, 24 Cal. 3d at 467-69 (not deciding question); *Citizens for Responsible Behavior*, 1 Cal. App. 4th at 1026 n. 8 (not deciding whether classifications based on sexual orientation should be subject to intermediate review); *Hinman v. Dep't of Personnel Administration,* 167 Cal. App. 3d 516, 526 n. 8 (1985) (not deciding whether classifications based on sexual orientation should be subject to

Lambda Br. at 28; CCSF Br. at 63. And, with the exception of a single intermediate state court of appeals decision, *see Tanner Oregon Health Sciences University*, 971 P.2d 435 (Or. Ct. App. 1998), cited by San Francisco, CCSF Br. at 65-66, no state or federal reviewing court has held that homosexuals are a suspect (or even a quasi-suspect) class entitled to heightened judicial scrutiny. The Oregon Court of Appeals was able to hold that homosexuals are a suspect class only by abandoning the requirement that members of a suspect class share an immutable trait, *Tanner*, 971 P.2d at 446, a requirement that this Court has insisted upon in recognizing suspect classes. *Sail'er Inn,* 5 Cal. 3d at 18 ("sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth"); *Meredith*, 19 Cal. 3d at 780-81 (applying *Sail'er Inn*).[34] Other than a single Ninth Circuit opinion which cannot be

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strict scrutiny review). In an earlier opinion by the same judge who dissented below (Kline, J.), the Court of Appeal referred in passing to "race or sexual orientation" as suspect classifications warranting strict scrutiny. *Children's Hospital & Medical Center v. Bonta*, 97 Cal. App. 4th 740, 769 (2002). The court, however, cited no authority in support of the proposition that sexual orientation is a suspect classification. Moreover, the statement was *dicta* because the case before the court concerned the "differential treatment of in-state and out-of-state [enterprises]." *Id*.

[34] In *Baker v. State*, the Vermont Supreme Court criticized *Tanner's* substitution of evidence of "adverse stereotyping" for proof that members of a particular class share an "immutable personal characteristic" in determining whether the class is suspect: "It is difficult to imagine a legal framework that could provide less predictability in the outcome of future cases than one which gives a court free reign to decide which groups have been the subject of 'adverse social or political stereotyping.' " 744 A.2d at 878 n. 10, quoting *Tanner*, 971 P.2d at 446.

reconciled with prior or subsequent case law of the same circuit,[35] no federal or state reviewing court has held that homosexuality is an immutable trait. The case law is to the contrary.

In *Woodward v. United States*, the Federal Circuit Court of Appeals explained why homosexuality is distinct from those characteristics that define suspect or quasi-suspect classes: "Homosexuality, as a definitive trait, differs fundamentally from those defining any of the recognized suspect or quasi-suspect classes. Members of recognized suspect or quasi-suspect classes, *e.g.*, blacks or women, exhibit immutable characteristics, whereas homosexuality is primarily behavioral in nature." 871 F.2d at 1076, citing *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (" 'The disadvantaged class is . . . . not . . . "suspect" or "quasi-suspect" . . . . they do not exhibit obvious, immutable or distinguishing characteristics that define them as a discrete group' " (quoting *Lyng v. Castillo*, 477 U.S. 635, 638 (1986))), and *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). *See also Equality Foundation*, 54 F.3d at 267 (same). "The conduct or behavior of the members of a recognized suspect or quasi-suspect class has no relevance to the identification of those groups." *Woodward*, 871 F.2d at 1076. *See also High Tech Gays*, 895 F.2d at 573 ("Homosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes") (following *Woodward*);

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[35] *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1093 (9th Cir. 2000) (characterizing sexual orientation and sexual identity as "immutable"), *overruled in part on other grounds*, *Thomas v. Gonzales*, 408 F.3d 1177, 1187 (9th Cir. 2005); *but see High Tech Gays*, 895 F.2d at 571 (homosexuality is not an "immutable characteristic"); *Flores*, 324 F.3d at 1137 (following *High Tech Gays*).

Padula, 822 F.2d at 102-03 (implying that homosexuality is behavioral).

Unlike sex or race, homosexuality is not an "immutable trait." Moreover, homosexuals lack another characteristic required of suspect classifications–political powerlessness. Although this factor was not mentioned in *Sail'er Inn*, that case, as this Court has noted, *see D'Amico v. Board of Medical Examiners*, 11 Cal. 3d 1, 18 (1974), was decided prior to *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), in which the Supreme Court identified "political powerlessness" as one of the "traditional indicia of suspectness." 411 U.S. at 19 (holding that wealth is not a suspect classification). *See also Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312-14 (1976) (applying *Rodriguez* in holding that age is not a suspect classification). Subsequently, this Court has cited and applied the *Rodriguez* "indicia of suspectness" in determining whether a classification is suspect. *See Bowens v. Superior Court*, 1 Cal. 4th 36, 42 (1991) (system of prosecution mandated by the California Constitution "does not single out a suspect class within the meaning of this definition [referring to the factors identified in *Rodriguez*]." Both this Court and the Court of Appeal have relied upon the absence of evidence of "political powerlessness" in holding that various classifications are not "suspect" under either the state and federal constitutions.[36]

It is (or should be) obvious that homosexuals are not "politically powerless" in the State of California. The California Legislature has

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[36] *See Schmidt v. Superior Court*, 48 Cal. 3d 370, 389 (1989) (age is not a suspect classification); *Kubik v. Scripps College*, 118 Cal. App. 3d 544, 551-52 (1981) (same); *Kenneally v. Medical Board of California*, 27 Cal. App. 4th 489, 496 & n. 5 (1994) (physicians are not a suspect class); *Tain v. State Board of Chiropractic Examiners*, 130 Cal. App. 4th 609, 628-31 (2005) (chiropractors are not a suspect class).

prohibited discrimination on the basis of sexual orientation by business establishments that offer services to the public under the Unruh Civil Rights Act, CIV. CODE § 51 *et seq*. (West 1982 & Supp. 2007),[37] in employment practices and the sale or rental of real estate under the California Fair Employment & Housing Act, GOV'T CODE § 12900 *et seq*. (West 2005 & Supp. 2007),[38] by adult day care health centers, HEALTH & SAFETY CODE § 1586.7 (West Supp. 2007), and in programs or activities funded in whole or in part by the State of California or any of its agencies, GOV'T CODE § 11135 (West Supp. 2007). California has added sexual orientation to the categories of offenses covered by its hate crimes legislation, PENAL CODE § 422.55(a)(6) (West Supp. 2007), *see also id*. § 190.03 (West Supp. 2007) (mandating life imprisonment for first degree murder that involves a hate crime), and to its legislation dealing with terrorism, §§ 11410, 11413(b)(9) (West Supp. 2007). Discrimination on the basis of sexual orientation is prohibited in placing minor children with foster parents or for adoption. WELF. & INST. CODE § 16013 (West Supp. 2007).

Of even greater significance is the Legislature's enactment of the Domestic Partner Act and the amendments thereto. FAM. CODE § 297 *et seq*. (West 2004 & Supp. 2007). The Domestic Partner Act, as amended, recognizes domestic partnerships between members of the same sex, creates a mechanism for registering such partnerships and provides that registered domestic partners "shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under

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[37] Sections 51(b) (West Supp. 2007) (adding sexual orientation).

[38] Sections 12920, 12921, 12926(q), 12940, 12944, 12955, 12955.8, 12956.1 (West 2005 & West Supp. 2007).

law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses." FAM. CODE § 297.5 (West Supp. 2007). The Act, as amended, confers all of the rights and benefits, burdens and obligations, of marriage upon same-sex couples that are within the power of the Legislature to confer.[39] In addition to these legislative accomplishments, homosexuals were successful in persuading the Legislature to pass a same-sex marriage bill in September 2005. *See* Assembly Bill No. 849 (2005-2006 Reg. Sess.). Although that bill was subsequently vetoed by Governor Schwarzenegger, the fact that it passed reflects the political strength of homosexuals, not their political weakness.[40] On a record of legislative accomplishments far less impressive, the Washington Supreme Court held that homosexuals are not entitled to the special protection accorded suspect classes because they are not politically powerless. *See Andersen v. King County*, 138 P.3d at 974-75. In California, as in Washington, homosexuals have not been "relegated to a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Rodriguez*, 411 U.S. at 28.

Classifications based on sexual orientation are not suspect or quasi-suspect. "[P]ublic discrimination towards persons who are not members of a suspect or quasi-suspect class is permissible as long as such official discrimination is rationally linked to the furtherance of some valid public

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[39] *See also* FAM. CODE §§ 9000(b), (g) (West Supp. 2007) (providing for adoption by registered domestic partner).

[40] The mere fact that a class of persons is unable to enact its entire legislative agenda does not reflect "political powerlessness," otherwise *every* class could be said to be "politically powerless."

interest." *Equality Foundation*, 128 F.3d at 297 n. 8, citing *Romer*, 517 U.S. at 632.[41] This holding is supported by a wealth of case law rejecting equal protection challenges to various forms of alleged discrimination against homosexuals where, regardless of animus, the discrimination in question was rationally related to a legitimate governmental purpose.[42] So, too, state courts have upheld state statutes reserving marriage to opposite-sex couples, notwithstanding claims that they were motivated in part by an anti-homosexual animus, because the courts determined that the statutes are reasonably related to legitimate state interests. *Standhardt*, 77 P.3d at 464-65; *Andersen*, 138 P.3d at 980-85.[43]

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[41] *See also Lofton v. Secretary of the Dep't of Children & Family Services*, 377 F.3d 1275, 1280 (11th Cir. 2004) (Birch, J., specially concurring in the denial of rehearing *en banc*) (*Romer* essentially stands for the proposition "that when all the proffered rationales for a law are clearly and manifestly implausible, a reviewing court may infer that animus is the only explicable basis" and "animus *alone* cannot constitute a legitimate government interest") (emphasis in original); *Andersen*, 138 P.3d at 981 ("*Romer* exemplifies the principle that where legislation is subject to rational basis review, it will not be found unconstitutional on the basis that it was animated by animus unless it also lacks any rational relationship to a legitimate governmental purpose").

[42] *See Equality Foundation*, 128 F.3d at 300-01 (upholding city charter amendment that removed homosexuals, gays, lesbians and bisexuals from the protections afforded by the municipality's anti-discrimination ordinances, and precluded the city and its boards and commissions from restoring them to protected status); *Citizens for Equal Protection*, 455 F.3d at 864-69 (upholding state constitutional amendment reserving marriage to opposite-sex couples); *Lofton*, 358 F.3d at 817-26 (upholding state law prohibiting practicing homosexuals from adopting children); *Holmes*, 124 F.3d at 1132-36 (upholding military's "don't ask/don't tell" policy).

[43] In *Standhardt*, the Arizona Court of Appeals held that "Arizona's prohibition of same-sex marriages furthers a proper legislative end and was

In Adopting §§ 300 And 308.5, The Legislature And The People Had Legitimate Reasons For Reserving Marriage To Opposite-Sex Couples.

The Court of Appeal determined that reserving marriage to opposite-sex couples, while extending the rights and benefits of marriage to same-sex couples in the Domestic Partner Act, is rationally related to the State's legitimate interests in "preserving the traditional definition of marriage," Op. at 52, and "carrying out the will of its citizens." *Id*. at 60. Case law from other jurisdictions supports the legitimacy of both interests.

With respect to the former interest, the New Jersey Supreme Court, while ordering the state legislature to enact legislation providing same-sex couples with all of the rights and benefits that opposite-sex married couples presently enjoy, refused to order the legislature to designate such unions as "marriages." The supreme court stated:

> We cannot escape the reality that the shared societal meaning of marriage – passed down through the common law into our statutory law – has always been the union of a man and a woman. To alter that meaning would render a profound change in the public consciousness of a social institution of ancient origin.

Lewis v. Harris, 908 A.2d at 222.

In *Lawrence v. Texas*, Justice O'Connor said that "preserving the traditional institution of marriage" is a "legitimate state interest," 539 U.S. at 585 (O'Connor, J., concurring), an opinion with which several state

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not enacted simply to make same-sex couples unequal to everyone else." 77 P.3d at 465. In *Andersen*, the Washington Supreme Court explained that under rational basis review, "*even if* animus in part motivates legislative decision making, unconstitutionality does not follow if the law is otherwise rationally related to legitimate state interests." 138 P.3d at 981-82 (emphasis in original), citing *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 367 (2001).

courts have concurred.[44] The Court of Appeal properly determined that the Legislature's decision to reserve the title of "marriage" for opposite-sex unions is rationally related to the State's legitimate interest in "preserving the traditional definition of marriage." *Op*. at 52.[45]

With respect to the latter interest, other courts have also recognized the legitimacy of the State's interest in "carrying out the will of its citizens." *Op*. at 60. In upholding an initiative amending a city charter ordinance (the substance of which is discussed above), the Sixth Circuit said that, "[a]s the product of direct legislation by the people, a popularly enacted initiative or referendum occupies a special posture in this nation's constitutional tradition and experience." *Equality Foundation*, 128 F.3d at 297. For that reason, "[a]n expression of the popular will expressed by majority plebiscite . . . must not be cavalierly disregarded." *Id*., citing, *inter alia*, *James v. Valtierra*, 402 U.S. 137, 141-43 (1971) (praising the referendum as manifesting "devotion to democracy, not to bias, discrimination, or

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[44] *See*, *e.g*., *Andersen*, 138 P.3d at 982 (recognizing that one purpose of the state DOMA was "to reaffirm the State's historical commitment to the institution of marriage between a man and a woman"), *id*. at 1000 (J.M. Johnson, J., concurring in judgment only) (quoting Justice O'Connor); *Samuels*, 811 N.Y.S.2d at 144-45 (quoting Justice O'Connor and holding that plaintiffs failed to establish that "it is irrational for the Legislature to preserve the historic legal and cultural understanding of marriage"); *Hernandez*, 805 N.Y.S.2d at 359 ("[t]he definition of marriage . . . expresses an important, long-recognized public policy"), *id* at 374 (Catterson, J., concurring) (quoting Justice O'Connor).

[45] Petitioners' attempt to dismiss the legitimacy of this interest by comparing it to the State's "interest" in preserving segregation, Lambda Br. at 73-76, Clinton Br. at 44, Tyler Br. at 21-23, is unavailing for the reasons set forth in Argument I, *supra*. Petitioners do not even address the State's interest in showing special respect to initiatives adopted by the People.

prejudice," and as constituting a "procedure [which] ensures that all the people of a community will have a voice in a decision . . . that will affect the future development of their own community"); and *Spaulding v. Blair*, 403 F.2d 862, 863 (4th Cir. 1968) ("[t]he referendum procedure . . . is a fundamental part of the State's legislative process"). *See also Andersen*, 138 P.3d at 1003 ("[a]nother rational basis requiring us to uphold DOMA is that the statute was found as necessary to ensure that decisions about marriage remain with the people of Washington") (J.M. Johnson, J., concurring in judgment only).

In addition to the foregoing interests, the Court of Appeal identified a third possible interest. Regardless of the nomenclature used to describe a solemnized same-sex union in California ("marriage" or "domestic partnership"), the federal government and most States, which refuse to extend the "rights and benefits" of marriage to same-sex couples, "will treat this union differently than [they] will an opposite-sex marriage." *Op.* at 55-56 n. 31. The Court of Appeal suggested that "such substantive differences [may] provide, in themselves, a rational basis for calling the license issued to same-sex couples by a different name." *Id.*, citing *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 574-78 (2004) (Sosman, J., dissenting).

In *Opinions of the Justices*, a bare majority of the Massachusetts Supreme Judicial Court opined that a civil unions statute would not remedy the constitutional defects they had previously found in the Commonwealth's marriage laws in *Goodridge*. *Opinions of the Justices*, 802 N.E.2d at 566-72. In dissent, Justice Sosman pointed out that, notwithstanding the court's decision in *Goodridge*, "neither [f]ederal law nor the law of other States will recognize same-sex couples as 'married' merely because Massachusetts

has given them a license called a 'marriage' license." *Id*. at 574.

> That fact, by itself, will result in many substantive differences between what it would mean for a same-sex couple to receive a Massachusetts "marriage" license and what it means for an opposite-sex couple to receive a Massachusetts "marriage" license. Those differences are real and, in some cases, quite stark. Their very existence makes it rational to call the license issued to same-sex couples by a different name, as it unavoidably–and, to many, regrettably–cannot confer a truly equal package of rights, privileges, and benefits on those couples, no matter what name it is given.

Id.

Describing same-sex unions by a different name ("domestic partnership") than for opposite-sex unions ("marriage") is rationally related to the State's legitimate interests in facilitating the administration of state programs, and the implementation of state laws, that are interconnected with federal law, which does not recognize same-sex "marriages," and in avoiding unnecessary conflict with the laws of other States that do not recognize such "marriages," in a wide range of issues that transcend state lines (*e.g.*, taxes, estates, adoption and other family matters). *See Forbush v. Wallace*, 341 F.Supp. 217, 222 n. 2 (M.D. Ala. 1971) ("[a]dministrative factors have often been considered rational bases for challenged statutes"), *aff'd*, 405 U.S. 970 (1972); *Matthews v. Lucas*, 427 U.S. 495, 509 (1976) (finding "administrative convenience" to be a rational basis for a statute).

An Anti-Homosexual Animus Cannot Fairly Be Attributed To Other Provisions Of The Family Code That Envision Marriage As A Relationship That May Exist Only Between A Man And A Woman.

Petitioners challenge §§ 300 and 308.5 of the Family Code, which expressly reserve marriage to opposite-sex couples. Apart from these two provisions, however, which were enacted in 1977 and 2000, respectively, more than a score of other current Family Code provisions that impliedly

recognize marriage as a relationship between a man and a woman may be traced back to the Civil Code of 1872, long before any anti-homosexual animus could possibly be attributed to the legislature. These provisions and their subject matter, listed below, employ gender-specific terms such as "husband" and "wife," "male" and "female," "bride" and "groom," and "mother" and "father," in identifying the parties to a lawful marriage, specifying the formalities for entering into a valid marriage and defining the rights and responsibilities of the parties to a marriage; they also prohibit marriages between collaterally related persons of the opposite sex, as well as marriages between directly related persons (ancestors and descendants).

Family Code (West 2004)	Civil Code (1872)	Subject Matter
§ 301	§§ 56, 69(4)	(establishing age at which males
§ 302	§§ 56, 69(4)	and females may marry with and without their parents' consent)
§ 355	§ 69	(form of marriage license)
§ 420(a)	§ 71	(solemnization of marriage)
§ 720	§ 155	(mutual obligations)
§ 721	§ 158	(authority to enter into contracts)
§ 750	§ 161	(methods of holding property)
§ 752	§ 157	(interest in separate property)
§ 754	§ 157	(disposition of separate property)
§ 803(c)	§ 164	(defining community property)
§ 1500	§ 177	(effect of marital agreements)
§ 1620	§ 159	(contracts altering legal relationship of spouses)
§ 2200	§ 59	(prohibiting incestuous marriages, including marriages between "brothers and sisters," "uncles and nieces" and "aunts and nephews")
§ 2201	§ 61	(prohibiting bigamous and polygamous marriages)
§ 2210(b)	§ 82(2)	(annulment)
§ 2322	§ 129	(domicile after separation)

§ 3580	§ 159	(immediate separation agreements)
§ 3600	§ 137	(orders of support)
§ 3900	§ 196	(duty to support minor child)
§ 3910(a)	§ 206	(duty to support adult child in certain circumstances)
§ 7500(a)	§ 197	(services and earnings of adult child)[46]

Other provisions of the Family Code that were first enacted in 1878, 1927 and 1955 also imply that marriage is a relationship that may be created only between a man and a woman.[47]

Entirely apart from §§ 300 and 308.5, the structure and language of the foregoing statutes clearly envision marriage as a relationship that may exist only between a man and a woman, as the Court of Appeal correctly observed. *Op*. at 32 ("marriage in this [S]tate has always been defined, implicitly or explicitly, as the union of opposite-sex individuals").[48] These

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[46] The Civil Code of 1872 had more than two dozen other provisions implying that marriage is a relationship that may exist only between a man and a woman. CIV. CODE §§ 84, 93, 96, 103-105, 114, 136, 139, 142, 144, 156, 162-63, 168-69, 170-71, 173-76, 198-99, 209 (1872).

[47] *See*, *e.g.*, FAM. CODE §§ 500 (excusing necessity of obtaining health certificates before solemnizing a "confidential marriage" between "an unmarried man and an unmarried woman . . . living together as husband and wife"); 751 (respective interests of the"husband" and "wife" in community property); 3551 (inapplicability of spousal testimonial privilege in support proceedings) (referring to "husband" and "wife") (West 2004).

[48] Similar statutory language has been found, without exception, to prohibit same-sex marriages. *See Baehr*, 852 P.2d at 60; *Jones v. Hallahan*, 501 S.W.2d at 589; *Goodridge*, 798 N.E.2d at 951-53; *Baker v. Nelson*, 191 N.W.2d at 185-86; *Lewis v. Harris*, 908 A.2d at 208; *Hernandez*, 855 N.E.2d at 5-6; *Li v. State*, 110 P.3d 91, 95-96 (Or. 2005); *DeSanto v. Barnsely*, 476 A.2d 952, 953-54 (Pa. Super. Ct. 1984); *Baker v. State*, 744

statutes were originally enacted long before the Legislature could have even "contemplated the possibility of same-sex marriage," *Hernandez*, 855 N.E.2d at 13 (Graffeo, J., concurring),[49] indeed, even before homosexuals were recognized as a class of persons,[50] as San Francisco admits, CCSF Br. at 8 ("Until some time after the Civil War, society did not identify people as 'gay' or 'straight' "), and, therefore, cannot not be regarded as manifesting an anti-homosexual animus. As Judge R.S. Smith, the author of the lead opinion in *Hernandez,* said:

> The idea that same-sex marriage is even possible is a relatively new one. Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex. A court should not lightly conclude that everyone who held this belief was irrational, ignorant or bigoted. We do not so conclude.

A.2d at 868-69; *Singer*, 522 P.2d at 1188; *Dean*, 653 A.2d at 310-15 (interpreting Congressional marriage statute governing the District of Columbia). *See also Adams v. Howerton*, 486 F.Supp. 1119, 1122 (C.D. Cal. 1980) (interpreting Colorado law), *aff'd* 673 F.2d 1036 (9th Cir. 1982).

[49] A point recognized by the Arizona Court of Appeals with respect to the interpretation of the 1910 Arizona Constitution, *Standhardt*, 77 P.3d at 460, and by the New Jersey Supreme Court with respect to the interpretation of the 1947 New Jersey Constitution, *Lewis*, 908 A.2d at 208-11. *See also Goodridge*, 798 N.E.2d at 980 (Sosman, J., dissenting) ("Gay and lesbian couples living together openly . . . comprise a very recent phenomenon").

[50] The Supreme Court has noted that, "according to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late 19th century." *Lawrence v. Texas*, 539 U.S. at 568, citing J. Katz, THE INVENTION OF HETEROSEXUALITY 10 (1995); J. D'Emilio & E. Freedman, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 121 (2d ed. 1997).

Id. at 8.[51]

And neither should this Court. Even if § 300 had not been amended by the legislature in 1977, and § 308.5 had not been adopted by the People in 2000, to prohibit same-sex marriages explicitly, multiple provisions of the current Family Code that were first enacted in the Civil Code of 1872 would still prohibit such marriages implicitly. In the absence of evidence that *those* provisions were adopted out of an anti-homosexual animus (which petitioners do not even allege), it is irrelevant whether §§ 300 and 308.5 were motivated solely by such animus. Regardless of the validity of §§ 300 and 308.5, those other provisions of the Family Code, unchallenged in this litigation, would bar the relief petitioners have sought here.

State Equal Protection Jurisprudence Requires Equality of Treatment, Not Identical Treatment, Of Similarly Situated Classes Of Persons, Which Is Provided By The Domestic Partner Act.

Lastly, *amicus* notes that the Domestic Partner Act, as amended, provides same-sex couples with all of the rights and benefits of marriage that the legislature is capable of conferring upon same-sex unions, other than the title of "marriage" itself. With the exception of a non-binding, advisory opinion of the Massachusetts Supreme Judicial Court, *see Opinions of the Justices*, "no precedent suggest[s] that the choice of differing titles for various statutory programs has ever posed an issue of constitutional dimension, here or anywhere else." *Opinions of the Justices*, 802 N.E.2d at 574 (Sosman, J., dissenting). Nor have the petitioners

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[51] *See also Dean*, 655 A.2d at 362-63 (Op. of Steadman, J.) (in enacting the District of Columbia marriage statute in 1901, governing opposite-sex marriage, Congress could not reasonably be thought to have engaged in "purposeful" or "invidious" discrimination against homosexuals).

identified any such issues. *See* Lambda Br. at 18-26.

The Supreme Court has cautioned that "the Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of our Constitution." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). For example, in *Dower v. Boslow*, 539 F.2d 969 (4th Cir. 1976), the Fourth Circuit held that "obvious differences" in the procedures applied to so-called "defective delinquency" commitments and involuntary civil commitments, including differences in the burden of proof and the availability of a jury trial, were "not of constitutional magnitude" and failed to establish a denial of equal protection because the different procedures did not result in unequal protection against the possibility of commitment. 539 F.2d at 972. Similarly, in *Tansley v. Grasso*, 315 F. Supp. 513 (D. Conn. 1970), the district court rejected an equal protection challenge to state statutes providing different means by which electoral candidates from single town districts and multi-town districts qualified for the party primary because in no instance was a candidate subject to one requirement obliged to run against a candidate subject to the other requirement. The court concluded that the difference in procedure was the "type of minor difference which *Williams* [*v. Rhodes*] does not proscribe." *Id*. at 519.

California equal protection jurisprudence fully accords with these principles. "The constitutional guaranty of equal protection of the laws mean[s] that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other person or other classes in like circumstances." *People v. Romo*, 14 Cal. 3d 189, 196 (1975) (citations omitted). "The concept recognizes that persons similarly situated with respect to the legitimate purpose of the law receive like treatment, *but it does not . . . require absolute equality*." *Id.* (citations omitted) (emphasis

added). "Accordingly, a [S]tate may provide for differences as long as the result does not amount to invidious discrimination." *Id*. (citations omitted). For purposes of both state and federal equal protection analysis, "like treatment" of similarly situated groups of persons is constitutionally sufficient. "Identical treatment is not required." *In re Jose Z.*, 116 Cal. App. 4th 953, 960 (2004). For example, both this Court and the Court of Appeal have held that minor differences in the standards applicable to a civil commitment under the Sexually Violent Predators Act, WELF. & INST. CODE § 6600 *et seq*. (West 1998 & Supp. 2007), and other civil commitment statutes do not violate equal protection.[52]

Even assuming that same-sex couples are "similarly situated" to opposite-sex couples, the decision to characterize the union of the former as "domestic partnerships," while reserving the title of "marriage" to the union of the latter, is "not of constitutional magnitude," *Dower v. Boslow*, 539 F.2d at 972, where the law provides same-sex couples with all of the rights and benefits that are within the power of the Legislature to confer.[53]

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[52] *Hubbart v. Superior Court*, 19 Cal. 4th 1138, 1168-70 (1999); *People v. Hubbart*, 88 Cal. App. 4th 1202, 1216-21 (2001). *See also People v. Green*, 79 Cal. App. 4th 921, 925-27 (2000) (same with respect to differences in procedural rights under the Sexually Violent Predators Act and former law).

[53] The alleged differences Lambda and San Francisco cite, *see* Lambda Br. at 18-26, CCSF Br. at 48-59, are subjective, speculative or simply non-existent, and none overcomes the rationality of providing different nomenclature for opposite-sex unions and same-sex unions. Moreover, the characterization of same-sex unions as "domestic partnerships," rather than "marriages," does not, contrary to Lambda's submission, Lambda Br. at 25 n. 8, preclude petitioners from challenging the reservation of marriage to opposite-sex couples on *federal* constitutional grounds, a challenge none of the petitioners has brought in these or any other cases.

Both the New Jersey Supreme Court and the Vermont Supreme Court have held that civil union statutes that bestow upon same-sex couples all of the rights and benefits of marriage are adequate responses to state constitutional violations. In *Lewis v. Harris*, the New Jersey Supreme Court refused to "presume that a separate statutory scheme, which uses a title other than marriage, contravenes equal protection principles, so long as the rights and benefits of civil marriage are made equally available to same-sex couples. The name to be given to the statutory scheme that provides full rights and benefits to same-sex couples, whether marriage or some other term, is a matter left to the democratic process." 908 A.2d at 200. In sum, "a difference in name alone is [not] of constitutional magnitude." *Id.* at 222. In *Baker v. State*, the Vermont Supreme Court held that "the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law." 744 A.2d at 887. Although "the State could do so through a marriage license," the court added, "it is not required to do so . . . ." *Id*.

Finally, for the reasons set forth in Argument I and in the Court of Appeal's opinion, *Op.* at 56-57, petitioners' "separate but equal" analogy to anti-miscegenation laws and laws mandating segregation of the races, *see* Lambda Br. at 21, 72-73, 74-75, CCSF Br. at 56-58, has no application to the Legislature's public policy choice to reserve the title of "marriage" to the union of opposite-sex couples. *See Lewis*, 908 A.2d at 221; *Baker*, 744 A.2d at 887-88. The reservation of marriage to opposite-sex couples does not discriminate on the basis of sexual orientation in violation of art. I, § 7(a), of the California Constitution. Accordingly, the judgment of the Court of Appeal should be affirmed.

Conclusion

For the foregoing reasons, and for those set forth in the brief of the Attorney General, *amicus curiae* respectfully requests that this Honorable Court affirm the judgment of the Court of Appeal.

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Certificate of Compliance

I certify that the attached Brief *Amicus Curiae* of the Knights of Columbus uses a 13-point Times New Roman font and contains 13,988 according to the word count feature of the computer program used to prepare this document.

Dated June 8, 2007

Respectfully submitted,

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Proof of Service

I, Paul Benjamin Linton, declare that I am over the age of eighteen years and that I am not a party to this action. My business address is 921 Keystone Avenue, Northbrook, Illinois 60062.

On June 8, 2007, I served the document listed below on all interested parties in this action in the manner listed below:

Brief *Amicus Curiae* of the Knights of Columbus, Case No. S147999

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See attached service list.

I declare under penalty of perjury under the laws of the State of Illinois that the foregoing is true and correct; that this declaration is executed on June 8, 2007, in Northbrook, Illinois.

_____

Paul Benjamin Linton, Esq.

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