

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Coordination Proceeding Special Title) Case No. **S147999**
)
)
IN RE MARRIAGE CASES) Judicial Council Coordination
) Proceeding No. 4365
) First Appellate District No.
) A110449
)
) (Consolidated on appeal with
) Case Nos. A110540, A110451,
) A110463, A110651, A110652)
)
) San Francisco Superior Court
) Case No. 429539 (Consolidated
) for trial with San Francisco
) Superior Court Case No.
_____) 36332)

APPLICATION OF THE BAR ASSOCIATION OF SAN FRANCISCO
TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF
CITY AND COUNTY OF SAN FRANCISCO

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Amitai Schwartz (#55187)
Co-Chair, Amicus Curiae Committee
Bar Association of San Francisco
Law Offices of Amitai Schwartz
2000 Powell St., Ste 1286
Emeryville, CA 94608
(510) 597-1775

Nanci L. Clarence (#122286)
President
Bar Association of San Francisco
301 Battery Street, Third Floor
San Francisco, California 94111
(415) 749-1800

Attorneys for Amicus Curiae

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TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE OF THE
SUPREME COURT OF CALIFORNIA:

Pursuant to Rule 8.520(f) of the California Rules of Court, the Bar Association of San Francisco (BASF) respectfully requests permission to file the attached brief as amicus curiae in the above-captioned coordinated cases. This brief supports plaintiff, City and County of San Francisco.

The Bar Association of San Francisco is a nonprofit voluntary membership organization of attorneys, law students, and legal professionals in the San Francisco Bay Area. Founded in 1872, the Bar Association of San Francisco enjoys the support of over 7,500 individuals, as well as 400 sponsor firms, corporations, and law schools. The majority of its members live and work in the City and County of San Francisco. Through its board of directors, its committees, and its volunteer legal services programs, BASF has worked actively to promote and achieve equal justice for all and oppose invidious discrimination in all its forms, including, but not limited to, discrimination based on race, sex, disability, and sexual orientation.

BASF is closely tied to the City and County of San Francisco. Many BASF members, including several officers, are gay or lesbian. Many members of BASF and its Board are affected by the prohibition of same sex marriage. Whether the law permits persons of the same sex to marry and enjoy the exact same

privileges, responsibilities, and commitments as heterosexual couples is therefore of great importance to the membership, staff, and board of BASF.

BASF views these coordinated proceedings as a watershed in the development of California law. Because the right to marry, regardless of gender or sexual orientation, is fundamental, BASF believes that equality should not be measured in bits and pieces, but that the right to marry must be assertively protected by legal principles that transcend political expedience.

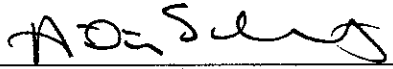
We are familiar with the issues in this case and with the scope of their presentation. We wholeheartedly support the position and the argument of the City and County of San Francisco. We do not intend to repeat arguments previously submitted. Instead we will provide a brief synopsis of opinions decided by this Court in the face of shifting and unpopular public sentiment. We will show how civil rights that were once considered controversial are now considered well settled and accepted by the vast majority of Californians.

We respectfully request permission to file the attached brief because the outcome of this case will affect fundamental principles of freedom and justice for this generation and generations in the future.

Dated: September 12, 2007

Respectfully submitted,

Amitai Schwartz
Nanci L. Clarence

by: 
Amitai Schwartz

For the Bar Association of San Francisco

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ARGUMENT

I. This Court Has The Ultimate Responsibility to Determine Whether the Fundamental Right to Marry Includes the Choice to Marry a Person of the Same Sex.

Two years ago both the California Senate and the California Assembly passed AB 849, which would have eliminated the State's man and woman requirement in the definition of marriage. Assem. Bill No. 849 (2004-2005 Reg. Sess.). Although the bill would have amended Family Code §§ 300 and 301, it also recognized that this Court has the final authority as to the determination regarding the meaning, validity or invalidity of Family Code § 308.5, which was added by initiative. *Id.* § 8. Despite the fact that the bill passed both houses, and it recognized the final authority of the state courts as to section 308.5, the Governor vetoed it. In returning the bill unsigned, the Governor referred to section 308.5 and stated he believes the Legislature cannot reverse an initiative approved by the People of California. Instead, he said that the bill was unnecessary in its entirety because the Court of Appeal was in the process of reviewing the constitutionality of section 308.5.

This Court has held that the City and County of San Francisco could not lawfully decide for itself that the right to marriage, includes the right to marry a

person of the same sex. Lockyer v. City and County of San Francisco (2004) 33 Cal.4th 1055.

In practical effect all three branches of government have recognized that this Court has the ultimate responsibility to decide whether the right to marry must constitutionally include the right to marry a person of the same sex. The Legislature cannot act alone. The Governor will not act. A municipality cannot unilaterally decide to interpret the law for itself.

Fortunately, the judiciary is the one branch of government that is realistically charged with the responsibility to decide cases on principle as dictated by the State Constitution, guided by fairness and precedent. The judiciary is not bound by political sentiment or the popularity or unpopularity of current notions of decency, mores, or social convention.

This Court is bound by the rule of law and principles of justice and equality that have made it stand out among courts as a protector of the inalienable rights of all persons to pursue and obtain “safety, happiness and privacy,” Cal. Const. Art. I, sec. 1, as well as “liberty” and “equal protection.” Cal. Const. Art. I, sec. 7(a). When presented with questions of individual freedom and equality this Court has protected the rights of minorities against prevailing sentiments. As history has shown, in most instances, the People have accepted the Court’s judgments. What

appeared to be controversial, later turned out to be acceptable, commonplace, and unexceptional in the evolving cultural and social fabric of our State.

Holding that the California Constitutional rights of privacy, liberty and equal protection encompass the right to marry persons of the same sex is unlikely to upset the long term social order. Just as they have accepted, and even embraced, other decisions of this Court, and as same sex partners are given full legal rights, years from now the majority of Californians will look back and question why same sex marriage was once controversial.

II. Prior Decisions of this Court Demonstrate that Social and Political Issues That Were Once Controversial Have Endured Over Time and Are Now Accepted as Part of Our Evolving Cultural Order

Historically, in the face of public hostility and differing moral viewpoints, this Court has resolved many cases protecting the rights of persons to enjoy fundamental rights. Looking back, many of the cases were undoubtedly controversial at the time they were decided. But hindsight also demonstrates that the Court was prescient when the cases were decided. What was once controversial is now settled and accepted. This Court applied legal principles to promote equality and justice when it mattered.

This Court's decisions addressing race, sexual equality, reproduction and personal choice, marriage, and gay and lesbian rights protected personal liberty and

privacy. Additionally, when societal prejudice or discrimination was based on differing views of what was considered to be morally correct, this Court came down on the side of individual choice. So long as one's choice did not cause injury, this Court put aside the prejudicial and moral justifications and ruled for the individual. Same sex marriage, which injures no one, presents the same challenge that this Court has faced many times.

What follows is a brief recapitulation of decisions of this Court that were to various degrees watershed cases at the time they were decided. In retrospect they demonstrate that recognition of fundamental rights, and, most importantly, acceptance of those rights, has expanded as the State has matured.

Race. In 1944 this Court decided James v. Marinship Corporation (1944) 25 Cal.2d 721, holding that disparate treatment of Negroes by a union that controlled access to jobs in the shipbuilding industry was unlawful under California common law. James preceded and anticipated the United States Supreme Court's major desegregation cases and the federal Civil Rights Act of 1964. Building on the Court's common law tradition, the Court applied existing precedent to expand the protection of a racial minority. Although some may have viewed the Court's decision as a departure from existing law, few people today would question whether African-Americans should have the same right to work in any job or

profession as a white person. This notion of equal treatment has been embraced as an emblem of our strength as a nation.

In 1964, this Court decided Mulkey v. Reitman (1966) 64 Cal.2d 529, aff'd (1967) 387 U.S. 369, prohibiting realtors and apartment managers from discriminating on the basis of race. A statewide initiative measure adopted by the voters permitted such discrimination. The case was decided before the Federal Fair Housing Act or the California Fair Employment and Housing Act were enacted. Today, few would doubt that racial discrimination in housing is impermissible under any circumstances.

Sex. In Sail'er Inn v. Kirby, Inc. (1971) 5 Cal.3d 1, this Court struck down a state statute that allowed the Department of Alcohol and Beverage Control to revoke licenses of establishments employing female bartenders, who were not licensees or married to men who were licensees. Relying in part on then Article I, sec. 18 of the State Constitution, this Court said that the Constitution "does not admit of exceptions based on popular notions of what is proper, fitting or moral occupation for persons of either sex." Id. at 9. Today, the notion that most women were prohibited from tending bar or any other occupation seems antiquated and strange.

Reproductive Freedom. A woman's right to choose whether to have a child remains controversial among some people, but it is accepted in this state. This Court was one of the first to protect a woman's right to make her own choice and to prohibit unnecessary burdens on that choice. In People v. Belous (1969) 71 Cal.2d 954, 963, this Court recognized "[t]he fundamental right of the woman to choose whether to bear children" and acknowledged "this court's repeated acknowledgment of a right to privacy or liberty in matters related to marriage, family, and sex." By 1981 the right was so firmly established that this Court said, "under article I, section 1 of the California Constitution all women in this state rich and poor alike possess a fundamental constitutional right to choose whether or not to bear a child." Committee to Defend Reproductive Rights v. Myers (1981) 29 Cal.3d 252, 262. This interpretation of the state Constitution has remained unaltered for almost 40 years, giving special status to "privacy or liberty in matters related to marriage, family, and sex." Belous, at 963.

Marriage. This Court's recognition that choice in marriage is among the fundamental rights of all people of California was not empty dicta. Almost 20 years before the United States Supreme Court recognized in Loving v. Virginia (1967) 388 U.S. 1, that the right to marry includes interracial marriage, this Court directed the issuance of a peremptory writ of mandate requiring the Los Angeles

County Clerk to issue a marriage license to white woman and a black man, striking a state statute that prohibited interracial marriage. Perez v. Sharp (1948) 32 Cal.2d 711. A state statute had made interracial marriage illegal and void. The plurality opinion of Justice Traynor recognized marriage as “one of the basic civil rights of man.” Id. at 715. “The right to marry is the right to join in marriage with the person of one’s choice, a statute that prohibits an individual from marrying a member of a race other than his own restricts the scope of his choice and thereby restricts his right to marry.” Id. Justice Carter concurring in the decision unhesitatingly observed that the miscegenation statutes “are the product of ignorance, prejudice and intolerance.” Id. at 732.

When this Court reached its decision in 1948, it was breaking new ground. But now interracial marriages are commonplace and unremarkable. They do not threaten anyone. What was once anathema is now accepted and uncontroversial.

Property. Prejudice and discrimination were not restricted to racial minorities. Aliens were also subject to restrictive prohibitions. But in 1952 this Court held unconstitutional the Alien Land Law, which prohibited persons of Japanese ancestry from owning land purchased by them. Sei Fujii v. State of California (1952) 38 Cal.2d 718. The United States Supreme Court had upheld the statute in 1923. Porterfield v. Webb (1923) 263 U.S. 225. Despite residual

prejudice against Japanese following World War II, and the Supreme Court's Porterfield decision, this Court did not wait for the United States Supreme Court to reexamine the constitutionality of the statute. This Court recognized that "[t]here can be no question that the rights to acquire, enjoy, own and dispose of property are among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment." Sei Fujii, at 728. This Court found that "[t]here is nothing to indicate that those alien residents who are racially ineligible for citizenship possess characteristics which are dangerous to the legitimate interests of the state, or that they, as a class, might use the land for purposes injurious to public morals." Id. at 738.

In retrospect, the decision holding that the State could not discriminate in the ownership of land on the basis of race or alienage seems self evident. When this Court ruled, however, it was matter of controversy and concern. Today, it is hard to believe that such laws were once given a judicial imprimatur.

Gay Rights. This Court's consideration and treatment of cases involving the rights of gay people is consistent with the Court's treatment of other cases involving fundamental rights. Despite hostility toward homosexuals, this Court rejected social approbation as a basis for legal justifications and analyzed the issues in light of the fundamental rights involved. In Stoumen v. Reilly (1951) 37 Cal.2d

713, this Court directed the issuance of a writ of mandate setting aside the suspension of a liquor license. The Board of Equalization suspended the license because the licensee's establishment "was reputed to be a 'hangout' for homosexuals." *Id.* at 716. This Court held that "something more must be shown than that many of his patrons were homosexuals and that they used his restaurant and bar as a meeting place." *Id.* at 717. In Vallerga v. Department of Alcoholic Beverage Control (1959) 53 Cal.2d 313, 315, this Court similarly held that the State could not revoke a liquor license solely on the ground that the premises were "'a resort for sexual perverts, to wit, homosexuals' and that the licensees were aware of that fact." Looking back, this principle does not appear extraordinary.

In Morrison v. State Board of Education (1969) 1 Cal.3d 214, this Court overturned a decision revoking a teaching credential, involving a male teacher who had engaged with another male teacher in a noncriminal sexual relationship in private. The teacher was disciplined under a statute authorizing revocation of a teacher's life diploma for immoral conduct, unprofessional conduct, and acts involving moral turpitude. This Court expressly recognized that societal mores change over time. *Id.* at 226. It held that the relevant inquiry was fitness to teach. Accordingly, this Court found that fitness to teach was the critical criterion, not societal views or judgments of sexual orientation or private sexual conduct.

Morrison was followed by Gay Law Students Association v. Pacific Tel. & Tel. Co. (1979) 24 Cal.3d 458, which held that a public utility cannot discriminate against homosexuals in employment. The Court squarely recognized that “[t]he aims of the struggle for homosexual rights, and the tactics employed, bear a close analogy to the continuing struggle for civil rights waged by blacks, women, and other minorities.” Id. at 488.

Each of the subjects addressed in Stoumen, Vallerga, Morrison and Gay Law Students was controversial at the time. Looking back, however, it is inconceivable that in the State of California a liquor license could be revoked because patrons of a bar were gay, or that a teacher could lose a license because he engaged in private consensual sexual conduct with a partner of the same sex. Likewise, it is difficult to imagine that the State would permit gays and lesbians to be excluded from employment by public utilities simply because they are gay or lesbian.

Family Relations. In the area of family relationships, this Court has interpreted California family law statutes to recognize the validity of same sex parents. It has held that when partners in a lesbian relationship decide to produce children with one partner donating ova for in vitro fertilization, “both the woman who provides her ova and her partner who bears the children are the children's parents.” K.M. v. E.G. (2005) 37 Cal.4th 130, 134. Significantly, the K.M. case,

Elisa B. v. Superior Court (2005) 37 Cal.4th 108, and Sharon S. v. Superior Court, (2003) 31 Cal.4th 417, 433, 438 (holding that a child may have two parents of the same sex by adoption), recognize that despite statutory ambiguity, a child in this State may legally have two mothers or two fathers. Due to this Court's interpretation of the relevant statutes, this is now established law in the State of California.

III. Recognizing that Same Sex Marriage is Protected by the Fundamental Right to Marry Would Carry On the Court's Practice of Interpreting the Constitution in a Manner that Protects Individual Choice.

The evolution of tolerance and respect for fundamental rights – respecting race, sexual equality, reproduction and personal choice, marriage, adoption, gay rights, and family relations – is evident looking back at prior decisions of this Court. In retrospect, the Court made decisions that mattered at the time because it protected personal choices of individuals against the imposing moral judgments of the times.

Allowing gay men and lesbians to marry partners of their own choosing would recognize that marriage is a uniquely personal decision because, as the Court recognized in Perez, prohibiting a person from marrying another person of his or her choice would, in effect forbid marriage to a unique individual who “may be irreplaceable.” Perez, at 725.

“As a public institution and a right of fundamental importance, civil marriage is an evolving paradigm.” Goodridge v. Department of Public Health (2003) 440 Mass. 309, 339. As the Massachusetts Supreme Judicial Court observed when it held that same sex marriage is permitted by the Constitution of Massachusetts, “Alarms about the imminent erosion of the “natural” order of marriage were sounded over the demise of antimiscegenation laws, the expansion of rights of unmarried women, and the introduction of “no fault” divorce. Marriage has survived all of these transformations, and we have not doubt that marriage will continue to be a vibrant and revered institution.” Id.

If gay men and lesbians can engage in private consensual sexual conduct without risk of punishment, and a child may have two mothers, or two fathers, why is it that these individuals cannot choose to marry one another? As the City and County of San Francisco and Justice Kline’s dissent in the Court of Appeal have amply demonstrated, there is no legally justifiable reason. Future generations will look back and ask why this question was once controversial.

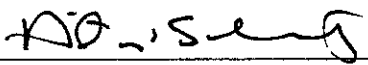
CONCLUSION

This Court should hold that Family Code §§ 300, 301, and 308.5 are unconstitutional as applied to prohibit same sex marriage.

Dated: September 12, 2007

Respectfully submitted,

Amitai Schwartz
Nanci L. Clarence

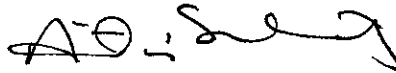
by:  _____

Amitai Schwartz
For the Bar Association of San Francisco

Certificate of Counsel as to Word Count

I, Amitai Schwartz, certify that the attached Brief of Amicus Curiae was prepared in 14 point Times New Roman font. It consists of 2,750 words, exclusive of tables.

Dated: September 12, 2007



Amitai Schwartz
Attorney for Amicus Curiae

PROOF OF SERVICE BY MAIL

Re: In Re: Marriage Cases, Supreme Court of the State of California, Case No. S147999

I, Caitlin Barth, declare that I am over 18 years of age, and not a party to the within cause; my business address is 2000 Powell Street, Suite 1286, Emeryville, CA 94608. I served a true copy of the attached

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FRANCISCO

on the following, by placing a copy in an envelope addressed to the party listed below, which envelope was then sealed by me and deposited in United States Mail, postage prepaid at Emeryville, California, on September 12, 2007.

SEE ATTACHED LIST

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 12, 2007 at Emeryville, California.

Caitlin Barth

SERVICE LIST

DENNIS J. HERRERA City Attorney
THERESE M. STEWART Chief Deputy City Attorney
DANNY YEH CHOU Chief of Appellate Litigation
SHERRI SOKELAND KAISER
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682

STEPHEN V. BOMSE
RICHARD DENATALE
HELLER, EHRMAN, WHITE & MCAULIFFE, LLP
333 Bush Street
San Francisco, CA 94104-2878

BOBBIE J. WILSON
AMY E. MARGOLIN
HOWARD RICE NEMEROVSKI
CANADY FALK & RABKIN
Three Embarcadero Center, 7th Floor
San Francisco, California 94111-4024

SHANNON MINTER
VANESSA EISEMANN
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market Street, #370
San Francisco, CA 94102

EDMUND G. BROWN, JR.
Attorney General of the State of California
CHRISTOPHER E. KRUEGER Supervising
Deputy Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550

CHRISTOPHER C. MENNEMEIER
Mennemeier Glassman et al
980 9th St. #1700
Sacramento, CA 95814

ANDREW B. PUGNO
TIMOTHY DONALD CHANDLER
101 Parkshore Drive, Suite 100
Folsom, CA 95630

ROSS S. HECKMANN
1214 Valencia Way
Arcadia, CA 91006

RENA M. LINDEVALDSEN
MARY MCALISTER
MATHEW D. STAVER
LIBERTY COUNSEL
100 Mountain View Road, Suite 2775
Lynchburg, VA 24502-2272

MATHEW D. STAVER
LIBERTY COUNSEL
1055 Maitland Center Commons Second Floor
Maitland, FL 32751

GLEN LAVY
BENJAMIN W. BULL
ALLIANCE DEFENSE FUND
15333 North Pima Road, Suite 165
Scottsdale, AZ

ROBERT H. TYLER
ADVOCATES FOR FAITH AND FREEDOM
24910 Las Brisas Road, Suite 110
Murrieta, CA 92562

TERRY L. THOMPSON
LAW OFFICES OF TERRY L. THOMPSON
199 East Linda Mesa, Suite 10
Danville, CA 94526

STEPHEN V. BOMSE
RICHARD DENATALE
CHRISTOPHER F. STOLL
HELLER, EHRMAN, WHITE & MCAULIFFE, LLP
333 Bush Street
San Francisco, CA 94104-2878

MICHAEL MAROKO
JOHN S. WEST
ALLRED, MAROKO & GOLDBERG
6300 Wilshire Boulevard, Suite 1500
Los Angeles, CA 90048-5217

RAYMOND G. FORTNER County Counsel
JUDY W. WHITEHURST Senior Deputy County Counsel
648 Kenneth Hahn Hall of Administration
500 W. Temple Street
Los Angeles, CA 90012-2713

WAUKEEN Q. MCCOY
LAW OFFICES OF WAUKEEN Q. MCCOY
703 Market Street, Suite 1407
San Francisco, CA 94103

JON WARREN DAVIDSON
LAMBDA LEGAL DEFENSE & EDUCATION FOUNDATION
3325 Wilshire Boulevard, Suite 1300
Los Angeles, CA 90005

PETER J. ELIASBERG
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1616 Beverly Boulevard
Los Angeles, CA 90026

ALAN L. SCHLOSSER
ACLU FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, CA 94111

JASON ELKINS HASLEY
PAUL, HANLEY & HARLEY
1608 Fourth St., Suite 370
Berkeley, CA 94710

GLORIA ALLRED
ALLRED MAROKO & GOLDBERG
6300 Wilshire Blvd. #1500
Los Angeles, CA 90035

