No. S147999

IN THE

Supreme Court

OF THE

STATE OF CALIFORNIA

COORDINATION PROCEEDING SPECIAL TITLE (RULE 1550(b))
IN RE MARRIAGE CASES

AFTER DECISION OF THE COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIVISION THREE
CASE NOS. A110449, A110450, A110451, A110463, A110651, A110652
SAN FRANCISCO SUPERIOR COURT CASE NOS. JCCP4365, 429539, 429548, 504038
LOS ANGELES SUPERIOR COURT NO. BC088506
JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4365
THE HONORABLE RICHARD A. KRAMER, JUDGE

APPLICATION FOR PERMISSION TO FILE AMICI CURIAE BRIEF AND PROPOSED BRIEF OF MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AGUILAS, BIENESTAR HUMAN SERVICES, COALITION FOR HUMANE IMMIGRANT RIGHTS, LA RAZA CENTRO LEGAL, NATIONAL BLACK JUSTICE COALITION, NATIONAL LAWYERS GUILD OF SAN FRANCISCO, AND ZUNA INSTITUTE IN SUPPORT OF RESPONDENTS CHALLENGING THE MARRIAGE EXCLUSION

O'MELVENY & MYERS LLP
PETER OBSTLER (BAR NO. 171623)
JEE YOUNG YOU (BAR NO. 241648)
EMBARCADERO CENTER WEST
275 BATTERY STREET, SUITE 2600
SAN FRANCISCO, CA 94111-3305
TELEPHONE: (415) 984-8700

Attorneys for Amici Curiae
[Additional counsel listed on inside cover]

Of Counsel:

JOHN D. TRASVIÑA (BAR NO. 112145)
CYNTHIA A. VALENZUELA (BAR NO. 186804)
MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATION FUND
634 SOUTH SPRINT STREET
LOS ANGELES, CA 90014
TELEPHONE: (213) 629-2512
FACSIMILE: (213) 629-0266

ELLEN FORMAN OBSTLER (BAR NO. 147479)
LAW OFFICE OF ELLEN FORMAN OBSTLER
C/O 275 BATTERY STREET, SUITE 2600
SAN FRANCISCO, CA 94111-3305
TELEPHONE: (415) 454-5204

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

APPLICATION TO FILE AN AMICI CURIAE BRIEF IN SUPPORT OF PARTIES CHALLENGING MARRIAGE EXCLUSION

TO THE HONORABLE CHIEF JUSTICE RONALD M. GEORGE:

Under Rule of Court 8.520(f), Amici respectfully request permission to file the accompanying brief in support of the Respondents challenging the marriage exclusion.

Amici have a substantial interest in the outcome of this case. Amici are groups that represent the full diversity of the state of California and advocate for equal rights for all its residents. Amici work to end discrimination on the bases of race, color, national origin and sex as well as sexual orientation and share a belief in the importance of maintaining consistent, robust equal protection jurisprudence to safeguard vulnerable minority groups. Many amici represent communities that have faced marriage discrimination based on race or national origin in the past and are therefore interested in seeing not only that such discrimination does not continue to affect their own communities but also that all people are free from such discrimination on any invidious ground.[1]

---

[1] Additionally, the sixty-three groups representing Asian and Pacific Islander Americans (APIs) that have joined the Brief of *Amici Curiae* Asian American Bar Association of the Greater Bay Area and 62 Asian Pacific American Organization In Support Of Respondents Challenging The Marriage Exclusion (the "AABA amici") also endorse the arguments presented in this brief. The AABA amici share with the MALDEF amici here a profound awareness of the harmful effects of invidious discrimination and a corresponding interest in preservation of meaningful equal protection analysis. Accordingly, although the API groups have submitted a separate brief presenting lessons drawn from the history of discrimination against APIs, especially restrictions on marriage, they also endorse the arguments of this *amici curiae* brief that sexual orientation classifications should be subjected to rigorous constitutional review.

The most recent U.S. Census data show that nearly 100,000 same-sex couples reside in California, more than in any other state.[2] These data show that individuals in same-sex relationships come from every racial, ethnic, religious, and socio-economic background in the state. Gay and lesbian parents are more likely to be racial minorities than are their heterosexual counterparts. Moreover, over 50% of the children raised by same-sex couples in the state are Hispanic and more than 50% are of color. The Census data further show these same-sex couples to be economically vulnerable – the average household income for same-sex parents is lower than for different-sex parents and the assets owned by the former group are worth considerably less than those owned by the latter. Given the wide-ranging diversity present in California's population of lesbian and gay couples, each of the civil rights groups and community groups joining as amici here have a particular interest in this litigation. More detailed statements of interest for each amicus curiae are attached at Tab A.

Amici have read the Respondents' and Appellants' briefs on the merits. Amici respectfully submit that a need for additional argument and briefing exists to refute the Attorney General's argument that political powerlessness is a key requirement under suspect classification analysis

---

[2] See Badgett & Sears, *Same-Sex Couples and Same-Sex Couples Raising Children in California: Data from Census 2000* (May 2004) pp. 1-2 (hereafter "*Same-Sex Couples in California*") available at <http://www.law.ucla.edu/williamsproj/publications/CaliforniaCouplesReport.pdf>. There is also significant reason to believe that the Census data significantly undercounts the number of same-sex couples, including concerns by many Census respondents about revealing same-sex orientation and that the existing Census categories do not adequately describe a same-sex relationship. (Sears, Gates & Rubenstein, *Same-Sex Couples and Same-Sex Couples Raising Children In the United States* (Sept. 2005) pp. 3-4, available at <http://www.law.ucla.edu/williamsproj/publications/USReport.pdf>.)

and to illustrate that sexual orientation classifications should be subjected to strict scrutiny review.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici welcome the Attorney General's concession that sexual orientation classifications should be subjected to strict scrutiny "if determining a suspect classification depended on *only* these considerations [immutability, history of discrimination, relevance on ability to contribute to society]." (Answer Br. Of State Of California And The Attorney General To Opening Br. On The Merits ("State's Answer Br.") at pp. 24-25) (emphasis in original). The Attorney General's request, however, that this Court refocus the strict scrutiny inquiry on whether the classified group is "unable to use the political processes to address their needs" not only runs afoul of established law but is also unpersuasive from a policy perspective. In deciding whether a classification is suspect, this Court has always looked to whether the classification is likely to be the result of bias and prejudice. Amici are organizations that support the diverse racial and ethnic communities in California and respectfully submit that there is no basis to abandon that test in this case.

Because the State concedes that laws discriminating against lesbians and gay men require strict scrutiny according to the established factors that have dominated this aspect of this litigation in the trial and appeals courts, refusing to recognize the suspect nature of sexual orientation classifications solely because the Attorney General contends that gay men and lesbians do not face significant impediments to using the political process to remedy decades of discrimination should be rejected for at least two reasons.

First, this Court has never relied on a single factor to determine whether a classification is suspect for equal protection purposes. Instead, the Court considers a number of different factors in determining whether discrimination against a vulnerable group of persons presumptively

warrants rigorous scrutiny. In contending otherwise, the Attorney General overplays political vulnerability in suspect classification analysis by ignoring that courts have applied heightened review to laws disadvantaging racial minorities and women despite numerous laws at all levels of government prohibiting discrimination based on race and sex. Thus, while the Court may consider whether the adversely classified group lacks effective representation in the political process, that factor, standing alone, cannot determine whether laws that deprive gay men and lesbians of equal rights should be presumed suspect as matter of law, rather than entitled to judicial deference. (See *Purdy & Fitzpatrick v. State* (1969) 71 Cal.2d 566, 579-80.)

Second, under all of the factors that this Court considers in its suspect classification analysis, including issues of political status, laws that discriminate against gay men and lesbians should receive strict scrutiny. (See *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 18.) California law recognizes that sexual orientation has no bearing on gay men and lesbians' ability to contribute to society. In addition, gay men and lesbians have suffered a pernicious history of discrimination and hate crimes, and such discrimination and hate crimes continue. Further, sexual orientation is a trait central to a person's identity, that is impossible, or at least difficult, to change, and the state has no legitimate interest in pressing individuals to change. Finally, the continuing bias and discrimination directed towards gay men and lesbians effectively and permanently interferes with the ability of this group to seek or obtain protections through the political process. When all of these factors are considered, the Court should apply strict scrutiny to Family Code section 300 and hold that the state's exclusion of lesbian and gay couples from marriage violates the California Constitution.

ARGUMENT

The California Constitution's equal protection clause guarantees that "[a] person may not be . . . denied equal protection of the laws." (Cal. Const. art. I, § 7, subd.(a).) When legislative actions involve "suspect classifications," courts will adopt "an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Mihaly* (1970) 2 Cal.3d 765, 784-85, vacated on other grounds (1971) 403 U.S. 915.)

Here, the Court of Appeal incorrectly concluded that sexual orientation classifications are not suspect and therefore did not subject Family Code section 300 to strict scrutiny. That judgment must be reversed.

I. POLITICAL POWERLESSNESS IS NOT THE KEY INQUIRY IN SUSPECT CLASSIFICATION ANALYSIS.

The Attorney General maintains that political powerlessness is the key requirement for a classification to be deemed suspect. (State's Answer Br. at p. 25.) This argument fails. Notwithstanding the fact that groups can use the political process to obtain some legal protections, this Court and the United States Supreme Court have, and continue to apply, strict scrutiny to laws discriminating against such groups because discrimination based on the personal trait in question remains presumptively irrational and unfair.

A. No One Test Governs Suspect Classification Analysis.

This Court has never specified a strict checklist of elements that must be met to establish that a classification should be presumed suspect. In *Sail'er Inn*, the Court held that sex-based classifications are suspect by comparing women to other groups protected by heightened review:

> Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex from nonsuspect statuses, such as

> intelligence or physical disability, and aligns it with the recognized suspect classifications is that the characteristic frequently bears no relation to ability to perform or contribute to society. [citation omitted] The result is that the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members. [citation omitted] Where the relation between characteristic and evil to be prevented is so tenuous, courts must look closely at classifications based on that characteristic lest outdated social stereotypes result in invidious laws or practices. [¶] Another characteristic which underlies all suspect classifications is the stigma of inferiority and second class citizenship associated with them. [citation omitted] Women, like Negroes, aliens, and the poor have historically labored under severe legal and social disabilities. (*Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal. 3d 1, 18-19 (citations omitted).)

Similar to California, the U.S. Supreme Court has identified "several formulations" that "might explain [its] treatment of certain classifications as 'suspect.'" (*Plyler v. Doe* (1982) 457 U.S. 202, 217, fn. 14.) For example, in *San Antonio Indep. Sch. Dist. v. Rodriguez* (1973) 411 U.S. 1, 28, the Court listed the "traditional indicia of suspectness" using the disjunctive "or"; relative political power was just one of the factors that might be considered in its analysis of whether wealth constitutes a suspect classification:

> [T]he class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

Accordingly, although courts may consider the relative lack of political power as part of the strict scrutiny analysis, this Court or the U.S. Supreme Court has never required a group to demonstrate an inability to muster national political support as a precondition to finding laws that exclude a group of persons as a class to be suspect. (See Spitko, *A Biologic*

Argument For Gay Essentialism-Determinism: Implications For Equal Protection And Substantive Due Process (1996) 18 U. Haw. L. Rev. 571, 600 [summarizing various "means" used by Supreme Court to determine whether classifications other than race or national origin warrant heightened scrutiny, and concluding that the Court has never required all the factors for a classification to be recognized as suspect].)

In arguing that the political factor be the overriding criterion for suspect classification, the Attorney General appears to go so far as to ask this Court to preclude finding ***any*** new classification suspect, regardless of whether the classification is the result of prejudice and bias:

> California is a very diverse state. There is no racial majority group in the state.... *But in a society where every group needs to do at least some coalition-building to get its needs addressed, adding more suspect classifications may not make sense.* Taken to its logical extreme, continuing recognition of additional suspect classifications could result in a situation in which almost everyone is a member of some suspect classification. (State's Answer Br. at 35-36) (emphasis added.)

The Attorney General's contention that California's rich plurality of ethnic groups and the broad ethnic diversity of its residents somehow justifies prospectively shutting the door on finding future classifications suspect has no basis in law or policy. Indeed, the Attorney General's approach would stifle the robust constitutional inquiry necessary for the Court to protect vulnerable minority groups in a highly diverse and evolving society.

B. Courts Have Applied Heightened Scrutiny To Laws Discriminating Against Groups Able To Attract The Attention Of Lawmakers.

Contrary to the Attorney General's claim, recent California legislation protecting lesbian and gay couples does not preclude this Court's finding that sexual orientation classifications should be presumed suspect. Courts have required heightened scrutiny of classifications

recognized as presumptively suspect even after the State enacted substantial legislation to protect a group usually targeted by such classifications.

Further, this Court found that sex-based classifications are suspect in *Sail'er Inn*, *supra*, despite that at the time of the decision women were protected against sex discrimination by Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, and the California Constitution, art. XX, § 8. (See *Sail'er Inn*, *supra*, 5 Cal.3d 1.) And the U.S. Supreme Court has noted that the number of women and the resulting presumptive ability to protect themselves through the political process will not preclude the application of heightened scrutiny to gender-based classifications. In *Frontiero v. Richardson* (1973) 411 U.S. 677, 686 fn. 17, the Court held that laws disadvantaging women as a class are suspect even though the Court found that "[i]t is true, of course, that when viewed in the abstract, women do not constitute a small and powerless minority." Similarly, in *United States v. Virginia* (1996) 518 U.S. 515, 532-33, 575, the majority confirmed that heightened scrutiny is warranted for gender classifications based on the "long and unfortunate history of sex discrimination." And the Court made its ruling despite Justice Scalia's dissent that women cannot be considered a discrete and insular minority "unable to employ" the ordinary political processes.

Indeed, the only classification for which the U.S. Supreme Court has placed significant weight on lack of political power in determining suspect classification status was alienage. (See, e.g., *Purdy & Fitzpatrick*, *supra*, 71 Cal.2d at p. 580; see also *Foley v. Connelie* (1978) 435 U.S. 291, 294 ["aliens – pending their eligibility for citizenship – have no direct voice in the political processes."].) And even with respect to alienage, courts have stressed the importance of prejudice and bias . (*Purdy & Fitzpatrick*, *supra*, 71 Cal.2d at pp. 579-580 [noting that "particular alien groups and aliens in general have suffered from . . . prejudice"].).

Further, when considering political vulnerability in this context, courts have stressed that this factor uniquely applies to aliens because they "lack the most basic means of defending themselves in the political processes" – the right to vote. (*Id.* at p. 580.)[3] This legal exclusion from voting – rather than any relative inability to use political processes in general – has been crucial in finding the classification suspect. Indeed, decades before 1969, when *Purdy* was decided, California's anti-discrimination laws banned discrimination based on alienage. (See *Prowd v. Gore* (1922) 57 Cal.App.458, 461 [discrimination against "unnaturalized residents of foreign birth" prohibited by Unruh Act's predecessor].)

The cases that the Attorney General cites do not compel a different result. In each of the cases, one or more of the other factors warranting strict scrutiny review of a discriminatory rule was absent with respect to the particular groups in issue:

- In *City of Cleburne v. Cleburne Living Ctr.* (1985) 473 U.S. 432, 442, the Court held that laws disfavoring "mentally retarded" persons did not warrant heightened review because this group has a "reduced ability to cope with and function in the everyday world," and thus it cannot be presumed that the particular trait has no relationship with one's ability to contribute to society such that classifications based upon that trait most likely reflect prejudice.
- In *Mass. Bd. of Retirement v. Murgia* (1976) 427 U.S. 307, 313-34, the Court held that age is not a suspect classification

---

[3] Concerning laws disfavoring women, courts have noted the denial of suffrage as part of the history of discrimination. (*U.S. v. Virginia* (1996) 518 U.S. 515, 531 [recounting history of opportunities denied women including disenfranchisement]; *Frontiero*, 411 U.S. at p. 686 [same].) Yet, those decisions came decades after the ratification of the Nineteenth Amendment reduced the relevance of this factor.

because age affects an individual's ability to contribute to society.

- In *San Antonio Indep. Sch. Dist. v. Rodriguez, supra*, 411 U.S. at p. 28, the Court noted that school children living in economically depressed neighborhoods lack a history of discrimination.
- In *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 237, this Court found that persons casting losing votes on tax classification failed to prove that they represent a definite, identifiable class.

In other cases cited by the Attorney General, the claim of suspect classification was patently meritless so the courts did not engage in a factor-by-factor analysis but rather dismissed the claim outright with no further discussion. (See, e.g., *Tain v. State Bd. of Chiropractic Examiners* (2005) 130 Cal.App.4th 609, 346 [disfavored treatment of chiropractors not suspect because "the United States Supreme Court has refused, thus far, to apply the strict scrutiny standard to putative classes who have far greater claims to past discrimination than appellants allege"]; *Kenneally v. Medical Bd. of California* (1994) 27 Cal.App.4th 489 [adverse treatment of physicians in general, not warranting heightened scrutiny]; *Bowens v. Superior Ct. of Alameda County* (1991) 1 Cal.4th 36, 42 [rules disfavoring persons indicted for a felony not suspect]; *Reyna v. City and County of San Francisco* (1977) 69 Cal.App.3d 876, 881-82 [none of the indicia for heightened scrutiny exist regarding parents of unborn children]; *Schmidt v. Superior Court of Santa Barbara* (1989) 48 Cal.3d 370, 389 [declining to parse factors and not even mentioning political power factor in finding that adverse classification based on youth was not suspect].)

Far from proving that political vulnerability is the predominant criterion for rejecting these claims, these cases support that courts consider multiple factors in determining when classifications are presumed suspect

and warrant rigorous scrutiny. In so doing, court have given little, if any, consideration to the relative political strength or weakness of the group in issue.

This limited reliance that courts place on the political power factor is not surprising. Once a court identifies a characteristic that is presumptively improper as a ground for state classification, such as race or gender, then all classifications on that ground are recognized as suspicious, including laws discriminating against white people and men. Political vulnerability plays no part in the analysis. In addition, a group's political power may vary with geography and time, but the presumptive irrationality of discrimination based on particular personal traits does not. Thus, a classification disadvantaging African Americans is subjected to strict scrutiny review whether it was adopted in Fargo, North Dakota or Detroit, Michigan, without inquiry into whether or not that group presently wields power in that jurisdiction.

II. SEXUAL ORIENTATION CLASSIFICATIONS SHOULD BE SUBJECT TO HEIGHTENED SCRUTINY CONSIDERING ALL THE FACTORS OF SUSPECT CLASS ANALYSIS.

Considering all the factors relevant to the analysis – including the factor related to political processes – laws discriminating against gay men and lesbians should be presumed suspect.

A. Sexual Orientation Has No Bearing On An Individual's Ability To Contribute To Society.

Courts have been vigilant in closely examining those enactments that classify groups based on characteristics that "bear[] no relation to ability to perform or contribute to society," thus indicating that the discrimination in question is truly arbitrary. (*Sail'er Inn*, *supra*, 5 Cal.3d at p. 18.) Where no such relation exists, the classification should be considered "suspect" because it is highly likely that the classification was motivated solely by

antipathy toward members of the group. (See Ely, Democracy and Distrust (1980) p. 150.) In addition to race and gender, California courts have recognized that national origin, alienage, illegitimacy, and school district wealth have no bearing on relative abilities and, therefore, constitute suspect classifications. (See *Purdy & Fitzpatrick*, *supra*, 71 Cal.2d at pp. 580-81.)

Like these characteristics, an individual's sexual orientation bears no relation to his or her ability to contribute to society. While at one time homosexuality was widely considered a mental illness and gay people were labeled as deviants and degenerates who were unable to maintain healthy relationships, all of these harmful stereotypes have proven baseless. (American Psychiatric Association, *Position Statement on Homosexuality and Civil Rights* (1973) 131 Am. J. Psychiatry 497.) It is now well-established among medical and psychological professionals that homosexuality implies no impairment in judgment, stability, reliability, or general social or vocational capabilities. [4]

---

[4] *Ibid*; see also American Psychological Association, *Fact Sheet: Gay, Lesbian and Bisexual Issues* (Feb. 2000); American Psychological Association, *Minutes of the Annual Meeting of the Council of Representatives* (1975) 30 Am. Psychologist 620, 633; American Psychiatric Association, *COPP Position Statement on Therapies Focused on Attempts to Change Sexual Orientation (Reparative or Conversion Therapies)* (2000), available at <http://www.psych.org/psych_pract/copptherapyaddendum83100.cfm.>.

In recent years, the APA and other mental health groups have joined various amici curiae briefs in endorsing marriage for lesbian and gay couples. E.g., *Goodridge v. Goodridge v. Dep't of Public Health* (2003) 440 Mass. 309 [Massachusetts Psychiatric Society, the American Psychoanalytic Association, and many other psychiatric, psychological, and social science organizations joined in a brief on behalf of plaintiffs challenging Massachusetts' marriage laws]; Amici Curiae Brief of the American Psychological Association et al. in *Kerrigan et al. v. Connecticut* (Conn. Jan. 31, 2007) (No. S.C. 17716) [APA joined the amici curiae brief

California law provides that sexual orientation should in no way limit a person's occupation and does not affect an individual's ability to perform in the workplace. (See Cal. Gov't Code § 12940 [prohibiting sexual orientation discrimination in workplace].) In fact, gay men and lesbians contribute actively and vibrantly to the state and national economy. The most recent U.S. Census data show that 71% of members of same-sex couples are employed, compared with only 62% of members of married different-sex couples. (See Badgett & Sears, *Same-Sex Couples in California, supra*, p. 1.) This Court has also recognized that sexual orientation bears no relation to one's ability to perform and succeed in the workplace, holding that because equal protection prohibits "arbitrary discrimination on grounds unrelated to a worker's qualifications," a public utility could not "automatically exclude[] all homosexuals from consideration for employment." (*Gay Law Students Ass'n v. Pac Tel. & Tel. Co.* (1979) 24 Cal.3d 458, 474-75.)

California law also recognizes that sexual orientation has no bearing on one's ability to form loving and lasting intimate relationships, to create families, and to raise children. California's Domestic Partner Rights and Responsibilities Act of 2003 provides that all registered couples, regardless of sexual orientation, have the same rights, responsibilities, obligations and duties to each other and any children they raise as different-sex married couples. (Cal. Fam. Code § 297.5.) In enacting the law, the Legislature stated that "despite longstanding social and economic discrimination, many lesbian, gay, and bisexual Californians have formed lasting, committed, and

---

about child welfare along with the American Psychological Association, National Association of Social Workers, the Hezekiah Beardsley Connecticut Chapter of the American Academy of Pediatrics, and the Connecticut Council of Child and Adolescent Psychiatry in support of the plaintiffs challenging Connecticut's exclusion of same sex couples from marriage].

caring relationships with persons of the same sex," and that "[e]xpanding the rights and creating responsibilities of registered domestic partners would further California's interests in promoting family relationships." (2003 Cal. Stat. ch. 421, § 1, subd. (b).) Moreover, decisions dating back nearly 40 years show that the state's courts indulge no presumption that a parent's sexual orientation adversely affects their abilities to have healthy relationships with their children. (See, e.g., *Nadler v. Superior Court* (1967) 255 Cal.App.2d 523, 525 [holding that the court may not determine custody on the basis of sexual orientation]; *In re Marriage of Birdsall* (1988) 197 Cal.App.3d 1024, 1031 [holding that visitation rights may not be restricted on the basis of one parent's sexual orientation].) And this Court has confirmed that same-sex parents have the same rights and responsibilities as different-sex parents when it comes to the children they have had and raised together. (See *Elisa B. v. Superior Court* (2005) 37 Cal.4th 108 [former partner could not abandon parental responsibilities when she had agreed to raise the child, supported her partner's insemination, and held the child out as her own]; *id.* at p. 119 ["We perceive no reason why both parents of a child cannot be women."].[5] These cases reiterate that, as a matter of California law and policy, sexual orientation has no bearing on a parent's ability to raise healthy children.

B. Gay Men And Lesbians Have Been Subject To The Stigma Of Second Class Citizenship And Have Historically Been The Targets Of Discrimination And Violence.

Courts have also focused on protecting those groups that have been the victims of a "stigma of inferiority," "second class citizenship," and a history of past discrimination. (*Sail'er Inn*, *supra*, 5 Cal.3d at p. 18.) Here,

---

[5] Indeed, same-sex couples in California are currently raising more than 70,000 children, including more than 50,000 of their own children. (*Same-Sex Couples in California* at p. 2.)

gay men and lesbians have long faced social and economic discrimination in both the private and public spheres. In addition, they have been the victims of a disproportionate number of hate crimes and violence. This Court has analogized this type of discrimination to that experienced by groups that have been granted heightened scrutiny protection under California equal protection law: "The 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." (*Gay Law Students Ass'n*, *supra*, 24 Cal.3d at p. 488; see also *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1276 [gay men and lesbians "share a history of persecution comparable to that of Blacks and women"]; *id.* at p. 1279 ["[o]utside of racial and religious minorities, we can think of no group which has suffered such 'pernicious and sustained hostility' and such 'immediate and severe opprobrium' as homosexuals."] [internal citation omitted].)

As with race and gender, this long history of pernicious discrimination counsels toward subjecting laws that discriminate on the basis of sexual orientation to heightened scrutiny under the California equal protection clause. (See Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays* (1996) 96 Colum. L.Rev. 1753, 1772 [noting that a history of discrimination is a widely accepted criterion of suspect class status and that no court has found gay people not to have suffered a history of severe abuse and opprobrium].)

1. Social Discrimination

For much of recent history, medical science classified same-sex attraction as a sexual "pathology."[6] (Somerville, Queering the Color Line

---

[6] Despite the different schools of thought regarding sexual orientation in the medical profession, "all agreed, however, on one point . . . [h]omosexuality was a pathological condition." (Bayer, *Homosexuality and*

(2000) p. 18.) Gay men and lesbians historically were referred to as "inverts," "deviants," "degenerates," "sex criminals" and "perverts," and often institutionalized to "cure" them of their disease.[7] (Chauncey, Gay New York: Gender, Urban Culture, and the Making of the Gay Male World 1890-1940 (1994) pp. 14-15 (hereafter "Gay New York"); Katz, *Gay American History* in Cases and Materials on Sexual Orientation and the Law (William B. Rubenstein edit., 1997) p. 100 [treatment was usually aimed at "asexualization" or "heterosexual reorientation"]. More than half of the state legislatures enacted laws allowing police to force persons convicted of certain sexual offenses, including sodomy, to undergo psychiatric examinations. (Chauncey, *The Postwar Sex Crime Panic* in True Stories from the American Past (William Graebner edit., 1993) pp. 166-167, 177; Marc Stein, City of Sisterly and Brotherly Loves: Lesbian and Gay Philadelphia, 1945-1972 (2000) pp. 124-125.) Scientists, writing in the late nineteenth and early twentieth centuries, produced physical "data" about the supposed "pathology" of homosexuality using techniques and methodologies borrowed from an earlier generation of comparative anatomists who, in studies of persons of different races, declared that "the grown-up Negro partakes, as regards his intellectual faculties, of the nature of the child, the female, and the senile white." (Somerville, *supra*, at p. 26 [quoting Vogt, Lectures on Man (1864)].)

American Psychiatry: The Politics of Diagnosis in Cases and Materials on Sexual Orientation and the Law (William B. Rubenstein edit., 1997) p. 109.)

[7] See, e.g., Duberman, Cures (1991) [memoir of experiences undergoing so-called conversion therapy, which did not "cure" the author but did cause considerable mental stress]. It was not until 1973 that the American Psychiatric Association removed homosexuality from its classification as a mental illness. (See Bayer, *supra*, at p. 109.)

Armed with the arsenal of anti-gay discourse from the scientific and medical communities, state governments have repeatedly signaled to gay people that their relationships are not worthy of dignity, that their intimate activities are immoral and criminal, and that they are not fit to be parents or raise families. Indeed, until the recent decision in *Lawrence v. Texas* (2003) 539 U.S. 558, a number of states had laws making most forms of same-sex intimacy a crime.[8] (See, e.g., *Doe v. Commonwealth's Attorney for City of Richmond* (E.D. Va. 1975) 403 F.Supp. 1199, affd. (1976) 425 U.S. 901 [upholding constitutionality of Virginia's sodomy prohibition against two consenting gay men]; *Baker v. Wade* (5th Cir. 1985) 769 F.2d 289, 292 (en banc) [upholding constitutionality of Texas sodomy law].) Gay men and lesbians have also faced constant discrimination from the states in their struggle to form and maintain stable families and raise children. Most egregiously, a number of courts have denied parental rights to gay or lesbian parents in favor of less fit caregivers, often to the detriment of the children involved. (See, e.g., *Weigland v. Houghton* (Miss. 1999) 730 So.2d 581 [placing child in home with convicted felon and wife abuser because the father was gay]; *S.E.G. v. R.A.G.* (Mo.Ct.App. 1987) 735 S.W.2d 164 [denying custody to lesbian mother in favor of an alcoholic father]; *Bottoms v. Bottoms* (Va. 1995) 457 S.E.2d 102 [awarding custody

---

[8] Until 1961, all 50 states outlawed "sodomy." At the time *Bowers* was decided, rejecting the due process challenge to Georgia's prohibition on same-sex oral intercourse, 24 states and the District of Columbia provided criminal penalties for acts of consensual sodomy. (*Bowers v. Hardwick* (1986) 478 U.S. 186, at p. 194; see Apasu-Gbotsu et al., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity* (1986) 40 U. Miami L.Rev. 521, 524 fn. 9.) When *Bowers* was overturned by *Lawrence* in 2003, that number had dropped but there were still 13 states that criminalized the intimate expressive conduct which the Supreme Court in *Lawrence* finally recognized as being entitled to constitutional protection. (*Lawrence*, *supra*, 539 U.S. at p. 573.)

to grandmother because mother was a lesbian even though grandmother lived with a man who had sexually abused mother more than 800 times]; see generally *Jacobson v. Jacobson* (N.D. 1981) 314 N.W.2d 78 [reasoning that it was not in the best interests of the children to be placed with their mother in light of society's mores toward homosexuality and mother's involvement in a lesbian relationship]; *Thigpen v. Carpenter* (Ark.Ct.App. 1987) 730 S.W.2d 510 [lesbian mother was denied custody of her child because of Arkansas sodomy law that made the mother a criminal].)

2. Economic Discrimination

Economic discrimination against gay men and lesbians has also been pervasive and well-documented in the courts. Gay people have been denied jobs in a host of professions or fired from jobs they already held because of their sexual orientation. (See, e.g., *Gay Law Students Ass'n*, *supra*, 24 Cal.3d at p. 463 [class action suit alleging systemic discrimination in hiring, firing, and promotion on the basis of sexual orientation by public utility]; *Kovatch v. Cal. Cas. Mgmt. Co.* (1998) 65 Cal.App.4th 1256 [action for wrongful termination on the basis of sexual orientation]; see also *DeSantis v. Pac. Tel. & Tel. Co.* (9th Cir. 1979) 608 F.2d 327 [Title VII suit for discrimination based on sexual orientation at a nursery school and telephone companies]; *Gaylord v. Tacoma Sch. Dist. No. 10* (Wash. 1977) 559 P.2d 1340 [school teacher fired for alleged "immorality" because he was gay man].)

Even when not fired or discriminated against in the hiring process, gay and lesbian workers often face harassment, verbal abuse, and physical violence on the job from their own co-workers and supervisors. (See, e.g., *Hope v. Cal. Youth Auth.* (2005) 134 Cal.App.4th 577 [persistent pattern of anti-gay verbal abuse and ostracism of gay male employee]; *Murray v. Oceanside Unified Sch. Dist.* (2000) 79 Cal.App.4th 1338 [lesbian schoolteacher alleged that she was harassed because of her orientation and

school district retaliated when she complained]; *Carreno v. Local Union No. 226, IBEW* (D. Kan. 1990) 54 Fair Empl.Prac.Cas. (BNA) 81, 83 [gay employee suffered physical and verbal anti-gay harassment].)

Discrimination against gay men and lesbians in public sector employment has been no less severe. In the 1950s, the United States Senate investigated the employment of "homosexuals and other sex perverts" in government and declared that gay people, like communists, constituted "security risks." (Employment of Homosexuals and Other Sex Perverts in Government, Interim Report by the Subcomm. for Comm. on Expenditure in the Exec. Dept's (1950) S. Doc. 241, 81st Cong., 2d Sess. 1 at p. 3.) The report contended that gay men and lesbians were unsuitable for government employment because overt acts of homosexuality were criminal under state and federal law and because, in the Committee's words, gay people "lack the emotional stability of normal persons." (*Id.* at p. 4.) The Committee further concluded that "indulgence in acts of sex perversion weakens the moral fiber of an individual to a degree that he is not suitable for a position of responsibility," (*ibid.*), and great efforts were consequently made to purge the government of gay employees. (Cain, *Litigating for Lesbian and Gay Rights: A Legal History* (1993) 79 Va. L.Rev. 1551, 1567.)

Furthermore, in 1953, President Eisenhower issued Executive Order No. 10,450, 3 C.F.R. 936 (1949-1953), requiring the dismissal of all "sex perverts," including gay men and lesbians, from government employment, civilian or military. (79 Va. L.Rev. at p. 1566.) This Executive Order required all private corporations with federal contracts to discover and discharge their gay employees. (D'Emilio, Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970 (1983) p. 44.) As a result, thousands of men and women were discharged or forced to resign from their jobs because they were gay or

suspected of being gay. (*Ibid.*; see generally Dean, Imperial Brotherhood: Gender and the Making of Cold War Foreign Policy (2001).)

3. Violence

Finally, gay people have been subject to pervasive, overt hostility and a disproportionate level of hate violence because of widespread social animus. According to a major national study, 74 percent of gay men, lesbians, and bisexuals report having been the target of prejudice and discrimination based on their sexual orientation. And 32 percent of those surveyed reported that they had been the target of physical violence because someone believed they were gay or lesbian. (Henry J. Kaiser Family Foundation, *Inside Out: Report on the Experience of Lesbians, Gays and Bisexuals in America and the Public's View on Issues and Policies Related to Sexual Orientation* (2001) p. 4.)[9] In fact, gay men and lesbians are consistently among the leading targets of hate crimes – an especially shocking fact given that only one to five percent of the general population is estimated to be gay. (Rubenstein, et al., *Some Demographic Characteristics of the Gay Community in the United States* (2003) pp. 4-5.)[10] The FBI has reported that sexual orientation prejudice accounted for 15.6 percent of bias-motivated crimes at the national level in 2004. (Federal Bureau of Investigation, *Hate Crime Statistics 2004* (2005) [only crimes based on race or religious identity ranked higher].)[11] And in California, hate crimes against gay men and lesbians comprise 18.7 percent of bias-related crimes, surpassed only by those against racial minorities (who comprise a much larger percentage of the state population than do gay

---

[9] Available at <http://www.kff.org/kaiserpolls/3193-index.cfm>.

[10] Available at <http://www.law.ucla.edu/williamsproj/publications/GayDemographics.pdf>.

[11] Available at <http://www.fbi.gov/ucr/hc2004/section1.htm>.

people). (Criminal Justice Statistics Center, Cal. Dep't of Justice, *Hate Crime in California 2004* (2005) p. 7.)[12]

Moreover, hate crimes motivated by animus toward gay people have often been characterized by their extraordinarily brutal nature. (E.g., Rotenberk, *Study Links Homophobia, 151 Murders*, Chicago Sun-Times (Dec. 21, 1994) p. 27.) In 1998, Wyoming college student Matthew Shepard was savagely beaten by aggressors who chanted "It's gay awareness week" before chaining him to a fence to die. (Brooke, *Witnesses Trace Brutal Killing of Gay Student*, N.Y. Times (Nov. 21, 1998) p. A9 [describing the murder].) In 1999, Private Barry Winchell, a gay soldier at Fort Campbell, Kentucky, was taunted and harassed for months by his fellow soldiers before one of them bludgeoned him to death with a baseball bat while he slept in Army barracks. (Clines, *For Gay Soldier, A Daily Barrage of Threats and Slurs*, N.Y. Times (Dec. 12, 1999) p. 33.) Also in 1999, Billy Jack Gaither of Sylacauga, Alabama, was brutally beaten, had his throat slit, was stuffed in the back of a car, murdered with an ax, and then lit on fire because he was gay. (Firestone, *Trial in Gay Killing Opens, To New Details of Savagery*, N.Y. Times (Aug. 4, 1999).) These gruesome hate crimes and thousands more like them attest to the severity of anti-gay prejudice in society and the need for strong legal protections for gay people. (See also *Naboszny v. Podlesney* (7th Cir. 1996) 92 F.3d 446, 454-455 [gay student repeatedly harassed, beaten, and even "mock rape[d]," to which a school official replied, "boys will be boys"]; Holmberg, *Beheading Stuns Gay Community*, Richmond Times Dispatch (Mar. 7, 1999) p. B1 [recounting how Henry Edward Northington was decapitated by attackers who then left his severed head at spot frequented by gay people].)

---

[12] Available at <http://ag.ca.gov/cjsc/publications/hatecrimes/hc04/preface.pdf>.

In addition, those who report sexual-orientation-related bias crimes sometimes are treated with rank hostility from the very authorities charged with their protection. A 2001 report of the National Coalition of Anti-Violence Project found that in 756 anti-gay bias incidents reported to local police and hospitals in the previous year, 12 percent of victims reported having been verbally or physically abused when they reported the incident. (Empire State Pride Agency Foundation, *State of the State Report* 2001 (2001) p. 15.)[13]

C. Sexual Orientation Is An Immutable Trait As Defined By Relevant Law.

Courts have further taken into account whether the relevant trait is "immutable" in that the trait is "so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change [it]" or "if changing it would involve great difficulty, such as requiring . . . a traumatic change of identity." (*Watkins v. U.S. Army* (9th Cir. 1989) 875 F.2d 699, 726 (conc. opn. of Norris, J.).)[14]

Sexual orientation is such a trait. It is so fundamental to one's identity that a person should not be required to abandon it. (*Hernandez-Montiel v. INS* (9th Cir. 2000) 225 F.3d 1084, 1087, 1093; *Karouni v. Gonzales* (9th Cir. 2005) 399 F.3d 1163, 1173 [same].

---

[13] Available at <http://www.prideagenda.org/pride/publications.html>.

[14] The anti-gay groups involved in the case below defined immutability as genetic or incapable of change. But this definition would call into question every classification designated as "suspect" by the courts. Those of disfavored religious minorities may convert. Aliens can become naturalized citizens. National origin may be hidden by changing one's name and customs. Illegitimate children may be adopted. Light-skinned blacks may "pass" as white. And one's sex can be changed through surgery and hormone therapy. (See *Watkins*, *supra*, 875 F.2d at p. 726 (conc. opn. of Norris, J.).)

Major health and mental health professional associations have rejected the idea that homosexuality is a disorder that requires a cure. In an amicus brief to the United States Supreme Court in support of the petitioners in *Lawrence v. Texas*, *supra*, the American Psychological Association, the American Psychiatric Association, and the National Association of Social Workers affirmed that decades of rigorous research and clinical experience had proven that same-sex orientation "is a normal variant of human sexual expression" that "is not a mental or psychological disorder," is "highly resistant to change," and is fundamental to the identities of gay men and lesbians. (Brief of Amici Curiae American Psychological Association, et al. at pp. 4-5 in *Lawrence v. Texas*, *supra*, 539 U.S. 559.) These groups warned of the risks of conversion therapy:

> In addition to the lack of scientific evidence for the effectiveness of efforts to change sexual orientation, there is reason to believe such efforts can be harmful to the psychological well-being of those who attempt them. Clinical observations and self-reports indicate that many individuals who unsuccessfully attempt to change their sexual orientation undergo considerable psychological distress. In fact, the potential psychological risks to some patients undergoing conversion therapies are sufficiently significant that treatment protocols have been developed to assist them in overcoming a wide range of psychological and relational problems. (*Id.* at p. 14.)

Thus, to the extent a change in sexual identity is even possible, any such change would "involve great difficulty [and require] . . . a traumatic change of identity." (*Watkins*, *supra*, 875 F.2d at p. 726 (conc. opn. of Norris, J.).) Given these facts, "it would be abhorrent for government to penalize a person for refusing to change" their orientation. (*Ibid.*)

D. Gay Men And Lesbians Cannot Fully Protect Themselves Through The Political Process.

Finally, as explained above, courts sometimes consider whether prejudice "may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." (*Purdy & Fitzpatrick, supra*, 71 Cal.2d at p. 579 (citing *Carolene Products, supra*, 304 U.S. 135, fn. 4).) Despite some recent legislative strides, the same animus towards gay men and lesbians that gives rise to discrimination and violence, also keeps them from effectively and permanently obtaining equal treatment through the political process.

1. Discrimination Deters Many Gay Men And Lesbians From Political Activism.

Gay men and lesbians constitute only a very small percentage of the population, [15] and their political power has been and continues to be diminished by the fact that many keep their sexual orientation a secret. In a survey conducted in 2000, 45% of lesbians and gay men reported they were not open about sexual orientation to their employers; 28% were not open to co-workers; and 16% were not open to family members. (Kaiser Family Foundation Study, *Inside OUT: A Report On The Experiences of Lesbians, Gays and Bisexuals In America And The Public's View On Issues And Policies Related To Sexual Orientation* (Nov. 2001).)[16] This secrecy is both a shelter from discrimination and an obstacle to overcoming it; many

---

[15] It is estimated that 5.2% of California's population, and 4.1% of the United States population, is gay, lesbian or bisexual. (Gates, The Williams Institute, *Same-Sex Couples and the Gay, Lesbian, Bisexual Population: New Estimates from the American Community Survey* (October 2006), at pp. 4, 5, available at <http://www.law.ucla.edu/Williamsinstitute/publications/SameSexCouplesandGLBpopACS.pdf>.)

[16] Available at http://www.kff.org/kaiserpolls/upload/New-Surveys-on-Experiences-of-Lesbians-Gays-and-Bisexuals-and-the-Public-s-Views-Related-to-Sexual-Orientation-Report.pdf.

gay men and lesbians are deterred from political activism out of fear of exposing themselves to the very discrimination they seek to eliminate. (See Bruce A. Ackerman, *Beyond Carolene Products* (1985) 98 Harv. L. Rev. 713, 731.)

Moreover, historically, states have opposed efforts by gays and lesbians to form affiliations – the building blocks of political mobilization – based on sexual orientation. (See, e.g., *Grant v. Brown* (1974) 39 Ohio St.2d 112 [denying writ of mandamus challenging secretary of state's refusal to grant articles of incorporation for nonprofit for the promotion and acceptance of homosexuality as valid life style]; *In re Thom Lambda Legal Defense & Educ. Fund* (N.Y.App.Div. 1972) 40 A.D.2d 787 [denying Lambda Legal's nonprofit application because organization's mission was deemed "neither benevolent nor charitable"), revd. (N.Y. 1973) 33 N.Y.2d 609; *Gay Lib v. Univ. of Mo.* (W.D.Mo. 1976) 416 F.Supp. 1350 [upholding University of Missouri's denial of recognition to gay rights group because such recognition would "tend to expand homosexual behavior," and thereby increase violations of state's sodomy law], revd. (8th Cir. 1977) 558 F.2d 848.)

2. Gay Men And Lesbians Are Underrepresented In Government.

Underrepresentation in political bodies is an acknowledged measure of relative political power in our representative government. (*Frontiero v. Richardson, supra*, 411 U.S. at p. 686 [classification based on sex "inherently suspect" because women were "vastly underrepresented"].) Judge Norris, concurring with the majority opinion holding that the army was estopped from barring soldier's enlistment solely because of his acknowledged homosexuality, relied on this reason in *Watkins v. U.S. Army, supra*, 875 F.2d at p. 727: "It cannot be seriously disputed, however, that homosexuals as a group cannot protect their right to be free

from invidious discrimination by appealing to the political branches. [¶] The very fact that homosexuals have historically been underrepresented in and victimized by political bodies is itself strong evidence that they lack the political power necessary to ensure fair treatment at the hands of government."

To say that gay men and lesbians are politically underrepresented today would be an understatement. Only recently have openly gay people dared to run for public office, and the number of openly gay elected officials in this country remains miniscule. Although California's gay, lesbian, and bisexual constituency is the largest in the country,[17] only four percent of the California state legislators are openly gay or lesbian.

3. Recent Gay Rights Legislation Does Not Undermine The Case For Treating Sexual Orientation Classifications As Suspect.

Despite the Attorney General's argument to the contrary, the relative political vulnerability of a group is not disproved by the existence of laws aimed at protecting that group from discrimination. For instance, that classifications based on race are suspect is beyond question. Yet, as stated above, African-Americans are protected by three federal constitutional amendments, numerous major federal Civil Rights Acts and antidiscrimination laws in at least 48 of the states. (See *High Tech Gays*, *supra*, 909 F.2d at p. 378 (Canby, J., dissenting from denial of rehearing en banc, joined by Norris, J.).) Similarly, gender classifications are subject to strict scrutiny in California, despite the existence of both constitutional and

---

[17] California has an estimated 1,388,164 gay, lesbian, and bisexual people. (Gates, *Same-Sex Couples and the Gay, Lesbian, Bisexual Population: New Estimates from the American Community Survey*, *supra*, note 16, at p. 6.) San Francisco ranks first in the percentage of gay, lesbian, and bisexual adults in a metropolitan area, with an estimated 15.4%. (*Ibid.*)

legislative prohibitions against gender discrimination.[18] Thus, even though legislative bodies may have crafted some prohibitions against exclusion or abuse of a commonly targeted group, the passage of such protective legislation in response to widespread discrimination does not magically transform that group to politically powerful. (See Guido Calabresi, *Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)* (1991) 105 Harv. L.Rev. 80, 97-98 fn. 51.) Rather than indicate the political power of gay people as a group, the existence of state laws that prohibit discrimination on the basis of sexual orientation simply reflects the enduring prejudice this group faces in almost all facets of American life.

The basic rights gay people have gained in California have been both recent and tenuous. For example, the domestic partnership protections were enacted only during the last two legislative sessions. (Assembly Bill No. 205 (Reg. Sess. 2003-2004) 2003 Cal. Stat. Ch. 421.) Prior to the enactment of the A.B. 205, and as late as 1999, all attempts to introduce bills to protect the rights of same sex couples in the form of domestic partnership failed. (E.g., Assembly Bill No. 627 (Reg. Sess. 1995); Assembly Bill No. 54 (Reg. Sess. 1997); Assembly Bill No. 1059 (Reg. Sess. 1997); Senate Bill No. 75 (1998).) And these legislative gains have not provided California's lesbian and gay residents the equality under law that the Constitution guarantees to all.

* * *

---

[18] Protective legislation includes Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, and the California Constitution, art. XX, § 18. When the California Supreme Court held classifications based on gender were subject to strict scrutiny in 1971, all of these legal protections were well established. (See *Sail'er Inn, supra*, 5 Cal.3d 1.)

Because discrimination against gay and lesbian couples satisfies all the criteria relevant to suspect classification analysis, Family Code section 300 cannot be upheld unless it passes muster under strict scrutiny. (*Sail'er Inn*, *supra*, 5 Cal.3d at p. 20.) There can be no question that it does not. The state cannot show a compelling state interest that justifies the discrimination, or that section 300 is necessary to achieve that compelling interest. (*Id.* at pp. 16-17.) The state's purported interests in the legislation, sounding only in "tradition" and "common understanding," are based on nothing more than "outdated social stereotypes [that] result in invidious laws or practices." (*Id.* at p. 19.) Amici agree with the Superior Court and the Respondents that Family Code section 300 fails to meet even the threshold of being rationally related to a legitimate state purpose, much less the burden of being necessary to further a compelling governmental interest.

CONCLUSION

Amici respectfully request that the Court should apply strict scrutiny in evaluating Family Code section 300 and find that the state's ban on marriage equality violates the equal protection rights of lesbian and gay couples.

Dated: September 26, 2007

PETER OBSTLER
JEE YOUNG YOU
O'MELVENY & MYERS LLP

By: _____
Peter Obstler
Attorneys for Amici Curiae

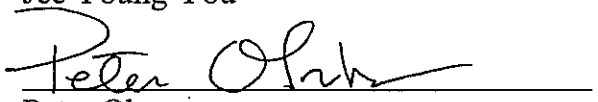
CERTIFICATE OF COMPLIANCE

I hereby certify that this *Amici Curiae* Brief has been prepared using proportionately spaced 13-point Times New Roman font. In reliance on the word count feature of the Microsoft Word for Windows software used to prepared this brief, I further certify that the total number of words of this brief is 7,241 words, exclusive of those materials not required to be counted.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on the 26th day of September 2007.

Respectfully submitted,

Peter Obstler
Jee Young You

By 

Peter Obster
O'Melveny & Myers LLP
275 Battery Street
San Francisco, California 94111-3305
Telephone: (415) 984-9700

Attorneys for:
Amici MALDEF et al.

A

ADDENDUM

Established in 1968, the **Mexican American Legal Defense and Educational Fund** ("MALDEF") is the leading national civil rights organization representing the 48 million Latinos living in the United States through litigation, advocacy, and educational outreach. With its headquarters in Los Angeles and offices in Atlanta, Chicago, Houston, Sacramento, San Antonio and Washington, D.C., MALDEF's mission is to foster sound public policies, laws and programs to safeguard the civil rights of Latinos living in the United States and to empower the Latino community to participate fully in our society. MALDEF has litigated many cases under state and federal law to ensure equal treatment under the law of Latinos, and is a respected public policy voice in Sacramento and Washington, D.C. on issues affecting Latinos. MALDEF sets as a primary goal defending the right of all Latino families to equal treatment under law, including those headed by lesbian or gay Latinos who wish the equal right to marry and in which Latino children are disadvantaged because their same-sex parents are denied civil marriage.

AGUILAS was founded in 1992 to create a supportive, culturally specific environment for gay, lesbian, and bisexual Latinos. It is the largest Latino gay and lesbian organization in Northern California and has served over 900 Latino gay men through its HIV prevention services in San Francisco. In addition, AGUILAS serves to provide leadership and support to its target group through its commitment and dedication and advocacy for the needs of this community. Many couples in the gay and lesbian Latino community currently are being denied the right of marriage and are therefore unable to protect their relationships, children and families. The current status has contributed to the marginalization of this community and creates barriers for members to meet their responsibilities as partners, parents, and family members. In light of these facts, AGUILAS strongly supports the efforts to extend marriage rights to same-sex couples.

Bienestar Human Services ("Bienestar") is the largest Latino non-profit, community-based agency in the United States. Bienestar's early focus on AIDS education has broadened to address issues facing Southern California's Latino community, especially gay, lesbian, bisexual, and transgender Latinos, many of whom are involved in committed relationships and forming strong families throughout California. Bienestar is concerned with how race/national origin discrimination and language barriers can combine with sexual orientation bias. Bienestar recognizes that California's current marriage law unjustly impedes access to the protections and rights that should be afforded equally to all California families, and is

interested in this litigation on behalf of its many constituents who are harmed due to the limitation of marriage only to different-sex couples. Ending marriage discrimination would strengthen families throughout the state, and specifically would offer benefits to a great many in the Latino community. At the same time, Bienestar believes that to rule against marriage equality would further marginalize an already disenfranchised group of people, leaving families and children vulnerable without adequate legal safeguards, and very likely increasing anti-gay bias.

The **Coalition for Humane Immigrant Rights of Los Angeles** ("CHIRLA") is a nonprofit organization founded in 1986 to advance the human and civil rights of immigrants and refugees in Los Angeles. As a multiethnic coalition of community organizations and individuals, CHIRLA aims to foster greater understanding of the issues that affect immigrant communities, provide a neutral forum for discussion, and unite immigrant groups to advocate more effectively for positive change. Toward those goals, CHIRLA provides legal representation, extensive referral services, and a support network for immigrants and refugees; educates and organizes community members; and works to improve race and ethnic human relations throughout Southern California. With reference to this case, CHIRLA underscores the significant challenges facing immigrants in California; accordingly, the organization advocates for nondiscriminatory, respectful laws that offer equal treatment and dignity to all families.

La Raza Centro Legal ("LRCL") is a bilingual and multicultural public interest law agency that seeks to create a more just and inclusive society in the interests of the Latino, indigenous, immigrant and low-income people of San Francisco and the greater Bay Area. It is toward the goal of social justice that LRCL embraces community empowerment: the process of promoting and increasing the community's capacity to influence society by strengthening community leadership, invigorating community ties, assisting community members to identify appropriate solutions to their own problems, and to develop the appropriate strategies to achieve their aspirations for justice. With a passion for justice, LRCL works within the community promoting dignity and respect for the rights of all.

The **National Black Justice Coalition** ("NBJC") is a non-profit, civil rights organization of black lesbian, gay, bisexual and transgender people and allies dedicated to foster equality. NBJC advocates for social justice by educating and mobilizing opinion leaders, including elected officials, clergy and media, with a focus on black communities. Black communities have historically suffered for discrimination and have turned to the courts for redress. The issue presented by this appeal has significant implications for

the civil rights of black lesbians and gay men in this State – whether they will receive equal treatment under the law and the legal recognition and protections of marriage for their relationships and families. NBJC envisions a world where all people are fully empowered to participate safely, openly and honestly in family, faith and community, regardless of race, gender-identity or sexual orientation.

The **National Lawyers Guild of San Francisco** ("NLG-SF") is part of the larger organization founded in 1937 as the first racially integrated national bar association. The National Lawyers Guild is the oldest and largest public interest/human rights bar organization in the United States, with more than 200 chapters. The National Lawyers Guild is dedicated to the need for basic change in the structure of the political and economic system. NLG-SF seeks to unite the lawyers, law students, and legal workers of America in an organization that shall function as an effective political and social force in the service of the people. It has over 1300 active members in California. For these reasons, NLG-SF supports the respondents in this case and urges that this Court affirm the trial court's holding that excluding same-sex couples from the right to marry violates the California Constitution.

Zuna Institute is a national non-profit organization that advocates for the needs of black lesbians in the areas of health, public policy, economic development, and education. Zuna seeks to eliminate the barriers faced by black lesbians on a daily basis, including the inability of same-sex couples to marry, which causes great harm to black lesbians and their families, and which demeans the dignity and freedom of all people.

SF1:687383.7

PROOF OF SERVICE

I, the undersigned, hereby declare:

I am over eighteen years of age and not a party to the above action. My business address is 275 Battery Street, San Francisco, California 94111-3305.

On the date set forth below, I caused to be served the following documents:

APPLICATION FOR PERMISSION TO FILE AMICI CURIAE BRIEF AND PROPOSED BRIEF OF MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, AGUILAS, BIENESTAR HUMAN SERVICES, COALITION FOR HUMANE IMMIGRANT RIGHTS, LA RAZA CENTRO LEGAL, NATIONAL BLACK JUSTICE COALITION, NATIONAL LAWYERS GUILD OF SAN FRANCISCO, AND ZUNA INSTITUTE IN SUPPORT OF RESPONDENTS CHALLENGING THE MARRIAGE EXCLUSION

by putting a true and correct copy thereof together with a signed copy of this declaration, in a sealed envelope, with delivery fees paid or provided for, for the delivery the next business day to:

SEE SERVICE LIST

and by placing the envelope for collection today by the overnight courier in the accordance with the firm's ordinary business practices. I am readily familiar with this firm's practice for collection and processing of overnight courier correspondence. In the ordinary course of business, such correspondence collected from me would be processed on the same day, with fees thereon fully prepaid, and deposited that day in a box or other facility regularly maintained by Federal Express, which is an overnight carrier.

I declare under penalty of perjury under the laws of the State of California, that the above is true and correct. Executed on September 26, 2007, at San Francisco, California.

LINDA M. SARSON

SERVICE LIST

In Re: Marriage Cases
Judicial Council Coordination Proceeding No. 4365
In the Supreme Court of the State of California
Case No. S147999

Therese M. Stewart
Chief Deputy City Attorney
OFFICE OF THE CITY ATTORNEY
#1 Dr. Carlton B. Coodlett Place
City Hall, Room 234
San Francisco, CA 94102-4682
Tel: (414) 554-4708
Fax: (415) 554-4745
Counsel for the City and County of San Francisco, et al.

Bobbie J. Wilson
Amy E. Margolin
HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN
Three Embarcadero Center, 7th Floor
San Francisco, CA 94111
Tel: (415) 434-1600
Fax: (415) 217-5910
Counsel for the City and County of San Francisco, et al.

Edmund G. Brown, Jr.
Stacy Boulware Eurie
Christopher E. Krueger
STATE OF CALIFORNIA, DEPT. OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
1300 i Street, Suite 125
Post Office Box 944255
Sacramento, CA 94244
Tel: (916) 445-7385
Fax: (916) 324-8835
Counsel for the State of California, et al.

Kenneth C. Mennemeier
Kelci M. Gosling
MENNEMEIER, GLASSMAN & STROUD LLP
980 9th Street, Suite 1700
Sacramento, Ca 95814-2736
Tel: (916) 553-4000
Fax: (916) 553-4011
Counsel for Governor Arnold Schwarzeneggar and State of Registrar of Vital Statistics Teresita Trinidad

Shannon Minter
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market Street, Suite 370
San Francisco, CA 94102
Tel: (415) 392-6257
Fax: (415) 392-8442
Counsel for Respondents

Jon W. Davidson
Jennifer C. Pizer
LAMBDA LEGAL DEFENSE AND EDUCATION FUND
3325 Wilshire Blvd., Suite 1300
Los Angeles, CA 90010
Tel: (213) 392-7600
Fax: (213) 351-6050
Counsel for Respondents

Peter J. Eliasberg
Clare Pastore
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1616 Beverly Blvd.
Los Angeles, CA 90026
Tel: (213) 97709500
Fax: (415) 250-3919
Counsel for Respondents

Alan L. Schlosser
Alex M. Cleghorn
ACLU FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, CA 94111
Tel: (415) 631-2493
Fax: (415) 255-1478
Counsel for Respondents

David C. Codell
LAW OFFICE OF DAVID C. CODELL
9200 Sunset Blvd., Penthouse Two
Los Angeles, CA 90069
Tel: (310) 273-0306
Fax: (310) 273-0307
Counsel for Respondents

Stephen V. Bomse
Christopher F. Stoll
HELLER EHRMAN LLP
333 Bush Street
San Francisco, CA 94104-2878
Tel: (415) 772-6000
Fax: (415) 772-6268
Counsel for Respondents

Gloria Allred
Michael Marolo
John S. West
Allred, Maroko & Goldberg
6300 Wilshire Blvd., Suite 1500
Los Angeles, CA 90048
Tel: (323) 653-6530
Fax: (323) 653-1660
Counsel for Robin Tyler, et al.

Lloyd W. Pellman
Raymond G. Fortner
Judy W. Whitehurst
648 Kenneth Hahn Hall of Administration
500 W. Temple Street
Los Angeles, CA 90012-2713
Tel: (213) 974-8948
Counsel for the County of Los Angeles

Waukeen Q. McCoy
LAW OFFICES OF WAUKEEN Q. MCCOY
703 Market Street, Suite 1407
San Francisco, CA 94103
Tel: (415) 675-7705
Fax: (415) 675-2530
Counsel for Clinton Respondents

Jason E. Hasley
PAUL, HANLEY & HARLEY LLP
1608 Fourth Street, Suite 300
Berkeley, CA 94710
Tel: (510) 559-9980
Fax: (510) 559-9970
Counsel for Clint Respondents

Robert H. Tyler
ADVOCATES FORE FAITH AND FREEDOM
24910 Loas Brisas Road, Suite 110
Murietta, CA 92562
Tel: (951) 304-7583
Fax: (951) 894-6430
Counsel for Proposition 22 Legal Defense and Education Fund

Benjamin W. Bull
Glen Lavy
ALLIANCE DEFENSE FUND
15333 North Pima Road, Suite 165
Scottsdale, AZ 85260
Tel: (480) 444-0020\
Fax: (480) 444-0028
Counsel for Proposition 22 Legal Defense and Education Fund

Timothy Donald Chandler
ALLIANCE DEFENSE FUND
101 Parkshore Dr. #100
Folsom, CA 95630
Tel: (915) 932-2850
Fax: (916) 932-2851
Counsel for Proposition 22 Legal Defense and Education Fund

Andrew P. Pugno
LAW OFFICES OF ANDREW P. PUGNO
101 Parkshore Dr. #100
Folsom, CA 95630
Tel: (915) 608-3065
Fax: (916) 608-3066
Counsel for Proposition 22 Legal Defense and Education Fund

Terry L. Thompson
LAW OFFICES OF TERRY L. THOMPSON
1804 Piedras Circle
Alamo, CA 94507
Tel: (925) 855-15-7
Fax: (925) 820-6034
Counsel for Proposition 22 Legal defense and Education Fund

Mathew D. Staveer
LIBERTY COUNSEL
Second Floor
1055 Maitland Center Common
Maitland, FL 32751
Tel: (800) 671-1776
Fax: (407) 875-0770
Counsel for Randy Thomasson and Campaign for California Families

Mary McAlister
LIBERTY COUNSEL
100 Mountain View Road
Suite 2775
Lynchburg, VA 24506
Tel: (434) 592-7000
Fax: (434) 592-7700
Counsel for Randy Thomasson and Campaign for California Families

Ross S. Heckmann
ATTORNEY AT LAW
1214 Valencia Way
Arcardia, CA 91006
Tel: (626) 256-4664
Fax: (626) 256-4774
Counsel for Campaign for California Families

Courtesy Copies to:

CLERK OF THE COURT
Court of Appeal, First Appellate District
350 McAllister Street
San Francisco, CA 94102

HONORABLE RICHARD A. KRAMER
San Francisco County Superior Court
Department 304
400 McAllister Street
San Francisco, CA 94102