Case No. S124179

IN THE

SUPREME COURT OF CALIFORNIA

B. BIRGIT KOEBKE, et al.,

Plaintiffs and Appellants,

vs.

BERNARDO HEIGHTS COUNTRY CLUB,

Defendant and Respondent.

After a Decision by the Court of Appeal,
Fourth Appellate District, Division One,
Case No. D041058

APPELLANTS' OPENING BRIEF ON THE MERITS

Service on the California Solicitor General required by Cal. Civ. Code § 51.1

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I. ISSUES PRESENTED

In compliance with Rule 29.1(b)(2) of the California Rules of Court, the Petition for Review set forth the following statement of the issues:

> "1. Does California's Unruh Civil Rights Act prohibit discrimination based on marital status?
>
> "2. Does the Unruh Civil Rights Act's prohibition of sexual orientation and sex discrimination bar a business establishment from choosing to provide benefits to only those couples who are legally married, so long as California does not allow same-sex couples to marry?"

This Court's order granting review dated June 9, 2004 did not specify the issues to be briefed and no additional issues were included in the Answer to the Petition for Review.

II. STATEMENT OF THE CASE

A. INTRODUCTORY STATEMENT

The Unruh Civil Rights Act (the "Unruh Act," "Unruh" or the "Act") has been described as "this state's bulwark against arbitrary discrimination in places of public accommodation." (*Isbister v. Boys' Club of Santa Cruz, Inc.* (1985) 40 Cal.3d 72, 75 [219 Cal.Rptr. 150, 707 P.2d 212].)[1] The Act "guarantees every person in California" equal treatment by business establishments in our state in order "to banish ... from California's community life" the invidious exclusion of some people, or their unequal treatment, by

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[1] The Unruh Act currently provides, in relevant part, that "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, or medical condition are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." (Civ. Code § 51(b).)

facilities open to the public. (*Id.*, 40 Cal.3d at pp. 75-76.)

This appeal asks whether couples who are not married to one another, and particularly couples in same-sex relationships currently barred by California from marrying, are entitled to the same guarantee of equal treatment by businesses subject to the Unruh Act as this Court has found to exist under other California civil rights laws. (See *Smith v. Fair Employment and Housing Commission* (1996) 12 Cal.4th 1143, 1155, 1160 [51 Cal.Rptr.2d 700, 913 P.2d 909] (holding that Fair Employment and Housing Act bars a landlord from refusing to rent to a couple because they are not married to one another).)

In particular, this case involves lesbian domestic partners who share a long-term, committed relationship and who are avid golfers. (See Clerk's Transcript ("CT") 171, 254, 272, 441.) These two women were told that, unlike married couples, they could use a country club's golf course together no more than six times per year and had to pay extra fees of up to seventy-five dollars each time they did so, unless they paid twice the membership fees charged to couples who are married. (CT 229, 303, 322, 390, 455, 458, 463, 468.) They also were told that, even if they did pay twice as much, the club would not allow their valuable ownership interests in the facility to be inherited by one another, unlike the interests owned by those who are married. (CT 399, 400, 446.) Intentionally treating a couple unequally in these ways based on their being in a same-sex relationship – and as a result their not being married to one another – should be found to be barred by the Unruh Act both as marital status discrimination and as discrimination based on sexual orientation and sex. Any other result would repudiate the Unruh Act's promise of equality in community life for all in our state and would be a statement that lesbian and gay couples are second-class citizens, afforded no recourse for exclusion and unequal treatment by California's businesses.

That this case arises in the context of playing golf at a country club in no way diminishes the importance of the civil rights issues here at stake. Because these clubs provide unique opportunities for making business, career advancement, and political contacts with those with power, overcoming discrimination in this context has been an essential step in the civil rights struggles of many communities.[2] Even beyond the link to networking and

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[2] In the past, country clubs across the nation regularly excluded African-Americans, Latinos, those of Irish, Italian and German descent, Jews, and Catholics from membership. (See Jolly-Ryan, *Chipping Away at Discrimination at the Country Club* (1997) 25 Pepp. L.Rev. 495, 496; Frank, *The Key to Unlocking the Clubhouse Door: The Application of Antidiscrimination Laws to Quasi-private Clubs* (1994) U.Mich. J. Gender & L. 27, 30.) In many instances, it took litigation under civil rights laws like the Unruh Act to end these practices. (See, e.g., *Wright v. Salisbury Club, Inc.* (4th Cir. 1980) 632 F.2d 309; *Anderson v. Pass Christian Isles Golf Club, Inc.* (5th Cir. 1975) 488 F.2d 855; *Evans v. Laurel Links, Inc.* (E.D.Va. 1966) 261 F.Supp. 474). Numerous golf clubs also prohibited women from joining, or treated them unequally when they did, and some clubs still engage openly in such practices. (See Charpentier, *An Unimproved Lie: Gender Discrimination Continues at Augusta National Golf Club* (2004) 11 Vill. Sports & Ent. L. Forum 111; Janiak, *The "Links" Among Golf, Networking, and Women's Professional Advancement* (Spring 2003) 8 Stan. J.L. Bus. & Fin. 317, 332-36; Kamp, *Gender Discrimination at Private Golf Clubs* (1998) 5 Sports L.J. 89; *Warfield v. Peninsula Golf & Country Club* (1995) 10 Cal.4th 594 [42 Cal.Rptr.2d 50, 896 P.2d 776] (challenging requirement that country club membership be held in a man's name); *Albright v. S. Trace Country Club of Shreveport, Inc.* (2004) 2004 La. LEXIS 2221 (prohibiting country club's exclusion of women from "men's grille"); *Bourne v. Haverhill Golf & Country Club* (2003) 58 Mass. App.Ct. 306, 320-21 [791 N.E.2d 903] (affirming $1,967,400 jury award against country club that discriminated against women).) Respondent, for example, previously allowed only men to play golf at its club on Saturday mornings (CT 276, 331, 456, 470, 689), a practice many clubs premised on the stereotypical assumption that men were busy working during the week and women (presumed to be the male members' wives) were not. (See Jolly-Ryan, *supra*, 25 Pepp. L.Rev. at p. 496.)

other economic opportunities, discrimination in athletic activities has been an enduringly vexing problem for women and for lesbians and gay men.[3] But, most importantly, what laws like the Unruh Act fundamentally seek to counter is inequality in the "transactions and endeavors that constitute ordinary civil life in a free society."[4] Sometimes these involve concerns as critical as obtaining health care;[5] other times, they involve matters as pedestrian as equal access to a swimming pool or equal treatment at a car wash or restaurant.[6] Regardless of the context, ending the dignitary and other harms caused by such differential treatment is a state interest of the highest order.[7] The issues raised

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[3] See Brake, *The Struggle for Sex Equality in Sport and The Theory Behind Title IX* (Fall 200/Winter 2001) 34 U.Mich. J.L. Ref. 13, 83-122 (discussing impacts of sex inequality in sports upon development of leadership, gender roles, and attitudes toward athletic women); Baird, *Playing It Straight: An Analysis of Current Legal Protections to Combat Homophobia and Sexual Orientation Discrimination in Intercollegiate Athletics* (2002) 17 Berkeley Women's L.J. 31, 32-48 (discussing prevalence and effects of sexual orientation bias in sports); see generally Pronger (1990) The Arena of Masculinity: Sports, Homosexuality, and the Meaning of Sex; *Blanding v. Sports & Health Club, Inc.* (Minn. App. 1985) 373 N.W.2d 784 (challenging sports club's exclusion of gay man).

[4] *Romer v. Evans* (1996) 517 U.S. 620, 631 [116 S.Ct. 1620, 134 L.Ed.2d 855].

[5] See *Benitez v. N. Coast Women's Care Med. Group* (2003) 106 Cal.App.4th 978 [131 Cal.Rptr.2d 364]; *Washington v. Blaupin* (1964) 226 Cal.App.2d 604 [38 Cal.Rptr. 235].

[6] See *Isbister*, *supra*; *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24 [219 Cal.Rptr. 133, 707 P.2d 195]; *Rolon v. Kulwitzky* (1984) 153 Cal.App.3d 289 [200 Cal.Rptr. 217].

[7] See *Roberts v. United States Jaycees* (1984) 468 U.S. 609, 625-26 [104 S.Ct. 3244, 82 L.Ed.2d 462] (laws like the Unruh Act protect against stigmatizing deprivation of personal dignity and further society's interest in

by this appeal accordingly should be resolved with concern for what it would mean for our common humanity and our state's commitment to ending the wounds caused by bias[8] were unmarried couples, and particularly those who are lesbian or gay and therefore currently cannot marry under California law, to be found to be excluded from the guarantee of "the equality of citizens" in treatment by our state's businesses that is the Unruh Act. (See *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721 738 [180 Cal.Rptr. 496, 640 P.2d 115] (quoting *Piluso v. Spenscer* (1918) 36 Cal.App. 416, 419 [172 P. 412]).)

B. SUMMARY OF MATERIAL FACTS

Plaintiffs and Appellants in this action are two women named B. Birgit Koebke ("Ms. Koebke") and Kendall E. French ("Ms. French") (collectively, "Appellants"). (See CT 272, 276.) Ms. Koebke and Ms. French, who are both lesbian, have been domestic partners for over ten years. (See CT 441.) They

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"wide participation in political, economic, and cultural life"); *Koire, supra*, 40 Cal.3d at p. 34 (discrimination "injures not only the victim but the state and public in general") (citation omitted); *Orloff v. Los Angeles Turf Club, Inc.* (1951) 36 Cal.2d 734, 739 [227 P.2d 449] (referring to equal treatment in public places as among our nation's "precious" rights); *Pines v. Tomson* (1984) 160 Cal.App.3d 370, 391 [206 Cal.Rptr. 866] (Unruh Act serves "compelling" state interest in eradicating all forms of prohibited discrimination).

[8] See Wolfson, *Civil Rights, Human Rights, Gay Rights: Minorities and the Humanity of the Different* (1991) 14 Harv. J.L. & Pub. Policy 23, 24-25 (discrimination leads to dehumanization, hardheartedness, and false senses of superiority and inferiority); Hofmeister, *Women Need Not Apply: Discrimination and the Supreme Court's Intimate Association Test* (1994) 28 U.S.F. L.Rev. 1009, 1046-48 (discrimination undermines the nation's pride in its commitment to egalitarianism and fairness and hurts everyone by reinforcing stereotypes, limiting exposure to individual differences, and depriving us all of the contributions of those excluded).

live together and have entered a written "Statement of Domestic Partnership," which confirms that each considers the other "to be her primary life companion and spouse." (CT 278, 336, 455-56.[9]) They are the executors and sole beneficiaries of one another's wills, have executed estate planning documents and durable powers of attorney allowing for health care decisions and management of their assets by one another, have agreed to common ownership of their real property, have committed to "sharing with one another the joys and difficulties" of life as each other's family, and would legally marry one another if they could. (CT 336, 456.) As Ms. Koebke has explained, they have gone "as close as [they] can get" to "being legally married." (CT 456.)

In 1987, before Ms. Koebke and Ms. French became a couple, Ms. Koebke purchased membership in Bernardo Heights Country Club (referred to herein as "BHCC," the "Club," or "Respondent"). (CT 229.) BHCC is a social and recreational club located in San Diego that is owned by its approximately 350 "Regular" or equity members. (CT 170, 229, 311, 390, 463.) Each such member owns, as a valuable (and hopefully appreciating) investment, an equal interest in all of the real property and other assets of BHCC, and is liable to it for capital and operational assessments as well as dues and other charges. (CT 323, 329, 481.) The facilities at BHCC include a golf course, driving range, putting greens, club house, restaurant, bars, meeting facilities, and pro shop. (CT 170, 229, 275, 297.)

All BHCC memberships are for a member and his or her "family." The Club has no less expensive, "single" membership. (CT 284, 482, 696.) Ms. Koebke originally joined BHCC as a Junior Executive Member (provided to

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[9] As described at Ms. Koebke's deposition, Appellants also have filed as domestic partners with the state. (CT 455; see Fam. Code §§ 297, 298.5.)

those under age 35) and converted to being a Regular Member in 1991. (CT 229, 323.)[10] Junior Executive and Regular Members are entitled to play golf at BHCC as frequently as they wish without paying additional "green fees." (CT 229.) Moreover, according to the Club's Bylaws, "[m]embership entitlements extend to [a] member's legal spouse and unmarried sons and daughters under the age of twenty-two (22) residing with them." (CT 322, 390.) In other words, members of BHCC are allowed to have their legal spouses, as well as certain other family members, play golf with them and otherwise use the Club to an unlimited extent, without payment of any additional membership or usage fee.[11]

By contrast, according to the BHCC's Rules and Regulations, other individuals are to be treated as "guests" of a member. Guests are not allowed to play golf at the Club "more than six times in any one year" or "more than once every two months," and may be closely monitored to ensure that they do not exceed this limit. (CT 303, 455.) In addition, guests must pay a green fee of between forty and seventy-five dollars every time they use BHCC's golf course, which legal spouses and certain other family members are exempted from having to pay. (See CT 178, 229, 366, 455, 466.)

Furthermore, the Club's Bylaws provide that, "In the event of the death of a sole owner of a Regular membership ... not survived by a spouse, son or

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[10] The purchase price of a Regular Membership at the time Ms. Koebke bought hers was $18,000. Members also must pay monthly dues and quarterly minimum food charges. (CT 273, 284.)

[11] Although the Club's Bylaws provide membership entitlements for only a legal spouse and children, the Club has adopted Rules and Regulations also allowing grandchildren under the age of 22 also to play golf with a member or other player in the member's household on an unlimited basis, without payment of green fees. (CT 366.)

daughter, the membership shall terminate," along with all property rights that belong to members. (CT 400.) By contrast, if the member was married or had children, "The legal representative of such person ... may ... transfer such membership to the spouse ... or a son or daughter of the decedent, without payment of any transfer fee to the Club," provided the transferee is accepted for membership. (CT 399; 446.)[12]

Despite repeated requests, BHCC steadfastly has refused to provide Ms. Koebke and Ms. French the same benefits it provides to married members of the Club and their different-sex, legal spouses. (CT 279, 338.) As a result, Ms. Koebke and Ms. French can play golf together at the Club no more than six times per year, and – on top of the considerable membership fee, dues and other assessments required of members – must pay substantial additional fees for Ms. French when they do so.[13] In addition, should Ms. Koebke die first, her membership cannot be transferred to Ms. French. (See CT 282, 481.)

Respondent's Board of Directors informed Appellants that the only way they could play golf together at the Club more than six times per year would be for them to buy an "additional membership" to cover Ms. French. (CT 458, 688.) Respondent also stated that the only way Ms. Koebke could obtain

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[12] These provisions restrict even further the Bylaws in effect when Ms. Koebke purchased her membership, which allowed for transfer to someone other than a spouse, son or daughter of the deceased, if approved for membership, upon payment of a transfer fee, and simply exempted a member's spouse and children from payment of that fee. (CT 326.)

[13] Ms. Koebke and Ms. French also suffer the indignity of Ms. French having to register at the Club's Pro Shop as a "guest" each time they want to play golf together, which is not required of the legal spouses of members. (CT 232, 289, 341, 693.) Furthermore, although legal spouses of members are allowed to sign charge slips to pay for food at the Club, Ms. French is not permitted to do this. (CT 459.)

the privileges given to members with spouses would be for her to marry someone of a different sex, and that, if she wanted those privileges for Ms. French, that would only be possible if Ms. French were to change her sex to being a man. (CT 458, 463, 468.)

Respondent's policies differ from the majority of other country clubs in San Diego County, including San Diego Country Club, Rancho Bernardo Golf Club, Del Mar Country Club, Shadow Ridge Country Club, Loma Santa Fe, Vista Valley, Stoneridge, and Escondido Country Club, which have "significant other," "buddy system" or guest privilege policies that do not discriminate based upon sexual orientation, sex or marital status. (CT 277, 461, 467, 692.)

In addition to expressly denying benefits on the basis of marital status, there is significant evidence in the record that Respondent's policy was intended to discourage individuals who are lesbian or gay from belonging to the Club. For example, after Ms. Koebke sought to have the Board of Directors of the Club adopt a policy that would provide membership entitlements to a member's "significant other," without regard to the sex or sexual orientation of the member or the member's partner, the Club directed its membership committee to recommend a policy regarding significant others. (CT 277, 467.) The only proposal the Club's leadership was willing to submit to the membership, however, limited the definition of significant other to someone of a different sex than the member. (CT 277, 333, 690.) [14]

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[14] The Club's intent to discriminate based on Appellants' sexual orientation and their being in a same-sex relationship also was evidenced by the hostility and harassment based on sex and sexual orientation to which Appellants were subjected at the Club, which Appellants reported and the Club failed even to investigate, notwithstanding Club Rules and Regulations requiring members to be courteous to one another and providing that any

Although the Club's Rules and Regulations state that the Club's policy is to "accommodate each member in every way possible as long as it does not interfere with the legal rights of others" and to have "each member enjoy the privileges and services of the club to the fullest extent" (CT 275, 297, 468), Appellants' requests that their relationship be taken into account by allowing Ms. Koebke to enjoy the privileges and services of BHCC with her partner without limit (and without payment of additional fees) repeatedly were rejected by the Club, with explanations that the Club's Bylaws could not be changed. (CT 270, 338; see also CT 465 (deposition testimony of Club president that they "[c]an't bend the bylaws"). At the same time, however, the Club repeatedly has been flexible and "bent the bylaws" for individuals who were not in same-sex relationships by, among other things: (a) allowing minor grandchildren of members to play golf with a member to an unlimited extent, without fee, which is not provided for in the bylaws (CT 366, 469, 483-84, 690, 698, 723-24); (b) allowing other relatives (such as adult children and

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member who is a party to offensive conduct would be subject to discipline. (See CT 297, 301, 359, 364, 380, 456-58, 723, 728.) Club members made Appellants' sexual orientation a topic of conversation at the Club and were extraordinarily rude to them, ostracizing and shunning them, and refusing them common courtesies (such as allowing them to "hit through") routinely extended to other golfers. (CT 456, 685-86, 689.) Referring to Appellants being lesbian, a Club member suggested at the Club that he and his male colleagues should get Appellants "to put on a skit to show us how they do it with their toys, and charge an admission price." (CT 723.) Other club members similarly mocked and chided Ms. Koebke for being a lesbian, suggesting that they should invite her over and "pay her for putting on a show." (CT 728.) In addition, Club members have been warned not to play golf with or assist Appellants. (CT 454-55, 723.) Furthermore, Ms. Koebke baselessly was chastised for her golf practices that violated no rules and that others routinely engaged in and for her attire (even though it comported with what professional female golfers wear). (CT 461-62, 467.)

grandchildren) to play with a member up to 14 times per year instead of the limit of 6 times imposed on guests (including domestic partners), and allowing these other relatives to play at reduced fees (CT 366, 457, 469, 724), which also is not provided for in the bylaws; (c) allowing members repeatedly to play golf at the Club without fee with minors who were not their legal children (CT 457, 460, 692, 726-27), in violation of the bylaws; (d) allowing legal spouses of members to serve on the Club's committees and to be officers of the Club (CT 687, 688, 690, 693), in violation of the Club's bylaws (CT 375, 390, 688, 691); and (e) allowing a number of unmarried, different-sex couples to have the very same privileges denied to Appellants (CT 457-58, 460, 686, 691, 726-27).

Ms. Koebke's deposition testimony confirms that this willingness on the part of the Club to cater to the family structures of heterosexual Club members – but not Appellants – was based on Appellants being a lesbian couple. As she explained, the concern of the Club's Board and members was that, if they let Appellants join as a couple, "the flood gates would open" and they would need "to let all gays and lesbians in," resulting in the Club becoming known as "gay-friendly," which the Club did not want. (CT 461-62.)[15]

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[15] The strategy adopted by the Club appears to have been effective. For example, a member of the Club's Membership Committee testified at her deposition that, aside from Ms. Koebke, she did not know of any other club members who were gay or lesbian and that the Club did not have any prospective members who were gay. (CT 687-88.)

C. PROCEDURAL HISTORY

Appellants filed their initial complaint in this action on May 11, 2001 (CT 1), and filed a First Amended Complaint on July 20, 2001 (CT 22). After Respondent's demurrer to the First Amended Complaint (CT 48) was sustained with partial leave to amend (CT 165), Appellants filed a Second Amended Complaint on October 12, 2001 (CT 167), which is the controlling pleading in this litigation.

The Second Amended Complaint set forth a claim for violation of the Unruh Act (Civ. Code § 51), which prohibits business establishments in California from discriminating on various grounds in the provision of accommodations, advantages, facilities, privileges or services. In this claim, Appellants specifically asserted that Respondent in various ways discriminated against them on the basis of their sexual orientation, sex, and marital status. (See CT 168, 174-84).[16]

Respondent moved for summary judgment, based on numerous declarations and exhibits. (CT 200, 228-52, 267.) For purposes of the motion, Respondent did not contest that it is a business establishment subject to the Unruh Act (a position it has not altered on appeal).[17] Rather, Respondent

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[16] The Second Amended Complaint also included claims for violation of San Diego Municipal Code §§ 52.9604 - 52.9606 (which prohibit sexual orientation discrimination in real property transactions, by business establishments, and by city-supported facilities); for violation of Civil Code § 53, which prohibits discriminatory restrictions on the use and transfer of real property; for fraud and misrepresentation; and for declaratory relief. These other claims are not now before this Court.

[17] This Court has held that a country club may be considered a "business establishment" subject to the Unruh Act if it is not a truly private social club or if it regularly conducts business transactions on its premises with non-members. (*Warfield*, *supra*, 10 Cal.4th at pp. 620-21.) There is

instead asserted that it did not treat individuals differently on the basis of their sexual orientation or sex, only on the basis of their marital status, which it claimed to be lawful. (See CT 201-02, 219-25, 261-62, 490, 498, 541.)

Appellants opposed the summary judgment motion (CT 412), likewise relying on numerous declarations, exhibits, and other evidence (CT 267-411, 437-84). After further briefing and submission of additional declarations and exhibits (see CT 486, 485, 496, 682-735; see also Exhibits to Stipulation for Augmentation of the Clerk's Transcript), the Superior Court issued a telephonic ruling tentatively granting Respondent's motion for summary judgment, based on its conclusion that "Defendant did not provide different privileges to Appellants than to other unmarried couples." (CT 739.) The trial court did not explain, however, why it believed the Unruh Act permits Respondent to afford more benefits to married members and their legal spouses than to unmarried members and their partners, including those like Appellants whom California's Family Code currently does not allow to marry.

After oral argument (see CT 746; RT 3:1-19), the Superior Court issued an order on July 19, 2002 confirming its telephonic ruling, with no further explanation. (CT 74;.)[18] After receiving notice of entry of judgment (CT 759, 766), Appellants timely and properly filed their Notice of Appeal. (CT 772; see Code Civ. Proc. §§ 904.1, Cal. Rules of Court, rule 2(a)(2).)

On March 8, 2004, the Fourth Appellate District affirmed the grant of

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substantial evidence that BHCC meets both of these tests. (See CT 268, 271, 389, 459, 466-67, 470-71, 691.)

[18] A formal Order Granting Motion for Summary Judgment in favor of Respondent (which likewise provided no further explanation) and a separate Judgment by Court Pursuant to California Civil Procedure Code Section 437c followed. (CT 748, 750, 753.)

summary judgment in part and reversed it in part. Finding a triable issue of material fact as to whether the Club granted some heterosexual unmarried couples privileges denied to Appellants, the Court of Appeal held that summary judgment improperly had been granted on Appellants' claim that the Club "*applied* its membership bylaws in a discriminatory manner." (Court of Appeal Slip Op. at p. 3 (emphasis added).)[19] The Court of Appeal accordingly reversed the judgment entered in the Club's favor as to that limited claim. (*Id.* at pp. 34, 40.)

At the same time, however, the Court of Appeal affirmed that portion of the judgment entered in the Club's favor on Appellants' broader claims that the Club's policy itself discriminated on the basis of marital status, sexual orientation, and sex. (*Id.* at pp. 3, 40.) The Court of Appeal concluded that the Unruh Act does not prohibit discrimination based on marital status (*id.* at pp. 3, 31, 34) and reasoned that no sex or sexual orientation discrimination had occurred because the Club's policy denied benefits to all unmarried

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[19] The Court of Appeal found that a triable issue of material fact regarding unequal application of the policy denying benefits to unmarried couples was raised by the unrebutted admission of BHCC's general manager that there were other couples who were not married who nevertheless were allowed to play under one membership, as well as his explanation that Ms. Koebke "had not 'found that out yet' through her lawsuit." (Court of Appeal Slip Op. at p. 37.) The Court of Appeal concluded that this admission, standing alone, was enough to support a violation of the Unruh Act if believed by a jury. (*Id.* at p. 38.) The Court of Appeal also found that an inference that Appellants had been treated in a discriminatory manner relative to other unmarried couples and that the Club may have attempted to hide this fact was supported by evidence that, although Appellants had been required to sign a guest book when they played golf together, others had not been; that no guest book had been in use prior to the filing of this lawsuit; and that the Club's general manager claimed such documents had been "thrown out." (*Id.* at pp. 37-38.)

individuals, regardless of the sex or sexual orientation of the partners comprising those couples (*id.* at pp. 29-31). After the Court of Appeal denied a petition for rehearing,[20] Appellants properly and timely petitioned this Court for review, (see Cal. Rules of Ct., rules 28(a)(1) and 28(e)(1)), which this Court unanimously granted.

III. DISCUSSION

A. SUMMARY OF ARGUMENT

Two independent reasons mandate reversal of the judgment Respondent obtained below on Appellants' claim that BHCC's policy granting various benefits only to couples who are legally married violates the Unruh Act. First, the lower courts erred in concluding that the Unruh Act does not prohibit discrimination based on marital status. As explained below, the California Legislature clearly believes that it does. Likewise, the administrative agency charged with enforcement of the Unruh Act, the California Attorney General, legal commentators, and the general public have long believed marital status discrimination to be among the grounds of discrimination the Unruh Act targets. Moreover, marital status discrimination fits neatly within each and every one of the criteria this Court described in *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142 [278 Cal.Rptr. 614, 805 P.2d 873] for when a personal characteristic should be considered to be a prohibited ground of discrimination under the Unruh Act.

Marital status cannot be distinguished from the other personal

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[20] Appellants' rehearing petition sought clarification of the Court of Appeal's ruling on Appellants' declaratory judgment claim. That petition was denied without opinion on March 30, 2004 (2004 Cal.App. LEXIS 453) and is not material to this further appeal.

characteristics as to which the Unruh Act forbids unequal treatment by California businesses. Marital status is a personal characteristic that bears no relation to ability to be a responsible consumer. It is a category of discrimination widely recognized in California, federal and other states' laws as invidious. There also are no legitimate business reasons to treat people differently based on their marital status. Likewise, no adverse consequences would flow from the prohibition of marital status discrimination like that engaged in by Respondent. Thus, just as this Court held it to be a violation of the Fair Employment and Housing Act for a landlord to refuse to rent to a couple because they were not married to one another (see *Smith*, *supra*, 12 Cal.4th at pp. 1155, 1160), there is no justification for not finding a violation of the Unruh Act when a business denies a couple benefits made available to others simply because the couple has not married.

A second, independently sufficient reason further mandates reversal. Even if the Unruh Act were held not to prohibit discrimination based on marital status, Respondent's policy still would have to be found to violate the Unruh Act because it also discriminates based on sexual orientation and sex, which unquestionably are grounds of discrimination forbidden by the Act. By deciding to grant benefits only to couples who are married at a time when California law prohibits same-sex couples from marrying, Respondent intentionally has denied benefits to women in committed relationships with other women and men in committed relationships with other men – that is, Respondent has engaged in discrimination against people because they are lesbian or gay and because they and their partners are of the same sex. This is not an argument based on a possibly incidental or unintended impact of Respondent's policy; rather, given that California law currently does not allow same-sex couples to marry, limiting benefits to couples who are married

intentionally and necessarily excludes all same-sex couples and is a form of "proxy" discrimination courts have come to recognize as prohibited disparate treatment on grounds the law squarely prohibits. Claims of this nature must be permitted or else the Unruh Act's mandate of equal treatment will be easy to evade, just as occurred in the lower courts in this case.

Thus, as detailed below, Respondent's policy should be found to violate the Unruh Act as a form of prohibited marital status, sexual orientation, and sex discrimination, and the judgment in Respondent's favor on these claims should be reversed.

B. THE UNRUH ACT SHOULD BE FOUND TO PROHIBIT DISCRIMINATION BASED ON MARITAL STATUS.

1. The Unruh Act Long Has Been Understood to Prohibit Discrimination on Grounds Not Listed in the Act.

At common law, certain kinds of business enterprises that held themselves out as providing a particular product or service to the community were held to have a "duty to serve *all customers* on reasonable terms *without discrimination*." (*In re Cox* (1970) 3 Cal.3d 205, 212 [90 Cal.Rptr. 24, 474 P.2d 992] (emphasis added).) In 1897, the California Legislature codified this duty as the statutory predecessor to the present Unruh Civil Rights Act, (*id.*, 3 Cal.3d at p. 213), providing that "*all citizens* within the jurisdiction of this State shall be entitled to the full and equal accommodations, advantages, facilities and privileges" of numerous listed places of public accommodation, "subject only to the conditions and limitations established by law and applicable alike to *all citizens*." (Stats. 1897, ch. 108, § 1, p. 137 (emphasis added).)

Under this law, covered enterprises were held to be prohibited from

excluding patrons "except for good cause" or from engaging in any form of "unreasonable discrimination." (See *Harris*, *supra*, 52 Cal.3d at p. 1151.) For example, in *Orloff*, *supra*, this Court held that a race track could not exclude a customer reputed to have been a bookmaker in the past. (46 Cal.2d at pp. 736, 741.) Likewise, in *Stoumen v. Reilly* (1951) 37 Cal.2d 713, 716-17 [234 P.2d 969], this Court held that a restaurant and bar did not have good cause to exclude or eject a customer simply because he is gay. (See also *Prowd v. Gore* (1922) 57 Cal.App. 458, 461 [207 P. 490] (holding that the statute protected state residents against discrimination even if they were not American citizens).)

In response to court of appeal decisions narrowly defining the kinds of businesses subject to the statute's obligation not to discriminate, the Unruh Act was enacted in 1959. (See *Cox*, *supra*, 3 Cal.3d at p. 214.) The former statute's list of covered places was replaced by a reference to "all business establishments of every kind whatsoever." (Stats. 1959, ch. 1866, § 1, p. 4424.) At the same time, the Legislature emphasized that the Act was to be applied equally regardless of "race, color, religion, ancestry or national origin" by inserting references to those characteristics in three places in new Civil Code sections 51 and 52.[21]

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[21] Thus, as adopted in 1959, the Unruh Act amended Civil Code section 51 to read, "All citizens within the jurisdiction of this State are free and equal, *and no matter what their race, color, religion, ancestry, or national origin*, are entitled to the full and equal accommodations, advantages, facilities, privileges or services in all business establishments of every kind whatsoever. This section shall not be construed to confer any right or privilege on a citizen which is conditioned or limited by law or which is applicable alike to citizens *of every color, race, religion, ancestry, or national origin.*" The Act also amended section 52 to read, "Whoever denies, or who aids, or incites such denial, or whoever makes any discrimination, distinction or restriction *on*

While, as this Court noted in *Harris*, *supra*, these additions might have been interpreted to narrow the statute's scope to prohibit only discrimination on the grounds of race, color, religion ancestry or national origin (see 52 Cal.3d at p. 1154), that most decidedly was not the understanding of the Unruh Act that prevailed in the decades that followed its adoption. Thus, in *Cox*, *supra*, this Court in 1970 decided that, as a result of the Unruh Act, a shopping center had no right to exclude a customer based only on his association with a young man "who wore long hair and dressed in an unconventional manner." (3 Cal.3d at p. 210.) Unanimously holding that "the identification of particular bases of discrimination" in the Unruh Act was "illustrative rather than restrictive" of the grounds of discrimination the Act forbid, this Court concluded that both the history and language of the Unruh Act "disclose a clear and large design to interdict all arbitrary discrimination by a business enterprise," subject only to a business's ability to "establish reasonable regulations that are rationally related to the services performed and facilities provided." (*Id.*, at pp. 212, 216-17.)[22]

In 1982, after surveying the Unruh Act's history, this Court reaffirmed *Cox*'s conclusion that the Act condemns "*any* arbitrary discrimination against *any* class." (*Marina Point*, *supra*, 30 Cal.3d at pp. 731-35, 744 (emphasis

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account of color, race, religion, ancestry, or national origin, contrary to the provisions of Section 51 of this code, is liable for each and every such offense for the actual damages, and two hundred fifty dollars ($250) in addition thereto, suffered by any person denied the rights provided in Section 51 of this code." (Emphasis added.)

[22] The Court stated that there was not even a "shred of legislative history" that might suggest an intent to reject the outcome in the *Orloff* and *Stoumen* decisions, and cautioned against lightly attributing to the Legislature an intent "to deprive citizens in general of the rights declared by statute and stanchioned by public policy." (*Cox*, *supra*, 3 Cal.3d at pp. 215-16.)

added).)[23] Deciding that, under the Unruh Act, a landlord could not refuse to rent to a family solely because the family includes a minor child (*id.* at p. 724), the Court buttressed its conclusions with evidence that the California Legislature had been well aware of the *Cox* decision and had endorsed it, adding categories such as "sex" to the Act's enumerated characteristics simply in order to highlight the particular problem of discrimination on that ground. (*Id.* at pp. 734-35.)

By the time this Court decided *Harris* in 1991, numerous other decisions had applied the Unruh Act to bases of discrimination not listed in the Act's text. (See, e.g., *O'Connor v. Village Green Owners Assn.* (1983) 33 Cal.3d 790, 792, 794 [191 Cal.Rptr. 20, 662 P.2d 427] (age under 18); *Vaughn v. Hugo Neu Proler International* (1990) 223 Cal.App.3d 1612, 1617-19 [273 Cal.Rptr. 426] (having previously filed suit against company); *Long v. Valentino* (1989) 216 Cal.App.3d 1287, 1297 [265 Cal.Rptr. 96] (occupation); *Rolon, supra*, 153 Cal.App.3d at p. 292 (sexual orientation); *Curran v. Mount Diablo Council of the Boy Scouts* (1983) 147 Cal.App.3d 712 [195 Cal.Rptr. 325] (sexual orientation); *Leach v. Drummond Medical Group, Inc.* (1983) 144 Cal.App.3d 362, 370-71 [192 Cal.Rptr. 650] (having filed complaint with state agency); *Hubert v. Williams* (1982) 133 Cal.App.3d Supp. 1, 5 [184 Cal.Rptr. 161 (association with lesbian); *Winchell v. English* (1976) 62 Cal.App.3d 125. 128-30 [133 Cal.Rptr. 20] (association with African-Americans).) This Court

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[23] As the Court explained, a contrary ruling wrongly would have allowed "the total exclusion of homosexuals or members of the Republican Party from a public restaurant, a shoe store or an apartment complex" and would been inconsistent with numerous decisions that "properly recognize that the protection against discrimination afforded by the Unruh Act applies to 'all persons' and is not reserved for restricted categories of prohibited discrimination." (*Id.* at pp. 733, 736.)

also specifically had opined, in dicta, that the view that "marital status" discrimination was prohibited under the Unruh Act "properly" recognized the scope of the Act. (*Marina Point*, *supra*, 30 Cal.3d at p. 736.)

2. *Harris* Did Not Change the Law That the Unruh Act Covers Grounds of Discrimination Not Enumerated in the Act's Text.

In *Harris*, this Court was urged to reconsider all of the decisions extending the Unruh Act to kinds of discrimination not enumerated in the Act's text and to "confine the scope of the Act to its specified classifications." (52 Cal.3d at p. 1154.) Although this Court did reexamine its prior decisions, it specifically declined "to overrule the holdings of *Cox* and its progeny" (*Harris*, *supra*, 52 Cal.3d at p. 1155) and instead reaffirmed the conclusion in *Marina Point* that the Legislature had acquiesced in the holdings of these prior cases. (*Harris*, *supra*, at pp. 1156-57.) While the Court did conclude that the Legislature had not endorsed or acquiesced in the language of prior decisions that the Unruh Act prohibited all forms of arbitrary discrimination (*id.* at pp. 1156-59), the Court did not hold, as some lower courts since seem to have misperceived,[24] that the only forms of discrimination that the Unruh Act prohibits are those listed in the Act's text and those held to be covered prior to *Harris*.

Instead, the Court proceeded to "reconcile the plain language of the statute, including its listed discriminatory classifications, with the holdings of

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[24] See *Beaty v. Truck Ins. Exchange* (1992) 6 Cal.App.4th 1455, 1462-63 [8 Cal.Rptr.2d 593]; *Gayer v. Polk Gulch, Inc.* (1991) 231 Cal.App.3d 515, 521-25 [282 Cal.Rptr. 556]; see also *Brown v. Smith* (1997) 55 Cal.App.4th 767, 787 [64 Cal.Rptr.2d 301] (noting reluctance of courts to add new classifications to the Unruh Act's list after *Harris*).

... prior cases and the Legislature's actions and reactions to [those] decisions." (Harris, supra, 52 Cal.3d at p. 1160.) The Court accomplished this by applying the principle of "*ejusdem generis*" that, for a basis of discrimination to be prohibited by the Unruh Act, it must be part of "the same general nature or class" as the enumerated categories. (*Ibid.*) The "common element" of the categories listed in the Unruh Act, the Court explained, was that they involve "personal as opposed to economic characteristics." (*Ibid.*) The cases in which the courts "have applied the Act to arbitrary discrimination beyond the listed categories of race, sex, religion etc.," the Court further explained, have involved personal characteristics analogous to the listed categories, such as sexual orientation, having children, and physical appearance. (*Id.* at p. 1161 (citing *Rolon*, *Marina Point*, and *Cox*); see also *id.* at p. 1156 (referring to prior cases involving non-listed forms of discrimination as "confined to discrimination based on personal characteristics similar to the statutory classifications of race, sex, religion, etc.") and p. 1148 (explaining that prior decisions that "recognized additional categories of prohibited discrimination" such as "physical appearance and family status ... were based on personal characteristics of individuals").)

Whether marital status is a personal characteristic sufficiently similar to the listed categories to be found a prohibited ground of discrimination under the Unruh Act has not been decided by this Court. While the issue was presented in *Smith* and this Court there noted the open state of California case law on the question, the Court found it unnecessary at that time to resolve the matter. (See 12 Cal.4th at p. 1150, fn. 11.) Before analyzing that question based on the further insights that can be drawn from *Harris*, however, it is useful to examine how others have answered the question to date.

3. The Legislature Has Concluded That the Unruh Act Does Prohibit Marital Status Discrimination.

Both the Unruh Act and the Fair Employment and Housing Act ("FEHA") prohibit marital status discrimination in the rental of housing. (See *Marina Point, supra*, 30 Cal.3d at p. 731; Gov. Code § 12955.) In describing the acts that constitute housing discrimination in violation of FEHA, the Legislature specifically provided in Government Code section 12955(d) that it is unlawful under FEHA for "any person subject to the provisions of Section 51 of the Civil Code [i.e., the Unruh Act], as that section applies to housing accommodations, to discriminate against any person on the basis of sex, sexual orientation, color, race, religion, ancestry, national origin, familial status, *marital status*, disability, source of income, *or* on *any* ***other*** *basis prohibited by that section.*" (Emphasis added.) Similarly, the Legislature provided in Government Code section 12995(a)(3) that nothing in FEHA relating to discrimination in housing shall be construed to "[p]rohibit selection based upon factors other than race, color, religion, sex, *marital status*, national origin, ancestry, familial status, disability, *or* ***other*** *basis prohibited by the Unruh Civil Rights Act.*" (Emphasis added.) In other words, the Legislature has made clear that it considers marital status to be a basis of discrimination already prohibited by Unruh Act, along with the Act's "other" express prohibitions on discrimination based on sex, color, race, religion, ancestry, national origin, and disability, and the prohibitions on discrimination based on sexual orientation and familial status that case law has held Unruh Act to include. There is no other way to read these provisions of FEHA.

4. The Department of Fair Employment and Housing, the Attorney General, and Commentators and the Public Also Understand the Unruh Act to Prohibit Marital Status Discrimination.

It is not just the California Legislature that believes marital status to be a prohibited ground of discrimination under the Unruh Act. Both the Department of Fair Employment and Housing ("DFEH"), which is the state agency charged with receiving, investigating, and conciliating complaints under the Unruh Act, whether related to housing or not (see Gov. Code § 12930(f)(2) and Civ. Code § 52(f)) and with issuing accusations for violations of the Act and prosecuting them before the Fair Employment and Housing Commission (the "FEHC") (see Gov. Code §§ 12930(h) and 12965), and the FEHC, which is the state agency charged with holding hearings on such accusations and determining the issues raised therein (see Gov. Code § 12967)[25] likewise have taken the position, in a number of cases, that the Unruh Act prohibits marital status discrimination. (See *Smith*, *supra*, 12 Cal.4th at pp. 1152-53 (discussing positions of DFEH and FEHC in that case, reported at 1989 FEHC LEXIS 6, *17); *Dept. of Fair Employment & Housing v. Arrowhead Motel* (1992) FEHC Dec. No. 92-12 [1992 CAFEHC LEXIS 7, *9, fn. 2] (concluding that marital status is a "personal characteristic" as to which the Unruh Act prohibits discrimination after *Harris*); *Dept. of Fair Employment & Housing v. Donahue* (1989) FEHC Dec. No. 89-10 [1989 CAFEHC LEXIS 19, *14], revd. on other grounds (1991) 13 Cal.App.4th 350 [2 Cal.Rptr.2d 32], superceded by order granting rev. (1992) No. S024538, rev. dismissed (1993) (concluding that there is "no question" that

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[25] See also *Wilson v. Fair Employment and Housing Commission* (1996) 46 Cal.App.4th 1213, 1220 [54 Cal.Rptr.2d 419] (discussing the responsibility of these agencies in enforcing the Unruh Act).

discrimination against unmarried cohabitants violates the Unruh Act).) As this Court explained in *Smith*, *supra*, such interpretations by the agencies charged with the statute's administration should be given due "consideration." (12 Cal.4th at p. 1157.)

Similarly, the California Attorney General long has concluded that discrimination based on marital status violates the Unruh Act. (See 58 Ops.Cal.Atty.Gen. 608, 613 (1975); see also *Marina Point*, *supra*, 30 Cal.3d at p. 736 (approving of Attorney General's opinion)). Even when the Attorney General does not have an express role in enforcement of a statute, as he does under the Unruh Act (see Civ. Code §52(c)), Attorney General opinions regarding a law's interpretation also are entitled to "great weight" from the courts. (*Christmat v. County of Los Angeles* (1971) 15 Cal.App.3d 590, 595 [93 Cal.Rptr. 325].)

Likewise, legal commentators and the general public, even after *Harris*, have concluded that the Unruh Act prohibits discrimination based on marital status. (See, e.g., Cal. CEB, California Landlord-Tenant Practice §§ 2.20.1 and 2.58 (2d ed. 2004) (listing marital status among prohibited grounds of discrimination under the Unruh Act); Randazzo, *Constitutional Law* (1997) 25 Pepp. L. Rev. 225, 225 ("the Unruh Civil Rights Act ... provide[s] that it is unlawful ... to discriminate against any persons based on marital status"); Li, *The Private Insurance Industry's Tactics against Suspected Homosexuals: Redlining Based on Occupation, Residence and Marital Status* (1996) 22 Am. J. L. and Med. 477, 493 ("a discriminatory claim on the basis of marital status ... is possible under the Unruh Act"); *Rent Watch: Marital Status Should Not Be a Problem*, L.A. Times (June 6, 1993) page K2, column 2 ("Treating married and unmarried couples (of any type) differently is strictly prohibited under California law by both the Unruh and Fair Employment and Housing

Acts."); *Rent Watch: Husband Splits; Manager Wants Wife Out*, L.A. Times (Sept. 13, 1992) page K2, column 3 ("Because marital status discrimination is illegal under the provisions set forth in the Unruh Civil Rights Act, you are protected against this kind of discrimination."); Postema, *Apartment Life: Law Specific on Security Deposit Deductions*, L.A. Times (July 8, 1990) page K9, column 1 ("Refusing to renew your lease because of your marital status is not legal in California under our state's fair housing laws, the Rumford and Unruh Acts.").)[26]

5. Marital Status Discrimination Meets All of the Criteria this Court Pointed to in *Harris* for When a Personal Characteristic Should Be Considered a Prohibited Form of Discrimination under the Unruh Act.

In *Harris*, this Court set forth what some lower courts have described as a three-part inquiry for deciding whether a personal characteristic should be found to be a prohibited ground of discrimination under the Unruh Act. (See *Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 932-35 [134 Cal.Rptr. 2d 101]; *Hessians Motorcycle Club v. J.C. Flanagans* (2001) 86 Cal.App.4th 833, 836 [103 Cal.Rptr.2d 552]; *King v. Hofer* (1996) 42 Cal.App.4th 678, 682 [49 Cal.Rptr.2d 719].) The first criterion, grounded in the Act's language and history, looks at whether the characteristic is truly "similar to the statutory classifications" listed in the Unruh Act. (*Harris*, *supra*, 52 Cal.3d at p. 1156; see also *id.* at pp. 1160-61 (distinguishing personal characteristics from financial or economic ones).) One aspect of this

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[26] While such views are by no means controlling, they do indicate that settled expectations would not be disturbed by concluding that the Unruh Act prohibits marital status discrimination.

inquiry is whether the characteristic, like those listed in the Act, bears "little or no relationship to [individuals'] abilities to be responsible consumers of public accommodations." (*Id.* at p. 1148; see also *id.* at p. 1169 (describing the Unruh Act as covering "personal traits, beliefs, or characteristics that bear no relationship to the responsibilities of consumers of public accommodations").) A further aspect of this inquiry is whether the characteristic is subject to other state and federal prohibitions on discrimination (*id.* at p. 1161, fn. 9.) which, in general, "relate almost exclusively to personal, as opposed to economic, characteristics and attributes." (*Id.* at p. 1162, fn. 10.)[27]

Marital status unquestionably satisfies all aspects of this first criterion. Like other personal characteristics, marital status is a way in which individuals describe themselves[28] and by which people are classified by the government and others.[29] Indeed, like "family status," which this Court in *Harris* declared

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[27] The Court of Appeal below followed *Beaty* in concluding that a characteristic's express inclusion in other antidiscrimination statutes but not in the text of the Unruh Act evinces a legislative intent not to prohibit such discrimination under the Act. (See Slip Op. at p. 32; *Beaty*, *supra*, 6 Cal.App.4th at p. 1463). Such reasoning ignores this Court's explanation in *Harris* that inclusion in other antidiscrimination statutes is an indication of being a personal characteristic like those expressly included in Unruh, and therefore makes it *more* likely that the Act covers discrimination on that basis. (52 Cal.3d at p. 1161, fn. 9.) Because of the broad scope of other anti-discrimination laws, such reasoning also would have the practical effect of limiting Unruh's coverage to only the categories the Act expressly enumerates, a result this Court rejected in *Harris*.

[28] See, e.g., Cal. Rules of Court, Appx. § 8(c)(28) (Standard of Judicial Administration, suggesting, among other areas of inquiry, that prospective jurors be asked to describe their marital status).

[29] See Fields, *Unwed Partners Up 72% in U.S.*, L.A. Times (Aug. 20, 2001), p. A1 (year 2000 federal census counted 683,516 unmarried partner households in California); Health & Saf. Code § 102875(a)(1) (requiring death

a personal characteristic as to which discrimination is prohibited under Unruh (52 Cal.3d at pp. 1148, 1155), it is hard to imagine a *more* "personal" characteristic. (See Cal. Fam. Code § 300 (describing marriage as a "personal relation"); *Goodridge v. Dep't of Pub. Health* (2003) 440 Mass. 309, 322 [798 N.E.2d 941] (characterizing the decision of whether and whom to marry as among "life's momentous acts of self-definition").) Marital status also has absolutely nothing to do with the ability to be a responsible consumer.[30] Moreover, California broadly prohibits discrimination based on marital status in a host of statutes,[31] as do federal law[32] and the anti-discrimination laws of

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certificate to ask about decedent's marital status, among other "personal data"); Pen. Code § 838.2(a) (describing marital status as among the "personal data" that may be contained in personnel records); page 9 (Green, *Getting the Price Right* (Mar. 1, 2003) 11 Best's Rev. 36 (noting traditional use of marital status as a rating criterion in insurance).

[30] See Silva, *Survey: Women and California Law* (1993) 23 Golden Gate U. L.Rev. 1103, 1110 (marital status is like the categories of discrimination expressly prohibited by Unruh because "a marriage certificate does not indicate ability to pay for something"); Cal. Civ. Code § 1812.30 (prohibiting discrimination in credit based on marital status); *Gomon v. TRW, Inc.* (1994) 28 Cal.App.4th 1161, 1168-69 [34 Cal.Rptr.2d 256] (explaining that a report containing information such as "residence, marital status, and age" cannot be considered a consumer credit report because it does not bear on a consumer's credit worthiness, credit standing or credit capacity).

[31] At present, California statutes expressly prohibit marital status discrimination in employment (Gov. Code § 12940), housing (Gov. Code § 12955), mobile home park and marina tenancy (Civ. Code §§ 798.20, 800.25), insurance (Ins. Code § 679.71), health care service plans (Health & Saf. Code § 1365.5), credit and other financial transactions (Civ. Code § 1812.30, Fin. Code § 40101), education (Ed. Code § 230), public social services (Welf. & Inst. Code § 10000), and professional licensees' services (Bus. & Prof. Code § 125.6). (See also Gov. Code § 50264 (requiring local human relations commissions to take action to alleviate incidents of conflict and tension among people "including people subject to prejudice and discrimination due to ...

numerous states.[33]

The second consideration this Court pointed to in *Harris* as relevant to whether a characteristic should be found to be a prohibited ground of discrimination under the Unruh Act is whether discrimination on that ground tends to be supportable by "legitimate business interests." (52 Cal.3d at pp. 1162-63.) The kinds of business interests previously considered legitimate have been those that bear "a reasonable relation to commercial objectives appropriate to an enterprise servicing the public." (*Id.* at p. 1165.)[34] Respondent has never identified a reason why it should be considered a legitimate business interest for a commercial venture to grant benefits to a married couple that it denies to a similarly-committed couple who are not married, but instead has relied only on case law that pointed to purported

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marital status," among other factors); Cal. Code Regs., tit. 10, § 2560.4 (insurance commissioner regulation prohibiting denials of coverage based on marital status, among other factors).)

[32] See, e.g., 5 U.S.C. § 2302 (federal civil service employment), 15 U.S.C. § 1691 (credit), 20 U.S.C. § 1071 (student loans).

[33] In fact, 17 states and the District of Columbia currently have public accommodations statutes that expressly prohibit marital status discrimination. (See Alaska Stat. § 18.80.230; Colo. Rev. Stat. § 24-34-601; Conn. Gen. Stat. Ann. § 46a-64; DC Code § 2-1411.02; Del. Code Ann. tit. 6, § 4504; Haw. Rev. Stat. § 368-1; 775 Ill. Comp. Stat. Ann. § 5/1-102(A); Md. Ann. Code art. 49B, § 5(a); Mich. Comp. Laws Ann. § 37.2302; Minn. Stat. § 363A.11 subd. 1; Mont. Code Ann. § 49-2-304; Neb. Rev. Stat. § 18-1724; N.H. Rev. Stat. Ann. § 354-A:16; N.J. Stat. Ann. § 10:5-12(f); N.Y. Exec. Law § 296(2); Or. Rev. Stat. § 659A.403(1); Vt. Stat. Ann. tit 9, § 4502; Va. Code Ann. § 2.2-390.)

[34] See, e.g., *Hessians*, *supra*, 86 Cal.App.4th at p. 556 (legitimate business interest in limiting wearing of motorcycle club "colors" to prevent barroom brawls); *Scripps*, *supra*, 108 Cal.App.4th at p. 934 (legitimate business interest in allowing clinic to decline service to those suing it in order to maintain open communication within physician-patient relationships).

government or societal interests (rather than business ones) in privileging those who are married [35] that, in any event, does not reflect current public policy in our state.[36] The Court of Appeal hypothesized that a business interest for marital status discrimination could be found in averting a need to investigate or police whether two people are actually a couple and in preventing fraudulent representations about this that might add expenses and reduce revenue. (Slip Op. at p. 33.) But, given that, since January 1, 2000, California has allowed non-married couples to register as domestic partners with the state (see Fam. Code §§ 297-298.5), providing a simple "bright line" if one were needed, that businesses regularly have found other easy ways to confirm an unmarried couple's relationship,[37] that Respondent (like most businesses)

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[35] See CT 210, 219, 221, 490, 493, 496 (all citing *Beaty*, *supra*, 6 Cal.App.4th at p. 1466).

[36] See Stats. 2003, ch. 421 [AB 205], sec. 1(b) (legislative finding and declaration that protecting the rights of domestic partners furthers "California's interests in promoting family relationships" and will "reduce discrimination on the bases of sex and sexual orientation in a manner consistent with the requirements of the California Constitution."); *id.*, sec. 4 (adding new Fam. Code sec. 297.5(a) which provides that, with a few exceptions, effective January 1, 2005, "Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.").

[37] See O'Brien, *Domestic Partnership: Recognition and Responsibility* (1995) 32 San Diego L.Rev. 163, 181(discussing guidelines used by some businesses). In addition, as the evidence showed below, a majority of country clubs in San Diego County have policies, unlike BHCC's, that do not discriminate based on marital status (CT 277, 461, 467, 692), apparently without encountering difficulties.

simply accepts a couple's representation that they are married without similar investigation or policing,[38] and that there is no more reason to believe that couples would lie about being in a committed relationship than that they would lie about being married, this fails to provide a legitimate business justification for providing benefits only to those couples who are married.

A third consideration identified in *Harris* for deciding whether businesses should be found to be forbidden from discriminating based on a particular characteristic under the Unruh Act is the consequences of banning discrimination based on that characteristic. (52 Cal.3d at pp. 1165-69.) Unlike the concerns discussed in *Harris* regarding the difficulties that would be presented if a person's income were found a prohibited basis of discrimination under the Unruh Act, however, holding that marital status discrimination is a prohibited ground of discrimination under Unruh would not lead to adjudication nightmares or create problems across a range of businesses. Indeed, it is hard to understand how a prohibition on marital status discrimination against consumers would create significant problems for businesses subject to the Unruh Act or for courts when express statutory prohibitions already exist in California regarding marital status discrimination in employment, housing, insurance, health care, credit, education, and professional services. (See note 31 hereof, above.)

The Court of Appeal's assertion that allowing Unruh Act claims for marital status discrimination "would run contrary to [California] policy ... supporting the institution of marriage" (Slip Op. at pp. 33-34) is untenable for three reasons. First, as explained in note 36 above (and indeed at Slip Op. at p. 34, fn. 11), it is no longer California's public policy that those who are

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[38] See, e.g., CT 726.

married should be treated better than domestic partners such as Appellants.[39] Second, California already has numerous laws prohibiting marital status discrimination in a wide variety of contexts, so our state's public policy could not be that unmarried couples should suffer discrimination somehow in order to encourage marriage. But most fundamentally, the argument that not prohibiting marital status discrimination supports the institution of marriage, on examination, makes little sense. Allowing businesses to discriminate against same-sex couples such as Appellants will not encourage them to marry, since California does not allow them to marry one another at present and it is ludicrous, and offensive, to think that they would renounce their love for one another (and their sexual orientation) and marry men in order to obtain the benefits Respondent denies them at present. At the same time, the idea that different-sex couples marry because unmarried couples like Appellants are denied benefits by businesses like Respondent is simply not credible and impugns the dignity of the real reasons people seek to marry.[40]

The other arguments discussed by the Court of Appeal fare no better. The contention that the Legislature could have amended the Unruh Act after

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[39] See also Stats. 1999, ch. 588 [AB 26]; Stats. 2000, ch. 1004 [SB 2011]; Stats. 2001, ch. 893 [AB 25]; Stats. 202, ch. 146 [SB 1049]; Stats. 2002, ch. 373 [AB 2777]; Stats. 2002, ch. 377 [SB 1265]; Stats. 2002, ch. 412 [SB 1575]; Stats. 2002, ch. 447 [AB 2216]; Stats. 2002, ch. 901 [SB 1661]; and Stats. 2003, ch.752 [AB 17] (all eradicating distinctions between treatment of those who are married and those who are in domestic partnerships).

[40] See *Turner v. Safley* (1987) 482 U.S. 78, 95-96 [107 S.Ct. 2254, 96 L.Ed.2d 64] (marriage is an expression of emotional support, public commitment, and personal dedication; may be an exercise of religious faith; is a means of sharing intimacy; is a pre-condition to receiving certain government benefits and property rights; and may be sought for the sake of children).

the Court of Appeal in *Beaty* declined to be "the first" court to hold that marital status discrimination is prohibited by the Unruh Act (6 Cal.App.4th at p. 1462), but did not do so (Slip Op. at p. 32-33) is hardly persuasive. As this Court pointed out in *Harris*, "legislative inaction is a weak reed upon which to lean." (52 Cal.3d at p. 1156 (internal quotes and citation omitted).) Indeed, here, the Legislature may well not have taken action because it believed, based on higher court decisions such as *Marina Point* (see 30 Cal.3d at p. 736) and *Smith* (see 12 Cal.4th at p. 1150, fn. 11), that the *Beaty* decision was not controlling and because the Legislature believed it already had made clear its understanding that the Unruh Act prohibits marital status discrimination. (See Section III(B)(3) hereof, above.)

Likewise, the Court of Appeal's assertion that an unmarried person could fit into all or any of the categories listed in the Unruh Act (Slip Op. at p. 32) is no reason for concluding that the Unruh Act does not prohibit marital status discrimination. Those who have children or who have a particular sexual orientation (two characteristics covered under the Unruh Act under settled law) likewise belong to all of the categories referenced by the Act.

In following *Beaty*'s reasoning, the Court of Appeal ignored the scathing criticism that decision has received.[41] This Court should not follow

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[41] See Buhai, *One Hundred Years of Equality: Saving California's Statutory Ban on Arbitrary Discrimination by Businesses* (2001) 36 U.S.F.L.Rev. 109, 110, 126 (referring to *Beaty* as "radically" reducing the Unruh Act's protections, as misreading this Court's decision in *Harris,* and as "improperly" narrowing the scope of the Act); Liebaert, *The Death of the Unruh Civil Rights Act: An Examination of the Act After Harris v. Capital Growth Investors XIV and an Argument in Favor of Liberalizing the Act* (2001) 29 W.St.U L.Rev. 1, 15-20 (referring to *Beaty* as a case that significantly narrows the scope of the Unruh Act in ways that ignore the importance of "a free and equal society"); Silva, *supra*, 23 Golden Gate U.

that same path. The views of the Legislature, the state agencies charged with enforcement of the Unruh Act, and the Attorney General, as well as the factors this Court identified in *Harris* all strongly counsel that the Unruh Act should be found to prohibit marital status discrimination. As a result, the judgment in Respondent's favor on Appellants' Unruh Act marital status discrimination claim should be reversed.

C. THE UNRUH ACT'S PROHIBITION ON SEXUAL ORIENTATION AND SEX DISCRIMINATION SHOULD BE FOUND TO PROHIBIT BUSINESSES FROM PROVIDING BENEFITS TO ONLY THOSE COUPLES WHO ARE LEGALLY MARRIED, SO LONG AS CALIFORNIA DOES NOT ALLOW SAME-SEX COUPLES TO MARRY.

It has been California law for more than fifty years that the Unruh Act (or its predecessor) prohibits discrimination based on sexual orientation (see *Stoumen v. Reilly, supra,* 37 Cal.2d 713 at pp. 716-17), and there is no longer any dispute on this point.[42] The Act also expressly prohibits discrimination based on sex (see Civ. Code § 51), and repeatedly has been held additionally to forbid discrimination against an individual for associating with someone

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L.Rev. at 1109-10 (also stating that *Beaty* "incorrectly read *Harris*" and that *Beaty*'s reasoning is "unpersuasive").

[42] See *Harris*, *supra*, 52 Cal.3d at pp. 1155, 1160-61 (collecting and approving earlier cases). Accord *Curran v. Mount Diablo Council of the Boy Scouts of America* (1998) 17 Cal.4th 670, 702, 703 [72 Cal.Rptr.2d 410, 952 P.2d 218] (conc. opn. of Mosk, J.); *Hessians, supra,* 86 Cal.App.4th at p. 836; *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1281, fn. 10 [92 Cal.Rptr. 2d 339]; *Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 537 [30 Cal.Rptr.2d 706].

with a characteristic as to which the Act prohibits discrimination.[43] As a result, discrimination against individuals in a same-sex, intimate relationship (such as Appellants) is prohibited not only because such discrimination is discrimination based on sexual orientation,[44] but also because each of the individuals in the same-sex relationship in that situation is being discriminated against based on his or her sex (that is – in each of the Appellants' situations, on her being a woman, rather than a man, in a relationship with another woman),[45] as well as because each of the individuals in a same-sex relationship is being discriminated against based on his or her association with someone of a particular sex.[46]

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[43] See *Cox*, *supra*, 3 Cal.3d at pp. 210, 216; *Hubert*, *supra*, 133 Cal.App.3d Supp. at p. 5 [184 Cal.Rptr. 161]; *Winchell v. English*, *supra*, 62 Cal.App.3d at pp. 129-30; *Kotev v. First Colony Life Ins. Co.* (C.D.Cal. 1996) 927 F.Supp. 1316, 1320.

[44] See *Lawrence v. Texas* (2003) 539 U.S. 558 [123 S.Ct. 2472, 2485, 156 L.Ed.2d 508] (conc. opn. of O'Connor, J.) (recognizing that adverse treatment of those with same-sex "partners" ***is*** discrimination based on "sexual orientation"); see also *Harris*, *supra*, 52 Cal.3d at pp. 1155, 1161 (describing the refusal of the business in *Rolon*, *supra*, to treat a same-sex couple in the same manner as a different-sex couple as being a form of discrimination based on "homosexuality" prohibited by the Unruh Act).

[45] See Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination* (1994) 69 N.Y.U. L.Rev. 197; *Baehr v. Lewin* (1993) 74 Haw. 530, 564 [852 P.2d 44] (holding that not allowing individuals to obtain the benefits of married persons because they are of the same sex as the person they wish to marry is a form of sex discrimination).

[46] The argument Respondent has made that it is not engaging in sexual orientation discrimination because it was willing to allow Ms. French to purchase a separate membership even though it knew she and Ms. Koebke were lesbians is hard to take seriously. The "scope of the Unruh Act is not narrowly limited to practices which totally exclude classes or individuals from business establishments" on prohibited grounds. (*Koire*, *supra*, 40 Cal.3d at

Appellants contended below that Respondent's decision to limit various benefits to couples who are legally married violated the Unruh Act by discriminating against Appellants and other same-sex couples based on sexual orientation and sex, because – throughout the time this matter was pending in the Superior Court – California did not permit those in same-sex relationships to marry (see Fam. Code § 300) and would not recognize or treat as valid the marriages of same-sex couples that might be entered in other jurisdictions (*id.* § 308.5).[47]

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p. 30.) The language of the Act expressly guarantees *"full and equal* accommodations, advantages, facilities, privileges or services," not just admission. (Civ. Code § 51(b) (emphasis added).) The Act accordingly has been held to be violated when individuals were allowed to enter a business, but were restricted to certain portions of it. (See, *e.g.*, *Suttles v. Hollywood Turf Club* (1941) 45 Cal.App.2d 283, 287 [114 P.2d 27] (African-American ticket holders admitted to racetrack, but denied clubhouse seating); *Rolon*, *supra*, 153 Cal.App.2d at p. 290 (lesbian couple denied service in restaurant's semi-private booth, but offered service in main dining room).) Likewise, the Unruh Act has been held to prohibit arbitrarily charging one group of patrons more than others for the same services or products based on forbidden grounds of discrimination. (*Koire, supra*, 40 Cal.3d at pp. 30, 33-38; *Chabner v. United of Omaha Life Ins. Co.* (9th Cir. 2000) 225 F.3d 1042, 1050, 1052-53.) In other words, the Unruh Act is concerned "not only with access to business establishments, but with equal treatment of patrons in *all* aspects of the business." *(Koire*, *supra*, 40 Cal.3d at p. 29 (emphasis added).) Here, to receive some of the benefits different-sex couples who are married automatically are provided, Respondent requires same-sex couples to pay twice as much. This is discrimination. Respondent would not be heard to say that it does not discriminate on the basis of race if it allowed African-American couples to join, but charged them more than other couples to obtain benefits that otherwise come with membership.

[47] Whether the Family Code's restriction on same-sex couples legally marrying is constitutional currently is being litigated in the San Francisco Superior Court. (*City and County of San Francisco v. State of California*, S.F. Superior Court Case No. 429539, consolidated with *Woo v.*

The trial court essentially ignored this argument. The Court of Appeal addressed it but, again relying on reasoning from the much-criticized *Beaty* opinion, rejected it. The Court of Appeal's decision asserted that Respondent's bylaws do not discriminate based on sexual orientation or sex because they treat "all unmarried individuals, male or female, and regardless of sexual orientation, the same." (Slip Op. at p. 29.) This argument is erroneous because not all unmarried individuals were similarly situated with regard to the criteria for benefits Respondent intentionally chose to impose. Whether individuals could access those benefits depended entirely on whether they were in a same-sex or different-sex relationship

In other words, ***all*** unmarried individuals in same-sex relationships (who, by definition, are not heterosexual) necessarily are precluded – as a result of Respondent's decision to condition benefits on being legally married at a time when California's statutes prohibited such marriages – from ***ever*** obtaining these benefits, while ***all*** unmarried individuals in different-sex relationships (who are heterosexual) may obtain the benefits by marrying. Failing to appreciate this distinction ignores the U.S. Supreme Court's observation in *Jeness v. Fortson* (1971) 403 U.S. 431, 442 [91 S.Ct.1970, 29 L.Ed.2d 554] that "sometimes the greatest discrimination can lie in treating things that are different as though they were exactly alike." As the Oregon Court of Appeals has explained, the argument that policies that provide different benefits to people based on whether they are married or not treats

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Lockyer, S.F. Superior Court Case No 504038.) At the time of the lower court's judgment, however, there was nowhere Appellants could have gone to obtain a legal marriage to one another. (See Editors, Harv. L.Rev., *Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe* (2003) 116 Harv. L.Rev. 2004, 2004-05.)

unmarried heterosexuals the same way as unmarried lesbians and gay men are treated "misses the point." (*Tanner v. Oregon Health Sciences Univ.* (1998) 157 Or.App. 502, 525 [971 P.2d 435].) So long as "[h]omosexual couples may not marry," such policies mean that "the benefits are not made available" to lesbians and gay men on an absolute basis. In other words, "for gay and lesbian couples," obtaining benefits under such policies is "a legal impossibility." (*Id.*) By contrast, heterosexual couples may marry and obtain the benefits.

Respondent argued below, and the Court of Appeal's decision incorrectly suggests, that Appellants' argument is that Respondent's bylaws had a "disparate impact" based on sexual orientation or sex, a theory of recovery precluded under *Harris*, *supra*, 52 Cal.3d at pp. 1170-75. (Slip Op. at p. 30.) That has *not* been the theory on which Appellants have been proceeding, however. A disparate impact test of discrimination generally looks at a "facially neutral" practice that "nonetheless actually discriminates because of its disproportionate negative impact on the particular protected class to which the plaintiff belongs." (*Harris*, *supra*, 52 Cal.3d at pp. 1170-71.) Given California's ban on same-sex couples marrying, however, Respondent's choice to require that couples to be legally married in order to obtain benefits is not a neutral practice that has a statistically greater impact on unmarried, same-sex couples than unmarried, different-sex ones. Rather, the criteria Respondent intentionally decided to impose excludes ***all*** same-sex couples from benefits, while providing the benefits to ***any*** different-sex couple who is willing to marry.

Instead of relying on disparate impact, Appellants proceeded based on the analysis expressly approved in *Roth*, *supra*, 25 Cal.App.4th at p. 538, that even forms of discrimination that themselves may not be expressly prohibited

under the Unruh Act "may nevertheless be illegal if [they are] merely a device employed to accomplish prohibited discrimination." In other words, in the present case, by choosing to adopt criteria for accessing benefits (being married) that California law put off limits to same-sex couples, Respondent intentionally was accomplishing discrimination based on the prohibited grounds of sexual orientation and sex.[48] Some courts have referred to this as a challenge to "proxy" discrimination;[49] others have described it as a case for "constructive disparate treatment."[50] It is easy to see why such a manner of proving intentional discrimination must be allowed.

If businesses can condition benefits on being married, then – so long as same-sex couples are not allowed to marry in California – it will be quite easy for businesses to deny equal treatment to those in same-sex relationships based on their being in such relationships (that is, based on their lesbian or gay

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[48] Notwithstanding the fact that Appellants even had significant evidence that this was Respondent's specific intent in maintaining this policy (see CT 277, 333, 461-62, 467, 690), the Court of Appeal's decision dogmatically declared that Respondent's bylaws "only intentionally discriminate against unmarried persons as a class" (Slip Op. at p. 30) and nonsensically relegated consideration of the *Roth* case and of Respondent's intent to Appellants' remanded claim about discriminatory application of the policy, even though Appellants' point is that Respondent's choice to use marital status as a qualification for benefits (rather than merely Respondent's application of the policy) was the "device" Respondent intentionally used to deny equal treatment to those in same-sex relationships.

[49] See *Erie County Retirees Assn. v. County of Erie* (3rd Cir. 2000) 220 F.3d 193, 215 (holding that, even though the Age Discrimination in Employment Act may not permit disparate impact claims, employers cannot discriminate against employees based on proxies for age, such as Medicare eligibility).

[50] See *McWright v. Alexander* (7th Cir. 1992) 982 F.2d 222, 228.

sexual orientation, their sex, and their association with a person of a particular sex). Such a result is wholly inconsistent with the state legislature's repeated attempts to reduce the disadvantages faced by those who cannot marry and who only can form domestic partnerships. (See notes 36 and 39, above.) Indeed, until marriage is made equally available to those in same-sex, committed relationships in California, the Court of Appeal's decision relegates lesbian and gay couples to second-class status, subject to financial and dignitary injuries by a broad range of businesses, who can treat them unequally simply by saying that benefits are reserved to those who, unlike them, may marry.[51]

Thus, under the Court of Appeal's decision, lesbian and gay couples, who cannot be denied the lease of an apartment based on their not being married to one another (as this Court held in *Smith)*, could be turned away from a hotel in the middle of the night by hotel staff simply saying the business only lets rooms to couples who are married. Likewise, under the decision below, a restaurant that could not refuse, under FEHA, to hire a gay waiter on

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[51] The Court of Appeal's decision suggests that Appellants' complaint is with California's marriage law, not with Respondent's conduct. (Slip Op. at p. 31.) This is not so. Respondent did not have to choose to limit benefits to couples who are married. Respondent could have provided ***all*** couples the same benefits. Respondent also could have provided the benefits it afforded legal spouses to those who had registered with the State as domestic partners, which at least would have made the benefits potentially available to all couples, regardless of the sexual orientation or sexes of the members of the couple. It was Respondent's choice of criteria that intentionally and necessarily treats same-sex couples worse than different-sex couples (who are married or could marry) that has been the primary object of Appellants' objections and suit throughout this litigation. (See, e.g., CT 176 ("defendant's 'legal spouse' limitation was imposed by defendant, BHCC, for the exclusive arbitrary and capricious purpose to discriminate against persons because of their sex, sexual orientation, and marital status.").)

the ground that he was not married (see Gov. Code § 12940), could require him to refuse to seat same-sex couples in the restaurant on Valentine's Day by saying its tables were reserved that night for married couples. (Cf. *Rolon*, *supra*.) These anomalous results, which expose lesbian and gay couples to humiliation, economic harm, and deprivations of dignity, are inconsistent with the purpose of the Unruh Act and with California public policy. Whatever might have been the situation when *Beaty* was decided in 1992, such results should give this Court pause given the dramatic advances the California Legislature and public have made in no longer accepting unequal treatment of same-sex couples.

Even more broad reason for concern is the fact that the Court of Appeals' decision permits wholesale evasion of the Unruh Act's civil rights mandate whenever a defendant can fashion a "proxy" for discrimination prohibited by the Unruh Act that may not itself be a prohibited ground of discrimination under the Act. In conflict with existing case law, the rationale of the Court of Appeal's decision could be used to allow a business to exclude customers who cannot read or speak English. (Cf. *Rodriguez v. Provident Life & Accident Ins. Co.* (C.D.Cal. 2001) 2001 U.S.Dist. LEXIS 13102, *24 (holding that an insurance company's refusal to sell disability insurance to such individuals could give rise to a claim for national origin or ethnicity discrimination under the Unruh Act, without "language" having to be found to be a prohibited ground of discrimination under the Act). Likewise, in conflict with longstanding precedent, the reasoning of the Court of Appeal's decision might permit a business to insist that patrons be baptized (or have undergone some other religious experience) to receive service, arguing that "not being baptized" is not a ground of discrimination prohibited by the Unruh Act, even though such a policy would exclude all Jews, Muslims, Buddhists,

many Christians, and others. (Cf. *Pines, supra,* 160 Cal.App.3d at pp. 375, 377, 389 (recognizing requirement of "Christian Yellow Pages" business that those placing ads declare that they were "born again" illegally discriminated under the Unruh Act based on religion against Jewish customers).

The requirements of this state's civil rights laws should not be permitted to be so easily skirted. Laws prohibiting discrimination based on age may not be circumvented by a policy denying equal treatment to those with gray hair.[52] Laws prohibiting discrimination based on disability may not be dodged by the exclusion of service dogs.[53] So, too, the Unruh Act's prohibition on sexual orientation and sex discrimination should not be allowed to be evaded by the denial of benefits to those who presently cannot marry. The grant of summary judgment on Appellants' claim that Respondent's policy discriminates based on sexual orientation and sex accordingly should be reversed.

IV. CONCLUSION

Whether discrimination occurs at work, at school, at a Woolworth's lunch counter or on a country club's golf course, allowing some people to be treated as less worthy than others of equal treatment in the civil realm harms

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[52] See *McWright*, *supra*, 982 F.2d at p. 228 (reasoning that, although there are young people with gray hair, the fit between age and gray hair is "sufficiently close" that they would "form the same basis for invidious classification"); see also *Finnegan v. Trans World Airlines, Inc.* (7th Cir. 1992) 967 F.2d 1161, 1163 (using gray hair as a proxy for age "is a species of intentional discrimination," not disparate impact).

[53] See *Sullivan v. Vallejo City Unified School Dist.* (E.D.Cal. 1990) 731 F.Supp. 947, 958.

not only them, but us all.[54] As noted above, the Unruh Act was enacted to "banish such practices from California's community life." (*Isbister*, *supra*, 40 Cal.3d at p. 75.) Its promise should not be breached by allowing businesses to discriminate on the basis of marital status or by permitting discrimination based on sexual orientation and sex that is accomplished through limiting benefits to those who are married at a time when California bars same-sex couples from marrying. The judgment in Respondent's favor on Appellants' Unruh Act marital discrimination claim and on Appellants' claim that Respondent's policy discriminates on the basis of sexual orientation and sex

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[54] One court lightheartedly has explained that, even though "Playing golf was not one of the unalienable rights of 1776," "one of those rights was the pursuit of happiness, a significant if elusive, goal of the game of golf." (*Bourne*, supra, 58 Mas.App.Ct. at p. 320 and 320, fn. 15.) Beyond the humor of this, it should be recognized how particularly hard it is to find happiness on the golf course when one is being treated as a second class citizen – charged more than others, dissimilarly limited in how frequently one can play with one's loved one, and unequally deprived of the ability to leave one's financial investment in the club to one's family – because the club has decided to treat married couples better than unmarried ones at a time when that necessarily means denying lesbian and gay couples in California equal treatment. It is not only, as that court recognized, that "it is naive not to recognize the degree to which golf links and the country club are the locale for developing professional and business contacts" and that being discouraged from joining the club excludes one from the deals "cut on the fairway and in the clubhouse," but it transgresses the reasons why laws like the Unruh Act exist not to be moved by the psychological and dignitary injury such unequal treatment causes the direct victims of such discrimination (*id.* at p. 320-21), and by the ripples of harm caused by social tolerance of gay people's inequality. (See Herscher, *Wyoming Death Echoes Rising Anti-Gay Attacks*, S.F. Chronicle (Oct. 13, 1998) p. A7 (reporting on death of Matthew Shepard, "savagely bludgeoned and left lashed to a fence"); Karst, Law's Promise, Law's Expression (1993) p. 80 ("The behavior we call private discrimination is a spore that replicates itself in ever-widening circles.... The harm of private discrimination is not limited to its direct victims. All society suffers.").)

therefore should be reversed.

Dated: July 16, 2004

Respectfully submitted,

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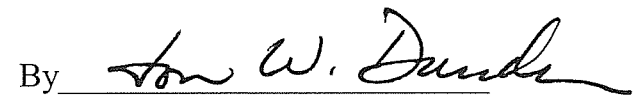
By 
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CERTIFICATE REGARDING LENGTH OF BRIEF

Pursuant to Rule 28.1(d)(1) of the California Rules of Court, I hereby certify that, excluding tables, permitted attachments, and this certificate, but including footnotes, the foregoing brief contains 13,995 words, based on the computer program used to prepare the brief.

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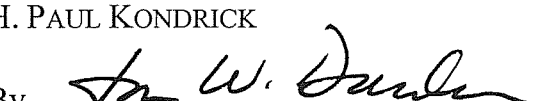
By 
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PROOF OF SERVICE BY U.S. MAIL

I, TITO GOMEZ, declare:

That I am a resident of the County of Los Angeles, California; that I am over eighteen (18) years of age and not a party to this action; that I am employed in the County of Los Angeles, California; and that my business address is 3325 Wilshire Blvd., Suite 1300, Los Angeles, CA 90010.

On July 16, 2004, I served a copy of the attached document, described as APPELLANT'S OPENING BRIEF ON THE MERITS, on the parties of record by placing true and correct copies thereof in sealed envelopes, with first-class postage thereon fully prepaid, addressed as follows:

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

Dated: July 16, 2004

Tito Gomez

PROOF OF SERVICE BY MESSENGER

I, TITO GOMEZ, declare:

That I am a resident of the County of Los Angeles, California; that I am over eighteen (18) years of age and not a party to this action; that I am employed in the County of Los Angeles, California; and that my business address is 3325 Wilshire Blvd., Suite 1300, Los Angeles, CA 90010.

On July 16, 2004, I served a copy of the attached document, described as APPELLANT'S OPENING BRIEF ON THE MERITS, on the party of record in said cause by hand-delivering a true and correct copy thereof in a sealed envelope addressed as follows to the addressee in person or to their official designees:

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

Dated: July 16, 2004

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