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

BRIEF OF AMICI CURIAE IN SUPPORT OF PLAINTIFFS/APPELLANTS

WOMEN'S SPORTS FOUNDATION
NANCY HOGSHEAD-MAKAR
FLORIDA COASTAL SCHOOL OF LAW
7555 BEACH BLVD.
JACKSONVILLE, FL 32216
(T) 904.680.7784
(F) 904.680.7771

CAL. WOMEN'S LAW CENTER
NANCY SOLOMON (SBN 192756)
3460 WILSHIRE BLVD., STE. 1102
LOS ANGELES, CA 90010

(T) 213.637.9900
(F) 213.637.9909

NATIONAL CENTER FOR LESBIAN RIGHTS
SHANNON MINTER (SBN 168907)
COURTNEY JOSLIN (SBN 202103)
870 MARKET ST., STE. 370
SAN FRANCISCO, CA 94102
(T) 415.392.6257
(F) 415.392.8442

Attorneys for *Amici Curiae*

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INTEREST OF AMICI

The **Women's Sports Foundation** (WSF) is a nonprofit educational organization dedicated to expanding opportunities for girls and women to participate in sports and fitness and creating an educated public that supports gender equity in sports. The WSF distributes over $1 million per year in grants and scholarships to female athletes and girls' sports programs, answers over 100,000 inquiries a year concerning Title IX and other women's sports related questions, and administers award programs to increase public awareness about the achievements of women in sports.

The **California Women's Law Center** (CWLC) is a private, non-profit advocacy and support center that works to ensure, through systemic change, that life opportunities for women and girls are free from unjust social, economic, and political constraints. CWLC's issue priority areas are sex discrimination, violence against women, women's health, race and gender, exploitation of women, and women's economic security. CWLC has expertise in the area of sex discrimination and, in particular, discrimination against women in sports. CWLC advocates and educates the community, advises the legislature, and joins as amicus in other cases related to this issue which is so critical to the lives of women and girls.

The **National Center for Lesbian Rights** (NCLR) is a nonprofit law firm founded in 1977 and committed to securing and protecting the civil rights of lesbian, gay, bisexual, and transgender people. NCLR has a particular interest in eradicating homophobia and sexism in sports and has a legal and public policy program specifically dedicated to this purpose.

INTRODUCTION

Golf clubs are gateways to professional and political power in contemporary American society. Historically, such clubs have discriminated against racial and religious minorities and women, including lesbians. Regardless of which group is being targeted, the result has been to exclude individuals in these groups from professional and political contacts and to diminish their social status.

In this case, the Plaintiffs have been denied equal membership benefits in the Bernardo Heights Country Club and subjected to harassment because they are a lesbian couple. This unequal treatment perpetuates a long history of discrimination against women in golf clubs, and especially against unmarried women. Historically, many clubs did not allow women to be members or restricted membership to wives or daughters of male members.[1] Even today, many clubs in other parts of the country do not allow women to

[1] Kamp, *Gender Discrimination at Private Golf Clubs* (1998) 5 Sports L.J. 89, 90 (hereafter "Kamp").

be full members or have adopted rules regarding tournaments and tee times that favor men and are based on the outdated notion that men are breadwinners and women are homemakers.[2]

The California Supreme Court has held that private golf clubs that do business with the public must comply with the Unruh Civil Rights Act ("the Unruh Act" or "the Act").[3] California's courts also have made it clear that the Act prohibits businesses from discriminating against same-sex couples,[4] as well as on the basis of other personal characteristics. It is also well settled that the Act does not merely prohibit policies that unfairly exclude a particular group, but requires "equal treatment of all patrons in all aspects of the business."[5] In this case, the Club has violated the Act by discriminating against the Plaintiffs on multiple bases, including their gender, sexual orientation, marital status, and domestic partnership status. To bring a viable claim under the Act, the Plaintiffs need not show that they were

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[2] *Ibid.*

[3] *Warfield v. Peninsula Golf & Country Club* (1995) 10 Cal.4th 594.

[4] *Rolon v. Kulwitzy* (1984) 153 Cal.App.3d 289 (restaurant's refusal to seat lesbian couple in a semiprivate "romantic" booth violated the Act) (cited with approval in *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1155, 1161).

[5] *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 29 ("The scope of the statute clearly is not limited to exclusionary practices."). Here, although the policy is not one of complete exclusion, the effect of requiring the Plaintiffs to pay two membership fees to have the same rights and benefits as a married couple is to deter lesbian and gay couples from seeking membership at the club.

discriminated against solely on a particular basis; rather, they need only show that the Club's discriminatory conduct toward them was motivated by one or more prohibited grounds of discrimination. The Plaintiffs have met this standard here.

The discriminatory membership rules in this case stem from and perpetuate the history of unequal treatment of women, and particularly of unmarried women. If Ms. Koebke were a man, she would marry her partner and thereby gain automatic access to full membership rights and privileges. (See CT 322, 390.) Because she is a woman and unable to do so, the Club refuses to provide her with equal membership benefits. By design, the Club's policy disadvantages women who are unattached to male partners and provides special benefits only to "families" comprised of married different-sex couples. This perpetuates a stereotyped view of women as unworthy of full inclusion or respect in their own right, without regard to their dependence upon or connection to men. This violates the Act.

STATEMENT OF FACTS

B. Birgit Koebke and Kendall E. French ("Plaintiffs") have been domestic partners for twelve years. (See CT 254, 441.) They are both talented and dedicated golfers. (See CT 171, 272) They are suing the Bernardo Heights Country Club ("the Club") under the Unruh Act for

refusing to provide them with the same membership benefits given to different-sex couples and for allowing other members to harass and insult them for being a same-sex couple. (CT 168, 174-184.)

Ms. Koebke joined the Club in 1987, paying $18,000 for a membership. (CT 229, 254, 512.) The Club does not offer less expensive memberships for single persons. (CT 284, 482, 696.) Rather, the only memberships offered are family memberships that provide benefits both to the primary member and to his or her legal spouse, children, and grandchildren. (CT 322, 390.)

In 1992, Ms. Koebke entered into a committed relationship with Ms. French. For the past twelve years, they have shared their lives together and supported one another financially, emotionally, and spiritually. (CT 254, 441.) They are registered as domestic partners with the State of California, pursuant to Family Code section 297, subdivision (a) which defines domestic partners as "two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring." The statute also requires domestic partners to have a common residence and agree to be jointly responsible for each other's basic living expenses.[6]

[6] Cal. Fam. Code section 297, subd. (b)(1) & (2).

Ms. Koebke and Ms. French also are the executors and sole beneficiaries of one another's wills and have executed documents authorizing each to make financial and medical decisions for the other, should either of them become ill or disabled. (CT 336, 456.) They own a home and two cars together, as well as household furnishings and numerous other items. They have taken every step they can to formalize and protect their relationship. (CT 279, 336, 456; see also CT 272.) They consider themselves to be each other's immediate family members and would marry if they could. (CT 336, 456; see also CT 272.)

Ms. Koebke and Ms. French have suffered multiple forms of discrimination by the Club because they are a same-sex couple. First, although Ms. Keobke is required to pay the same price for a family membership as heterosexual members of the Club, she does not receive the same value for her fees as other members. (See CT 279, 338.) Second, Ms. French has been deprived of her membership rights entirely; based on current Club policy, Ms. French is treated as a "guest," despite her legally-recognized relationship with Ms. Koebke and the duration and committed nature of the couple's relationship. (CT 232, 289, 341, 459, 693.) Third, while the Club has been willing to expand its definition of family on occasion to accommodate heterosexual members, it has refused to do so for

Plaintiffs. (CT 270, 338, 336, 457-458, 460, 469, 723-724, 727.) And finally, the Club has permitted other members to harass Ms. Koebke and her partner for being a same-sex couple, thereby destroying their ability to make use of the Club facilities with any reasonable degree of enjoyment. (See CT 456-458, 723, 728.)

Although Ms. Koebke was required to purchase a standard family membership, the Club defines "family" in a way that precludes her life partner from the benefits given to the spouses of heterosexual members. The Club's bylaws define family to include "[a] member's legal spouse and unmarried sons and daughters under the age of twenty-two (22) residing with them." (CT 322, 390.) These family members may use the Club to an unlimited extent, without additional payments or fees. (See CT 229, 322, 390.) All other persons are "guests." Guests cannot play golf at the Club more than six times a year, and cannot play any more than once every two months. (CT 303, 455.) Moreover, when they do play, guests must pay a green fee, which ranges from forty-five to seventy-five dollars. (See CT 178, 229, 322, 366, 390, 455, 466.) In addition, while a member can transfer his or her membership to a spouse or child upon death without any payment of a transfer fee, if the member dies without a legal spouse or child, the

membership automatically terminates and cannot be transferred to another party. (CT 399, 400, 446.)

Both Ms. Koebke and Ms. French are seriously disadvantaged by this policy. Ms. Koebke pays the same membership fee as other members; however, unlike other members, she does not get to extend her membership benefits to her immediate family. (CT 458, 463, 468.) In addition, if Ms. Koebke dies, her membership will automatically end; she cannot transfer it to her life partner. (CT 282, 400, 481.) Ms. Koebke thus has a second-class membership due only to the fact that she and her life partner are women. (See CT 458, 463, 468.)

Ms. French is deprived of her rights as a family member entirely. Even though she has been Ms. Koebke's partner for twelve years, she is and always will be treated as nothing more than a "guest" at the Club. As such, Ms. French may only play golf at the club six times a year, and every time she does so, she must pay a fee. (See CT 178, 229, 303, 322, 366, 390, 455, 466.) In contrast, if Ms. Koebke and Ms. French were a different-sex couple and therefore able to marry, as they would like to do, Ms. French automatically would be entitled to use the course as often as she likes, without any additional fees. She also would be eligible to inherit Ms. Koebke's membership upon Ms. Koebke's death. (CT 229, 322, 390.)

Over the years, the Club has rejected Ms. Koebke's repeated requests to remedy these inequities by providing equal membership benefits to all members, regardless of whether they are in a same- or different-sex relationship.

Moreover, the Club has enforced its policy in a discriminatory manner by providing numerous exceptions and waivers to men and heterosexual couples (both married and unmarried), but refusing to do so for the Plaintiffs. For example, there is evidence that the Club: allowed grandchildren to play golf with a member without paying guest fees (CT 366, 469, 483-484, 690, 698, 723-724); allowed members to play golf with minors who were not their legal children without paying guest fees (CT 457, 460, 692, 726-27); and allowed a number of unmarried, heterosexual members to play golf with their different-sex partners without paying guest fees, (CT 457-458, 460, 686, 691, 726-727) while never permitting Ms. Koebke and Ms. French to do so. Further underscoring the Club's invidious discrimination against same-sex couples, when Ms. Koebke asked the Club to revise its policy to provide equal benefits to non-marital partners, the Club considered doing so only for *heterosexual* members. (CT 277, 333, 467, 690.)

The Club also has allowed Ms. Koebke and her life partner to be exposed to hostility and harassment from other Club members for being a same-sex couple, in a clear violation of the Unruh Act. (See Cal. Civ. Code, § 51, subd. (b).) For example, one Club member told Ms. Koebke that she and Ms. French should "put on a skit" for male Club members "to show us how they do it with their toys, and charge an admission price." (CT 723.) Other members harassed Ms. Koebke and suggested that they "pay her for putting on a show." (CT 728.) The Club has taken no action to address this harassment, despite Ms. Koebke's requests. (CT 456-458, 723, 728.)

After many years of attempting and failing to negotiate a solution to these problems with the Club, Plaintiffs initiated this litigation to seek redress under the Unruh Act. (CT 167-168, 174-184.)

ARGUMENT

I. Discrimination in Golf Clubs Inflicts Significant Harms.

A. Golf Clubs Act as Gatekeepers to Professional, Economic, and Political Power.

Golf clubs play a unique role in American society. While the public erroneously may perceive such venues as primarily recreational, "the reality is that membership in these clubs fosters political and economic power."[7] Golf courses are important places to develop business relationships with

[7] Kamp, *supra*, at p. 91.

clients and colleagues.[8] Every year, companies spend billions of dollars to purchase memberships for employees and tee time for clients in what has become known as "corporate" or "business golf."[9]

> [G]olf's main business purpose is building the relationships that lead to sales prospects and career advancement. Its effectiveness is reflected in enormous spending, with companies and their managers shelling out billions of dollars annually to sponsor tournaments, entertain clients and frequent the top clubs, market research shows.[10]

The membership rolls of prestigious clubs are comprised of leading figures in business and politics, many of whom develop or maintain close business and political relationships through their interactions in these private club settings. The membership rolls of the Augusta National Country Club,[11] for example, which has no female members, include former Senator and current Coca-Cola Board member San Nunn; Roger Penske, Chairman of Penske Corporation; and Douglas Warner, former chairman of J.P. Morgan Chase, all of whom serve on the board of General Electric, formerly led by current Augusta member Jack Welch.[12] In addition, of thirteen JP

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[8] Note, *The "Links" Among Golf, Networking, and Women's Professional Advancement* (2003) 8 Stan. J.L. Bus. & Fin. 317, 330 (hereafter "*Links*").
[9] See *id.* at p. 328.
[10] Burns, *Grass ceiling impeding women*, Chi. Trib. (Feb. 3, 2003) p. CN1.
[11] Augusta National ("Augusta") is a golf club in Augusta, Georgia, most notable for hosting the prestigious PGA Tournament, The Augusta National.
[12] *Links*, *supra*, at p. 344.

Morgan Chase board members, four are also members of Augusta.[13] "This 'web of business' reveals that more than golf is taking place when men get together at these golf clubs. It has become apparent that these 'private' memberships affect more than members' private, personal lives."[14]

Belonging to a club allows a member to interact with influential potential clients, colleagues, and politicians. "Business memberships at private clubs help to cultivate and retain new clients and help to increase opportunities for career advancement."[15] According to Betty Spence, president of the National Association for Female Executives, executives build relationships on the golf course that are critical to their professional success. "There is a lot of downtime on the golf course," Spence says. "That's why it is a terrific place to get to know people. Everyone wants to do business with people they know, that they have become comfortable with."[16]

In a recent article published in the Atlanta Constitution, June Somers, a senior vice president with the Georgia Bankers Association, agreed, stating: "The business world is still dominated by men at the senior level,

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[13] *Ibid.*
[14] *Ibid.*
[15] Kamp, *supra*, at p. 90.
[16] Church, *Women forge business bonds on the links*, New Journal (April 21, 2003) p. 678F.

and those men are on the golf course. If you want to know them better, you have to get into that circle."[17] The article further noted that, according to the businesswomen interviewed, "a round of golf can build important contacts unlike almost any other business invitation. People generally tend to steer business to people they like, and someone's personality and character are tested by the challenges and hazards of a round of golf."[18]

In addition to providing an opportunity to interact with important clients and policy makers, being a member of a golf club also bestows professional and social stature. In the words of Calvin Peete, one of the first African-Americans to play on the Professional Golf Association tour, "Golf enables a person to rub shoulders with the most important people in his [or her] community."[19] As another commentator has also noted, "Whether a person lives in a small city, a large city, or a suburb, the key to power within

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[17] Hiskey, *Women in Golf: Overcoming a Grass Ceiling*, Atlanta Journal-Constitution (April 10, 2003) p. 9E (also noting that Somer's "organization is the result of a merger hashed out during a round of golf she played with a male executive of a similar group").

[18] *Ibid.*

[19] Shropshire, *Private Race Consciousness* (1996) 1996 Det. C.L. Rev. 629, 636.

a community is often the same: membership in the community's elite organizations."[20]

In contrast, when individuals or groups are barred from these unique social and business networks, "they are also barred from cultivating business opportunities and from influencing policy through informal contact with policymakers. Being in the 'right' club can be crucial to one's career."[21] As Stanford Law Professor Deborah Rhode has noted, "Such discrimination has public consequences; it keeps professional women out of the informal networks where business and mentoring relationships are forged."[22] The impact of this exclusion was underscored in July of this year when Morgan Stanley reached a $54 million settlement in a sex discrimination case brought by dozens of female employees who accused "the firm of systematically denying them promotions and pay increases."[23] Among other allegations in the case, the women claimed they were denied equal

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[20] Frank, *The Key to Unlocking the Clubhouse Door: The Application of Antidiscrimination Laws to Quasi-Private Clubs* (1994) 2 Mich. J. Gender & L. 27, 38.
[21] *Ibid.*
[22] Rhode, *Tee time for equality*, Nat. L.J. (Oct. 7, 2002) p. A13.
[23] Kate Kelly & Colleen DeBaise, *Morgan Stanley Settles Bias Suit for $54 Million*, The Wall Street Journal (July 13, 2004) p. A1.

opportunities to succeed in the company because the company had a practice of holding sale outings at male-only golf courses.[24]

The California Supreme Court also has recognized the importance of eliminating discriminatory barriers in golf clubs. In *Warfield v. Peninsula Golf & Country Club* (1995) 10 Cal.4th 594, the Court held that few golf clubs are "truly private social clubs." Rather, they generally fall "within the very broad category of 'business establishments' governed by the nondiscrimination mandate of section 51" of the Unruh Act.[25] In this appeal, there is no dispute that the Bernardo Heights Country Club is governed by the Act and must comply with its nondiscrimination mandates.

B. Golf Clubs Have a History of Discrimination Against Racial and Religious Minorities, Which Has Caused Economic and Social Harms Similar to Those Suffered by the Plaintiffs in this Case.

The history of golf clubs is rife with discrimination against racial and religious minorities. In the 1950s, many cities excluded African American and other non-white racial groups from public golf courses or allowed

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[24] *Ibid.*

[25] *Warfield, supra,* 10 Cal.4th at p. 599; see also *id.* at p. 602 ("A number of club members testified that, on occasion, they brought business associates (clients or employees) to the club as invited guests, either for meals or for recreational activities, and that their businesses sometimes paid for the expenses involved in such occasions. Several club members also testified that, through their membership in the club, they had met other members who thereafter had become their patients, clients, or customers.")

African Americans to play only on certain days of the week.[26] In 1955, the United States Supreme Court ordered the integration of public recreational facilities.[27] In response, a number of cities "turned to a device that offered them a way out: the private club. Rather than integrate, a number of cities 'sold' their courses to private groups that maintained the absolute right to discriminate."[28] Other communities closed golf courses and other public facilities, rather than integrate.[29] Jewish people and members of other religious minorities have experienced similar discrimination.[30]

This history of discrimination has had an enduring impact on the culture of golf clubs. It was not until 1961, for example, that the Professional Golf Association finally eliminated its "Caucasians-only"

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[26] Moss, Golf and the American Country Club (2001) p. 154 ("Most Americans tend to think of school integration as the dominant racial issue during the early 1950s, as indeed it was. Nevertheless, private clubs and the opening up of golf were also explosive topics. All through the South and in some northern and western cities, African Americans pushed to open municipal golf courses to all races.") (hereafter "Moss").

[27] *Id.* at p. 155.

[28] *Ibid.*

[29] *Ibid. See, e.g., Clark v. Thompson* (S.D. Miss. 1962) 206 F. Supp. 539, affd. per curiam (5th Cir. 1963) 313 F.2d 637 (Mississippi community closed public swimming pools rather than comply with desegregation requirements).

[30] Moss, *supra*, at p. 129 (noting the persistence of discrimination against Jewish people in private golf clubs); Whelan, *Few Minorities at Country Clubs*, Allentown Morning Call (June 5, 1997) at p. D1.

clause, which was initially adopted in 1943.[31] As recently as 1990, the PGA annual championship was held at Shoal Creek, an Alabama country club with no African American members.[32]

In the face of this entrenched culture of discrimination, judicial action often has been required to put an end to these discriminatory practices.[33] Discrimination against racial and religious minorities in golf clubs has inflicted real and significant harms. It has contributed to the exclusion of these groups from professional and political advancement. And it also has inflicted serious social psychological harms, by publicly branding members of these groups as inferior. These harms underscore the need for legal intervention to combat the far-reaching effects of discrimination in these settings. "[T]he law should not...support the stigmatization that may come from being excluded from a prestigious place to conduct business, socialize, or play golf."[34]

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[31] Note, *Casey's Case: Taking a Slice Out of the PGA Tour's No-Cart Policy* (1999) 26 Fla. St. U.L. Rev. 783, 807.

[32] In response to pressure from civil rights groups, and after corporate sponsors withdrew more than $2 million in advertising revenues, Shoal Creek accepted its first African American member. See *Links*, *supra*, at pp. 341-342.

[33] See, e.g. *Daniel v. Paul* (1969) 395 U.S. 298; *Wright v. Salisbury Club, Ltd.* (4th Cir. 1980) 632 F.2d 309; *Anderson v. Pass Christian Isles Golf Club, Inc.* (5th Cir. 1975) 488 F.2d 855.

[34] Shropshire, *supra*, at pp. 638-639. See also Chambers, *The Changing Face of Private Clubs: the integration of African Americans into private golf*

C. Golf Clubs Also Have A History of Discrimination Against Women.

Discrimination against women also has deep roots in the history of golf clubs. Even today, policies that explicitly discriminate against women remain commonplace in other parts of the country, and practices that have long since been abandoned as offensive and unlawful in the workplace and the other arenas still crop up with regularity in golf clubs. These policies take a number of forms, including the following:

1. Excluding women from any form of membership.

The most blatant examples of discrimination against women in golf clubs are membership policies that exclude women altogether, such as that of the Augusta National. Even today, there are at least a dozen well known clubs in the United States that do not permit women to be members and some that do not even allow women to enter the club grounds.[35] While the number of such clubs is diminishing, they include some of the most prestigious and influential clubs in the country. The Augusta National, for example, has more CEO members than any other club in the country,[36] and

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clubs, Golf Digest (Aug. 1, 2000) at p. 92 (hereafter "*Changing Face*") (noting the importance of state public accommodations laws in challenging race discrimination in private golf clubs).

[35] See *Changing Face*, *supra*, at p. 27.

[36] *Id.* at p. 31.

yet it remains an all-male club despite pressure from women's groups and some of its own members to open the club to female members.[37]

The impact of these exclusionary policies extends well beyond the golf course. As one commentator has noted:

> [W]hen women do not have an equal opportunity to be a part of the golfing world, they remain excluded from a network of extremely powerful and influential individuals in legal, business, and other prestigious institutions. Such inequality significantly impacts professional women who desire an opportunity to use golf to help their career. Moreover, when women are not represented at the top legal and business levels, women's status and power in society is affected as a whole.[38]

Due in part to the importance of golf clubs in many professions and careers, some women have challenged exclusionary policies in court. In 1983, Stewart and Barbara Tenschler brought suit against the Burning Tree Country Club in Maryland for excluding women from membership and allowing only members and their male guests to use its facilities. At Burning Tree, "women are not allowed to become members or to enjoy guest privileges."[39] In fact, "women are not allowed to enter or use the

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[37] See, e.g., *Links*, *supra*, at p. 333 (noting that Augusta Chairman Hootie Johnson insists "there is no timetable for the admission of women into [the club's] membership, nor does [he] expect there to be one in the foreseeable future."). In California, Augusta's male-only policy would violate the Unruh Civil Rights Act. Unlike California, Georgia does not have a statute prohibiting sex discrimination in public accommodations.

[38] *Links*, *supra*, at pp. 335-336.

[39] *Burning Tree Club, Inc. v. Bainum* (Md. 1985) 501 A.2d 817, 819.

clubhouse. It is only by appointment on specific days in December that a member's wife may obtain limited access to the pro shop to purchase Christmas gifts for her husband."[40]

Even after losing a challenge to the validity of a new statute that barred the club from receiving a special tax benefit unless it opened its doors to women, the club voted to forego the tax break to maintain its male-only membership.[41]

"Few golf courses still retain the sign, legendary until five years ago, at the Royal St. George's Club in Britain: 'Women and dogs prohibited'. But women are not yet equal partners in this sport and until that changes, they will not be truly equal colleagues in the professional world outside it."[42]

2. Restricting women's membership rights.

Although most golf clubs now permit women to be members, other discriminatory practices and policies remain – particularly with regard to membership policies that favor married heterosexual men. These policies perpetuate the stereotype that men are the primary breadwinners and the "real" golfers, while women are homemakers and incapable of serious play.

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[40] *Ibid.*
[41] *State v. Burning Tree Club, Inc.* (Md. Ct. App. 1987) 554 A.2d 366.
[42] Rhode, *Tee time for equality*, Nat.L.J. (Oct. 7, 2002) p. A13.

In a considerable number of country clubs, husbands are required to hold the memberships, and wives are considered only associate members.[43] Some clubs go as far as to deny women membership unless they are married. Others do not permit women to retain memberships after their husbands die or do not allow divorced women to be awarded memberships in marital property settlements.[44]

In San Francisco, for example, the Olympic Club is a golf club founded in 1860 for "white male citizens of the United States of good moral character, integrity, and reputation."[45] In 1988, the City of San Francisco challenged the Club's membership policies under the Unruh Act, alleging race and sex discrimination. Although the Club dropped its formal ban on non-white members in 1968, it did not admit a single African- American member until the City filed its lawsuit.[46]

With respect to women, it took years of litigation before the Olympic Club relented and allowed women to become full members. As recounted by journalist Marcia Chambers, the club's treatment of Pamela Sayad

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[43] *Links*, *supra*, at p. 334. See also Mayo, The American Country Club: Its Origins and Development (1998) p. 193 (noting that from the 1940s through the 1960s, a "single or divorced woman had little to no chance of becoming a member" of a golf club).
[44] *Links*, *supra*, at p. 334.
[45] *Olympic Club v. Superior Court* (1991) 229 Cal.App.3d 358, 360.
[46] *Id.* at p. 362.

illustrates the injustice of the club's discriminatory membership policy and the club's resistance to changing it. Ms. Sayad was a founding law partner in the firm of Sayad & Trigero. "Her father, Sam, had become a club member in the mid-sixties, and she, her mother, her sister and brother all used the club's facilities. After her father's death, she applied for a full membership in her own name, as had her brother before her."[47] The Olympic Club refused to act on her application, and Ms. Sayad sued. "In the end, to avoid an acrimonious and potentially embarrassing and expensive trial, the club settled. In 1992, the club formally ended its 132 years of all-male rule and admitted women as full members."[48]

In another California case, *Warfield v. Peninsula Golf & Country Club* (1995) 10 Cal. 4th 594, Mary Ann Warfield sued the Peninsula Golf & Country Club for refusing to permit women to hold primary memberships, independent of their relationship to a husband or other male member. Ms. Warfield was an avid and accomplished golfer.[49] She and her husband joined the club in 1970. They divorced in 1981 and agreed that Ms. Warfield, as the more dedicated golfer, would retain the couple's

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[47] Chambers, The Unplayable Lie: The Untold Story of Women and Discrimination in American Golf (1995) at pp. 40-41 (hereafter "Chambers").
[48] Id. at p. 41.
[49] *Warfield v. Peninsula Golf & Country Club*, *supra*, 10 Cal. 4th 594, 604.

membership in the club. The club Board refused to transfer the membership into Ms. Warfield's name, citing a rule prohibiting women from holding full club membership.[50]

In 1995, the California Supreme Court ruled in Ms. Warfield's favor, holding that the Peninsula Club was subject to the Unruh Act and had engaged in unlawful discrimination on the basis of sex.[51] This holding applies equally in this case. Although the membership rules in this case differ slightly from those in *Warfield*, they are equally discriminatory to the Plaintiffs insofar as they penalize women who are not attached to male partners.

3. Other discriminatory rules and policies.

Even in clubs that permit women to be full members, regardless of their marital status, women frequently are still subjected to discriminatory practices, such as being restricted from eating in the club's grillroom. In a recent case, the Louisiana Supreme Court held that a golf course's policy of maintaining a men's only dining room violated the Louisiana Constitution.[52] A similar lawsuit recently was filed against the Fairbanks Ranch Country

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[50] *Id.* at p. 605.
[51] *Id.* at pp. 621-624.
[52] *Albright v. Southern Trace Country Club of Shreveport, Inc.* (2004) 879 So.2d 121 (holding that exclusion of women from dining room was unconstitutional, despite the lack of malevolent intent to discriminate on the basis of gender).

Club in Santa Fe, California which refuses to allow women to use the Club's lounge.[53] In addition, "[t]he most common unwritten policy that discriminates against women is tee time rules. The standard practice allows only men to reserve tee-times on weekend and holiday mornings with women often forbidden to tee off until after noon."[54] Weekend mornings are reserved for men, and women are expected to play during the weekdays. These practices initially arose from the stereotypical assumption that women were "housewives who could play during the week while men were in the office."[55]

If this assumption ever had any validity, it certainly does not today, when women compose almost 50% of the workforce in the United States.[56] Courts that have considered such policies have uniformly found them to be

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[53] Logan Jenkins, *No-Women Lounge Spells Trouble for Clubhouse, San Diego Union Trib.* (Oct. 4, 2004) ("'I can't for a moment buy that there's any claim' of discrimination, [the club's attorney John Shiner] said. He points out that the club offers ample dining areas where mixed company can mingle. Where's the harm, he wonders."). Mr. Shiner is also counsel for the Defendant in the present case.

[54] Kamp, *supra*, at p. 90.

[55] *Links*, *supra*, at pp. 333-334. The Club that is the Defendant in the present case had a similar policy that only allowed men to play golf on Saturday mornings, which the Club did not repeal until 1995, after Ms. Koebke fought for this change for over a year. (See CT 276, 331, 456, 470, 689.)

[56] *Ibid.*

unlawful.[57] Nonetheless, despite these changed social and legal realities, archaic rules that limit women's access to tee times and other activities continue at many golf clubs across the country.

4. Harassment of female members.

Like the Plaintiffs in this case, women who challenge or transgress discriminatory policies and practices at golf clubs frequently have been subjected to harassment and intimidation. For example, at one club, a golf tournament featured a three-foot high ice sculpture of a naked woman, "which was posed so that chilled vodka flowed from between the figure's legs."[58] Another woman in Long Island obtained special permission to tee off early with the men one Saturday, but was shunned by the male members in her scheduled foursome, who refused to play with her.[59] When she proceeded alone, a crowd of male members chased, threatened, and

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[57] See, e.g., *Borne v. Haverhill Golf and Country Club, Inc.* (2003) 58 Mass. App. Ct. 306, 791 N.E.2d 903 (affirming jury's award of nearly two million dollars to the nine women who challenged golf club's discriminatory policies of denying women the benefits of a primary membership, including tee times, clubhouse privileges, and tournament play); *Wanders v. Bear Hill Golf Club, Inc.* (Mass. Super. 1998) 1998 WL 1181150 (holding that tournament schedule that prevented women from playing in weekend tournaments discriminated on the basis of sex). See also *Award Upheld in Golf Club Bias Case*, The Boston Globe (June 16, 2003) p. B2.

[58] Levine, *Club Reportedly Punishes Organizers of Event Featuring Nude Ice Sculpture*, Wash. Post (Aug. 23, 1996) p. C03.

[59] Chambers, *supra*, at pp. 74-75.

physically harassed her.[60] According to Chicago Tribune reporters Ed Sherman and Greg Burns, "Stories abound of...[women] facing retaliation for bucking the rules."[61]

5. Discrimination against lesbians.

Increasingly, many golf clubs have adopted membership policies that treat all members equally, regardless of their gender, sexual orientation, marital status, or partnership status.[62]

As this case illustrates, however, some clubs continue to discriminate against same-sex couples by denying them equal membership benefits, as the Bernardo Heights Country Club does in this case. Particularly with regard to lesbians, such as the Plaintiffs in this case, this type of discrimination perpetuates sexist assumptions and stereotypes that have long

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[60] *Id.* at pp. 75-76. After filing a complaint, this woman and her husband received telephone threats on their lives. She subsequently instituted both criminal and civil suits against the club and its committee chairman. *Id.*

[61] Sherman & Burns, *Fairways barriers fall slowly; Doors have begun to open for women and blacks at private clubs in the Chicago area, a Tribune survey finds*, Chi. Trib. (Feb. 2, 2003) p. C1.

[62] Jenkins, *Decision on Couple Puts Private Golf Course to Test*, San Diego Union Trib. (June 23, 2003) p. B-2 (noting that all of the 200 ClubCorp golf courses, including the world-famous Pinehurst Country Club in North Carolina, the Akron Country Club in Ohio, and the Morgan Run Country Club in Rancho Santa Fe have policies providing equal membership benefits to all members by extending partner benefits to anyone who signs an affidavit stipulating that they live with a member and present themselves as the member's spouse).

been used to disadvantage lesbians and other women in sports, business, and other arenas.

Homophobia affects all women in sports. Discrimination against lesbians – and women perceived to be lesbians -- is deeply rooted in sexism and sexist stereotypes. These stereotypes are particularly prevalent in the realm of athletic competition, including the world of professional golf. In general, women's participation in sports is still relatively new. Because women's participation in athletics is viewed as non-traditional or non-gender conforming,[63] the hostility these pioneering women face often takes the form of anti-lesbian harassment, regardless of their sexual orientation.[64] "[F]or many women the fear of being labeled a lesbian continues to keep them

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[63] 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, 32-36 (describing the gender stereotypes that associate strength and athletic ability with masculinity and that often are used to classify athletic women as unfeminine or stereotype them as lesbians).

[64] See Hanna, *Bad Girls and Good Sports: Some Reflections on Violent Female Juvenile Delinquents, Title IX, and the Promise of Girl Power* (2000) 27 Hastings Const. L.Q. 667, 704 (homophobia "is one of the most damaging backlashes to the entry of women into competitive athletics"); Note, *Cheering on Women and Girls in Sports: Using Title IX to Fight Gender Role Oppression* (1997) 110 Harv. L. Rev. 1627, 1632-33 (homophobia is used to discourage women from participating in sports and hurts "both heterosexual and lesbian athletes").

away from sports at all levels. And for lesbians, the intense discrimination keeps them in the closet."[65]

For this reason, combating homophobia is important to the development of women's athletics and to all women who are involved in sports. Women who are discouraged or excluded from participating in sports are denied access to extremely valuable benefits – from life-long health benefits to lower rates of depression and higher rates of self-esteem.[66] Women and girls who participate in regular physical exercise have a reduced rate of breast cancer, cardiovascular disease, obesity, unwanted pregnancies, drug use, and osteoporosis.[67] Similarly, girls who participate in sports generally not only have greater confidence and self-esteem than those who do not, but also tend to make higher grades and are more likely to graduate from high school.[68] As one commentator has noted, "It is not difficult to envision the correlation between sports, self-esteem, and success: girls who play sports as children and throughout their adolescence grow up to be

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[65] *Stereotypes Detract Some Female Athletes*, The Daily News of Los Angeles, March 23, 1997.

[66] See National Women's Law Center, A Battle For Gender Equity in Athletics: Title IX At Thirty (June 2002) http://www.nwlc.org/pdf/Battle%20for%20Gender%20Equity%20in%20Athletics%20Report.pdf (as of Jul. 18, 2003).

[67] Jay, *Women's Participation in Sports: Four Feminist Perspectives* (1997) 7 Tex. J. Women & L. 1, 10-12 (describing studies) (hereafter "Jay").

[68] *Id.* at pp. 13-16.

successful adults not only because they have a greater chance of graduating from high school and college, but also because they pursue and excel at competitive jobs."[69]

In addition, sports-related enterprises comprise one of the largest industries in the country.[70] Thus, women's participation in sports presents significant career opportunities, including sports marketing, sports broadcasting, and sports administration, as well as lucrative professional opportunities as a touring member of the Ladies Professional Golf Association or in other professional athletic associations. When homophobia and gender stereotypes exclude lesbians and other women from entering into or competing equally in these professions, the economic and social impact on all women is profound.[71]

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[69] *Id.* at p. 15 ("Eighty percent of women identified as key leaders in Fortune 500 companies participated in sports during their childhood and self-identified as having been 'tomboys'"). See also Note, *Cheering on Women and Girls In Sports*, *supra*, at 1637-38 (participation in sports helps women and girls develop "the confidence and self-esteem that they will need to succeed in school, the workplace, and the rest of their lives").

[70] Recreation Market Report (July 2003), available at http://www.sgma.com/reports/data/2003/m7-03.pdf.

[71] Baird, *supra*, at p. 35 (describing the ways that homophobia is used to perpetuate the economic dominance of men in sports) (quoting Donna Lopiano, Executive Director of the Women's Sports Foundations). See also Garrity & Nutt, *No More Disguises: Muffin Spencer-Devlin Stands Tall in her Chosen Role: the First LPGA Player to Declare She's Gay*, Sports Illustrated (March 18, 1996) at p. 70 (describing pressures on lesbian golf players to conceal their identities to avoid discrimination).

II. The Unruh Civil Rights Act Must Continue To Be Construed Broadly To Protect "All Persons."

In *Romer v. Evans* (1996) 517 U.S. 620, the United States Supreme Court explained the genesis of state laws prohibiting discrimination in public accommodations:

> At common law, innkeepers, smiths, and others who 'made profession of a public employment,' were prohibited from refusing, without good reason, to serve a customer. . . . The duty was a general one and did not specify protection for particular groups. The common-law rules, however, proved insufficient in many instances, and it was settled early that the Fourteenth Amendment did not give Congress a general power to prohibit discrimination in public accommodations, *Civil Rights Cases*, 109 U.S. 3, 25 (1883). In consequence, most States have chosen to counter discrimination by enacting detailed statutory schemes.[72]

As this Court also has noted, the common law "regarded certain enterprises as 'public' . . . . [and] attached to these enterprises certain obligations, including . . . the duty to serve all customers on reasonable terms without discrimination."[73]

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[72] *Romer*, *supra*, 517 U.S. at pp. 627-628. See also *Warfield, supra,* 10 Cal.4th at pp. 607-608 (describing the enactment of California's first public accommodations statute in the wake of the *Civil Rights Cases*).

[73] *In re Cox* (1970) 3 Cal.3d 205, 213 (internal citations omitted). See also, e.g., *Perrine v. Paulos* (1950) 100 Cal. App.2d 655, 657 ("At common law innkeepers were under a duty to furnish accommodations to all persons in the absence of some reasonable grounds."); *James v. Marinship Corp.* (1944) 25 Cal.2d 721, 740 (at common law "innkeepers and common

Further, it was well settled that states have an affirmative obligation to enforce this duty and "to guarantee all citizens access to places of public accommodation."[74] "This obligation was firmly rooted in ancient Anglo-American tradition."[75] The Unruh Act (and its statutory predecessor) codified this common law rule.[76] Accordingly, throughout its history, the Unruh Act has included language that "compel[s] recognition of the equality of *all persons* in the right to the particular service offered by an organization or entity covered by the act."[77] The predecessor to section 51 provided that *"[a]ll citizens* within the jurisdiction of this state are entitled to full and

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carriers were under a duty to furnish accommodations to all persons, in absence of some reasonable ground").

[74] *Bell v. Maryland* (1964) 378 U.S. 226, 296-297.

[75] *Id.* at p. 297. See also *Harris*, *supra*, 52 Cal.3d at p. 1151 n.2 ("Even before 1893, it was a misdemeanor for a common carrier or innkeeper to refuse service to any person"); *Greenberg v. Western Turf Assn.* (1903) 140 Cal. 357, 362 (plaintiff's right to admission to a place of amusement was "secured to him by law, in common with all other inhabitants of the state").

[76] See *Cox*, *supra*, 3 Cal.3d at p. 213 ("The California Legislature . . . enacted these common law doctrines into the statutory predecessor of the present Unruh Civil Rights Act"); *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 738 ("the provisions of section 51 derive from the common law doctrine which imposed . . . the duty to serve *all* customers on reasonable terms without discrimination"); *Curran v. Mount Diablo Council of the Boy Scouts* (1998) 17 Cal.4th 670, 729 (Werdegar, J., concurring) (purpose of the Unruh Act was "to codify the state's policy against arbitrary discrimination by persons and entities serving the public").

[77] *Curran v. Mount Diablo Council of the Boy Scouts* (1983) 147 Cal.App.3d 712, 733 (emphasis added).

equal accommodations."[78] In 1961, the Legislature substituted "all persons" for "all citizens" to further underscore the broad applicability of Civil Code section 51.[79] Subsequently, while the Legislature has amended the statute to include various enumerated categories,[80] the Act has continued to refer to "all persons" and has retained language evincing a clear intent to safeguard "freedom and equality of all persons."[81]

Because of this unique history and the clear purpose of the Act, this Court and lower courts properly have treated the enumeration of protected groups in the Unruh Act as "illustrative, rather than restrictive."[82] Accordingly, over the past twenty years, courts have construed the Act to prohibit arbitrary discrimination against groups that are not specifically

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[78] *Warfield, supra*, 10 Cal.4th at pp. 607-608 (citing Stats. 1923, ch. 235, section 1, p. 485) (emphasis added).

[79] See *Cox, supra*, 3 Cal.3d at p. 215 n.7 (describing this statutory change).

[80] See *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142 at pp. 1152-1153 (summarizing amendments to the statute adding "sex" in 1974 and "disability" in 1987).

[81] *Id.* at p. 1160; see also *id.* at p. 1174 ("The Unruh Act . . . aims to eliminate arbitrary discrimination in the provision of all business services to all persons.").

Currently, the Act 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 any kind whatsoever." Cal. Civ. Code section 51, subd. (b) (emphasis added).

[82] *Cox, supra*, 3 Cal.3d at p. 212; see also *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 28 ("The Act is to be given a liberal construction with a view to effectuating its purpose.").

enumerated in the statute, where doing so is consistent with the common law rule that still provides the Act with its animating purpose. In *Stoumen v. Reilly* (1951) 37 Cal.2d 713, for example, the Court held that the State Board of Equalization violated the statutory predecessor to the Act by suspending the license of a public establishment for serving homosexual persons. The Court expressly based its construction of the statute on the common law rule, explaining: "Members of the public . . . have a right to patronize a public restaurant and bar so long as they are acting properly and are not committing illegal or immoral acts[.]"[83] Similarly, in *In re Cox* (1970) 3 Cal.3d 205, the Court applied the Act to a shopping center's refusal to serve a customer based on his association with a young man "who wore long hair and dressed in an unconventional manner."[84] Based on similar reasoning, the Court has

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[83] *Stoumen, supra*, 37 Cal.2d at p. 716. See also *Rolon v. Kulwitzy* (1984) 153 Cal.App.3d 289 (restaurant's refusal to seat a lesbian couple in a semiprivate "romantic" booth violated the Act); *Hubert v. Williams* (1982) 133 Cal. App. 3d Supp. 1, 5 ("[W]e hold homosexuals to be a class protected by the Unruh Act.").

[84] *Cox, supra*, 3 Cal.3d at p. 210 (relying on common law precedents holding that public accommodations had a duty "to serve all customers on reasonable terms without discrimination").

applied the Act to protect minors,[85] persons who associate with others of a particular race,[86] and families with children.[87]

In these cases, courts rightly have concluded that the Legislature's inclusion of specified categories in the statute simply is designed to ensure that the statutory purpose of protecting "all persons" is fulfilled where a particular form of discrimination is especially prevalent or severe, or where courts have failed to provide adequate protection for a particular group.[88] In *Cox*, for example, this Court rejected the argument that the Legislature's decision to enumerate "race, color, religion, ancestry, or national origin" as protected categories under the Act in 1959 evinced any intent to restrict the

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[85] *O'Connor v. Vill. Green Owners Ass'n* (1983) 33 Cal.3d 790 (holding that the Act prohibited a condominium development from excluding all persons under the age of 18).

[86] *Winchell v. English* (1976) 62 Cal.App.3d 125 (holding that the Act prohibited a business from discriminating against persons based on their associations with persons from another racial group).

[87] *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 724 (holding that the Act prohibited a rental policy of refusing to rent to families with children).

[88] As the Supreme Court noted in *Romer*, "Enumeration is the essential device used to make the duty not to discriminate concrete and to provide guidance for those who must comply." *Romer*, *supra*, 517 U.S. at p. 628. In *Bell v. State of Maryland* (1964) 378 U.S. 226, the Court similarly explained that the purpose of the federal public accommodations statutes that were invalidated in the *Civil Rights Cases* was to strengthen and enforce the common law rule requiring states to protect the right of all persons, including African Americans, to equal access to public accommodations. See *id.* at p. 300 n.18 (quoting testimony explaining that the Civil Rights Act of 1866 was necessary to ensure an *effective* remedy against race discrimination in public accommodations, even though a victim of such discrimination already "could maintain a suit at common law").

statute only to those bases. Rather, the Court recognized that "a Legislature that contemplated civil rights legislation in the late 1950's or early 1960's would have been particularly concerned with the plight of racial minorities in the United States."[89] Over time, the Legislature occasionally has amended the statute to expressly include new categories of discrimination, to keep pace with changing social conditions.[90] But the Legislature never has evinced any intent to abandon the core statutory purpose of ensuring equal access for *all* persons.[91]

In *Harris*, this Court reiterated the longstanding principle that the Act must be construed broadly to prohibit "distinctions among persons based on the classifications listed in the Act (e.g., race, sex, religion, etc.) or similar personal traits, beliefs, or characteristics that bear no relationship to the

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[89] *Cox*, *supra*, 3 Cal.3d at p. 215.

[90] See *supra*, Note 2; see also *Romer*, *supra*, 517 U.S. at p. 629 (noting that Colorado's state and local public accommodations laws similarly "set forth an extensive catalog of traits which cannot be the basis for discrimination, including age, military status, marital status, pregnancy, parenthood, custody of a minor child, political affiliation, physical or mental disability of an individual or of his or her associates – and, in recent times, sexual orientation").

[91] See *Cox*, *supra*, 3 Cal.3d at p. 215 (noting the absence of any "legislative history which would suggest an intent to disregard the sound rule of public policy enunciated by this court in our *Orloff* and *Stoumen* decisions"); *Harris*, *supra*, 52 Cal.3d at p. 1156 (the "suggestion that the holdings of . . . appellate decisions extending the Unruh Act beyond its specified categories of discrimination have somehow been repudiated by the Legislature is untenable").

responsibilities of consumers of public accommodations."[92] The Court also indicated, however, that, were it writing on a clean slate, it might well construe the Act to cover only those categories that specifically are enumerated in the statute.[93] Based on that language, lower courts have applied the Act much more cautiously, and some even have misapprehended this Court's decision in *Harris* to mean that courts may no longer apply the Act to unspecified classifications, such as marital status.[94]

This Court should reiterate the clear holding of *Harris* and prior cases that the Act must be applied -- consistently with its language, history and purpose -- to effectuate the broad common law protections providing equal access to public enterprises as among the most basic of civil rights.[95] In *Harris*, this Court properly held that in determining whether a policy is prohibited under the Act, the reviewing court must consider the implications of prohibiting or failing to prohibit such a policy.[96] Here, the implications of permitting Defendant to exclude Plaintiffs and other similarly situated

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[92] *Harris*, *supra*, 52 Cal.3d at p. 1169.
[93] *Id.* at p. 1159.
[94] See, e.g., *Beaty*, *supra*, 6 Cal.App.4th 1455; *Roth v. Rhodes* (1994) 25 Cal.App.4th 530 (holding that discrimination based on one's profession is not prohibited under the Unruh Act).
[95] *Bell*, *supra*, at pp. 296-304; see also *Romer*, *supra*, 517 U.S. at p. 631 (noting the importance of "protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.")
[96] *Harris*, *supra*, 52 Cal.3d at pp. 1165-1169.

persons from equal access to their facility would be profoundly negative. In addition to contravening the language and purpose of the Act, such an outcome would permit Defendant and others to discriminate against persons in same-sex and other non-marital relationships with impunity, despite the complete absence of any reasonable, business-related justification for doing so, and despite the detrimental impact of such discrimination on hundreds of thousands of families statewide.

III. The Club's Discriminatory Treatment of Plaintiffs Violates the Unruh Civil Rights Act.

In *Harris*, this Court properly stressed that a key criteria in determining whether a policy or practice violates the Act is whether it restricts equal access based on "personal characteristics that have no bearing on a person's status as a responsible consumer."[97] In this case, Plaintiffs' personal characteristics as women, as lesbians, and as domestic partners have no bearing on their ability to be responsible consumers of the services provided by the Club. In every relevant aspect, the Plaintiffs are similarly situated to the different-sex couples who are provided with far greater access to the Club's facilities, insofar as they are in a long-term, committed,

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[97] *Harris*, *supra*, 52 Cal.3d at 1169; see also *ibid.* (noting that the Unruh Act does not prohibit restrictions that apply "uniformally and neutrally to all persons regardless of personal characteristics").

legally-recognized relationship and wish to play golf together. The only difference between the Plaintiffs and other members of the Club is that other members' relationships are treated equally and with respect, and the Plaintiffs' relationship is not. Accordingly, the Plaintiffs have stated a claim under the Unruh Act, and the trial court erred in dismissing their claim.

A. The Club's Policy Discriminates Against the Plaintiffs on Multiple Bases, in Violation of the Unruh Civil Rights Act.

The Club's disparate treatment of the Plaintiffs based on their sex, sexual orientation, and marital status falls squarely within the scope of the discrimination prohibited by the Unruh Act – namely, arbitrary discrimination on the basis of "personal traits, beliefs, or characteristics that bear no relationship to the responsibilities of consumers of public accommodations."[98] As explained below, the basis on which the Club has discriminated against the Plaintiffs can be labeled in different ways, as discrimination based on sex, sexual orientation, marital status, or domestic partnership status. Yet regardless of which label is used, the Defendant's culpability under the Unruh Act is clear.

First, the Club's membership policy discriminates on the basis of sex by treating couples differently based on their gender. Under the Club's policy, couples consisting of a man and a woman are eligible for full

[98] *Harris*, *supra*, 52 Cal.3d at p. 1169.

membership benefits (since every such couple is free to marry). In stark contrast, couples consisting of two women (or two men) can never obtain full membership benefits (since no such couple currently is able to marry under California law). As a result of this disparity, the Club's policy relegates Ms. Koebke to a permanent, second-class membership status because she is a woman with a female partner rather than a similarly situated man. The Act specifically prohibits sex-based discrimination such as this.[99]

The Club's policy also discriminates on the basis of sex in that it is based on and perpetuates sex stereotypes. As described above, many golf clubs have had and some still have policies that perpetuate the stereotype that men are the primary breadwinners and the "real" golfers, while women are homemakers and incapable of serious play. So, for example, in the *Warfield* case, this Court held in 1995 that a policy of refusing to permit women to hold primary memberships, independent of their relationship to

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[99] Cal. Civ. Code section 51, subd. (b). See also *Rotary Club of Duarte v Board of Directors* (1986) 178 Cal.App.3d 1035, 1061 [224 Cal Rptr 213] ("The Unruh Act proscribes not only International's direct discrimination against women but also discrimination against Duarte on account of its association with women."); *Koire v. Metro Car Wash* (1985) 40 Cal. 3d 24, 28 [219 Cal. Rptr. 133, 707 P.2d 195] ("Nor can there be any dispute that the Act applies to classifications based on sex."); *Easebe Enterprises, Inc. v. Alcoholic Bev. etc. Appeals Bd.* (1983) 141 Cal.App.3d 981, 986 & fn. 4 [190 Cal.Rptr. 678,]; *Hales v. Ojai Valley Inn & Country Club* (1977) 73 Cal.App.3d 25, 28-29 [140 Cal.Rptr. 555].

their husbands, violated the Unruh Act.[100] Similarly, it was not until 1992 that the Olympic Club in San Francisco allowed women to become full members.[101] Other clubs deny women membership altogether unless they are married.[102] In addition to these more extreme policies, many other clubs have other types of rules that also perpetuate the stereotypical notion that the husband is the "real" business person of the family, including policies that prohibit women are eating in the grillroom or entering into the club's lounge, such as the policy at Fairbanks Ranch Country Club in Santa Fe, California, places where many business deals are transacted.[103] Similarly, many clubs continue to allow only men to reserve tee-times on weekends and holiday mornings, clearly based on the assumption that men are the only ones who work during the week and, therefore, they should be given priority on the weekends.[104]

In this case, as a same-sex couple in which both partners work outside the home, Ms. Koebke and Ms. French do not conform to these traditional stereotypes, that women should be married to men, and remain in the home while the husband supports the family. In its Answer Brief, Respondent

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[100] *Warfield*, *supra*, 10 Cal.4th 594.
[101] See, e.g., Chambers, *supra*, at pp. 40-41.
[102] *Links*, *supra*, at p. 334. See also Mayo, *supra*, at p. 193.
[103] Logan Jenkins, *No-Women Lounge Spells Trouble for Clubhouse*, San Diego Union Trib. (Oct. 4, 2004).
[104] Kamp, *supra*, at p. 90; *Links*, *supra*, at pp. 333-334

specifically invokes this stereotypical notion of a heterosexual family in its papers, where Respondent refers to Plaintiffs as if they were no more than casual friends, despite the fact that they have been in a committed relationship for more than a decade.[105]

In other contexts, the United States Supreme Court has recognized the harm caused by laws and policies based on stereotypical assumptions about the "proper" roles of men and women. In *Nevada Dept. of Human Services v. Hibbs* (2003) 538 U.S. 721, for example, the Court noted a long history of laws that limited women's employment opportunities based on the belief that "woman is, and should remain, 'the center of the home and family life'."[106] In the world of golf clubs, gender-based restrictions similarly

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[105] See, e.g., Respondent's Answer Brief ("RAB") at p. 5 (asserting that "there are legitimate reasons for private clubs to extend privileges to a member's immediate family that are not extended to an unmarried members' friends."); *id.* at p. 39 (contrasting spousal benefits with giving benefits to "friends").

[106] *Hibbs*, *supra*, 538 U.S. at p. 729 (citations omitted). See also, e.g., *Weinberger v. Weisenfeld* (1975) 420 U.S. 636 (striking down policy basing public benefits on the gender stereotype that only husbands are "breadwinners"); *Califano v. Westcott* (1979) 443 U.S. 76, 89 (invalidating a public benefits law based on "the baggage of sexual stereotypes that presumes the father has the primary responsibility to provide a home and its essentials, while the mother is the center of home and family life"); *Mississippi University for Women v. Hogan* (1982) 458 U.S. 718 (striking down admissions policies of a state-run nursing school that refused to admit men on the ground that such a policy perpetuates "the stereotyped view of nursing as an exclusively woman's job"); *J.E.B. v. Alabama ex. rel. T.B.* (1994) 511 U.S. 127, 135 ("policies that professedly are reasonable

perpetuate outmoded stereotypes and "confirm the belief that women are inferior to men....When it is well understood that golf is . . . a significant professional tool, these restrictions and attitudes cannot be overlooked."[107]

Second, the Club's membership policy also discriminates on the basis of sexual orientation. The Club provides benefits to heterosexual members by permitting their partners to use the club facilities at no charge. In contrast, the Club denies the same benefits to lesbian and gay members, no matter how committed their relationship or how long the couple has been together.

Although the Club has argued that its policy does not discriminate on the basis of sexual orientation, this claim is untenable. The Court of Appeals already correctly has held that a business that denied equal treatment to same-sex couples has discriminated on the basis of sexual orientation. In

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considerations in fact may be reflective of archaic and overbroad generalizations about gender"); *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 34-36 ("Men and women alike suffer from the stereotypes perpetrated by sex-based differential treatment. . . . This sort of class-based generalization as a justification for differential treatment is precisely the type of practice prohibited by the Unruh Act. *[T]he Unruh Civil Rights Act prohibits all forms of stereotypical discrimination.*) (citations omitted, emphasis in original); *Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 235 n.2 (accepting the "definition of 'gender bias' developed by the Judicial Council Advisory Committee on Gender Bias in the Courts, which provides that 'gender bias includes behavior or decision making of participants in the justice system which is based on or reveals (1) stereotypical attitudes about the nature of rules of women and men . . .").

[107] *Links*, *supra*, at p. 335.

Rolon v. Kulwitzky (1984) 153 Cal. App.3d 289, a restaurant refused to seat a same-sex couple at a private booth reserved for romantic couples. The couple sued, and the court held excluding the couple violated the Unruh Act.[108] The same analysis applies here, where the Club has denied the Plaintiffs equal treatment by excluding all same-sex couples from the definition of "family" and the benefits provided to family members.

Third, the Club's membership policy discriminates on the basis of marital status. The Club provides benefits to members who are married while denying the same benefits to members who are not. The Club does not dispute this factual claim; rather, the Club erroneously contends that the Unruh Act permits this type of discrimination. (CT 60-66, 219-220, 225, 490, 493, 496.)

The Club's sole support for this contention is *Beaty v. Truck Ins. Exch.* (1992) 6 Cal.App.4th 1455. In *Beaty*, two gay men challenged the refusal of a car insurance company to sell them a policy on the same terms as a married couple.[109] Based on a misreading of this Court's decision in *Harris,* the court in *Beaty* erroneously held that marital status is not protected under the Unruh Act because it is not specifically mentioned in the

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[108] *Rolon*, *supra*, 153 Cal.App.3d 289.
[109] *Beaty*, *supra*, 6 Cal.App.4th at p. 1457.

statute.[110] If the court in *Beaty* had followed *Harris*, it would have determined whether marital status is a personal characteristic akin to those specifically listed in the Act. *Amici* asks this Court to undertake that analysis here and submits that, under any fair consideration of that question, the answer must be yes.

Finally, the Club's membership policy also discriminates on the basis of domestic partnership status. Although members in a domestic partnership must pay the same membership fee as those who are married, they do not receive equal value for their money, despite a complete absence of any reasonable or legitimate basis for this differential treatment.[111]

Since 1985, numerous California cities paved the way for the rest of the nation in enacting domestic partner registries. In 1999, the state legislature established the first statewide domestic partner registry in the nation.[112] Since then, the domestic partnership law has been amended a number of times to provide domestic partners with substantial rights and

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[110] *Id.* at p. 1462 ([T]he Unruh Act makes no mention of discrimination on the basis of "marital status." [...] [N]o court has extended the Unruh Act to claimed discrimination on the basis of marital status and we shall not be the first to do so.").

[111] See *Harris*, *supra*, 52 Cal.3d at p. 1169 (the Act prohibits discrimination on the basis of personal characteristics that bear "no relationship to the responsibilities of consumers of public accommodations").

[112] Cal. Fam. Code sections 297 et seq.

responsibilities.[113] As a result of the registry, domestic partnership is a legally-recognized and sanctioned relationship under State law. By arbitrarily penalizing members who are in such a relationship, the Club has violated the manifest purpose of the Act.

B. Regardless of How Defendant's Discrimination against the Plaintiffs Is Labeled, Defendant's Conduct Violates the Unruh Civil Rights Act.

As stated above, the Club's treatment of the Plaintiffs can be characterized in various ways – as discrimination on the basis of sex, sexual orientation, marital status, or domestic partnership status. These descriptions are not mutually exclusive. To the contrary, as in many other instances of discrimination,

> where two [or more] bases for discrimination exist, they cannot be neatly reduced to distinct components. [Citations.] Rather than aiding the decisional process, the attempt to bisect a person's identity at the intersection of [differing bases for discrimination] often distorts or ignores the particular nature of their experiences.... Accordingly, ... when a person is claiming [more than one type of] bias, it is necessary to determine whether the employer [or in this case, business] discriminates on the basis of the *combination* of factors ....[114]

In this case, the Plaintiffs have been subjected to discrimination on the bases of multiple, overlapping classifications – namely, sex, sexual

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[113] See SB 2011 (2000), AB 25 (2001), SB 1049 (2001), AB 2216 (2002), AB 2777 (2002), SB 1575 (2002), SB 1661 (2002).

[114] *Lam v. Univ. of Hawaii* (9th Cir. 1994) 40 F.3d 1551, 1562 (emphasis in original).

orientation, marital status, and domestic partnership status. In assessing the Plaintiffs' claims, this Court need not choose between these categories or attempt to dissect the Plaintiffs' experiences at the intersection of these categories. The Act does not require that discrimination be based solely on a single characteristic. Rather, if a protected characteristic is a motivating factor in the Defendant's conduct, that is sufficient to establish liability, regardless of how the discrimination is labeled, and even if other motivating factors (such as economic considerations) are also present.[115]

Thus, in this case, the Court may consider how the Club's policies and conduct have subjected the Plaintiffs to discrimination on the basis of multiple factors. In *Rolon*, for example, the court held that the restaurant's conduct in refusing to seat a same-sex couple in a private romantic booth was based on sexual orientation.[116] Nonetheless, the court equally could have held that the discrimination was based on sex, as courts analyzing similar situations in other states have done.[117] Similarly, in this case,

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[115] See, e.g., *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 740 ("an entrepreneur may find it economically advantageous to exclude all homosexuals...from his restaurant or hotel, but such a 'rational' economic motive would not, of course, validate the practice").

[116] See *Rolon*, *supra*, 153 Cal.App.3d at p. 292.

[117] See, e.g., *Tanner v. Oregon Health Sciences Univ.* (Or. Ct. App. 1998) 157 Or. App. 502 (holding that discrimination against gay and lesbian couples constitutes discrimination on the basis of sex within the meaning of the state's employment non-discrimination statute).

regardless of which label is applied, the Defendant's policy discriminates on the basis of personal characteristics in violation of the Unruh Act.

This approach is necessary to effectuate the Act's broad remedial purpose of prohibiting arbitrary discrimination based on "the classifications listed in the Act...or similar personal traits, beliefs, or characteristics that bear no relationship to the responsibilities of consumers of public accommodations."[118] Especially given the strong public policy reasons for prohibiting arbitrary discrimination in golf clubs, it would contravene this purpose to permit the Club to discriminate against the Plaintiffs with impunity, simply because the nature of the discrimination can be labeled in different ways.

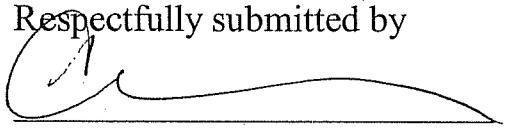
CONCLUSION

Golf courses in this country have a long history of engaging in invidious discrimination based on race, religion, sex, marital status, sexual orientation and other bases. Equal access to golf clubs where leading business executives and policymakers congregate is essential if women and minorities are to participate equally in professional realms and to combat discrimination in employment and athletics. In this case, the Plaintiffs have been denied equal access and subjected to harassment because they are two

[118] *Harris, supra*, 52 Cal.3d at p. 1169.

women in a domestic partnership rather than a different-sex married couple. While the Club's discrimination against them can be characterized in different ways, the impact on the Plaintiffs is the same: they are denied the same dignity, equality, and respect shown to other members. This violates the Unruh Act.

Respectfully submitted by



Shannon Minter
Courtney Joslin
Nancy Hogshead-Makar
Nancy M. Solomon

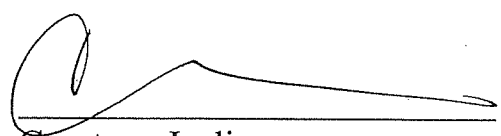
Attorneys for amici

CERTIFICATE OF COMPLIANCE

The accompanying brief of Amici Curiae Women's Sports Foundation, California Women's Law Center, and the National Center for Lesbian Rights complies with the specifications of California Rules of Court 14(c) as follows:

1. The word count of the Brief is 9,175 words, based on the count of the word processing system used to prepare the brief.

I certify that the foregoing is true and correct. Dated this 24th day of November, 2004, at San Francisco, California.



Courtney Joslin

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that: I am over eighteen years of age and not a party to this action; that I am employed in the County of San Francisco, California, and that my business address is 870 Market St., Ste. 370, San Francisco, California 94102.

On this 24th day of November 2004, I served a copy of the attached document, described as **BRIEF OF AMICI CURIAE IN SUPPORT OF PLAINTIFFS/APPELLANTS** 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:

Jon W. Davidson, Esq.
Lambda Legal Defense and
Education Fund
3325 Wilshire Boulevard, Suite 1300
Los Angeles, California 90010-1729

Attorney for Appellants

John R. Shiner, Esq.
John Sobieski, Esq.
Michael Katz, Esq.
Morrison & Foerster LLP
555 West Fifth Street, Ste. 3500
Los Angeles, California 90013-1024

Frederic D. Cohen, Esq.
Patricia Lofton, Esq.
Jeremy B. Rosen, Esq.
Horvitz & Levy, LLP
15760 Ventura Blvd., 18th Floor
Encino, California 91436

Attorneys for Respondents

California Court of Appeal, Fourth
Appellate District, Division One
750 B Street, Suite 300
San Diego, California 92101

Clerk, Superior Court of California
For the County of San Diego
(for delivery to the Hon. Charles R.
Hayes, Judge)
330 W. Broadway
San Diego, California 92101-3409

Jordan C. Budd, Esq.
ACLU Foundation of San Diego &
Imperial Counties
P.O. Box 87131
San Diego, California 92138-7131

Attorney for Amici

James D. Esseks, Esq.
Christine P. Sun, Esq.
ACLU Foundation
Lesbian & Gay Rights Project
125 Broad Street, 18th Floor
New York, New York 10004

Attorney for Amici

Steven C. Sheinberg, Esq.
Anti-Defamation League
823 United Nations Plaza
New York, New York 10017

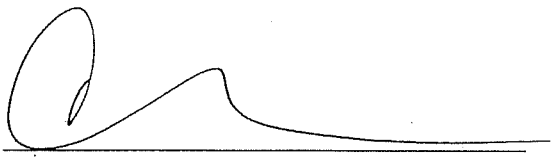
Attorney for Amici
Miranda J. Junowicz, Esq.
Anti-Defamation League

Miranda J. Junowicz, Esq.
Anti-Defamation League
10495 Santa Monica Blvd.
Los Angeles, California 90025

Attorney for Amici

Manuel Medeiros, Esq.
State Solicitor General
Office of the Attorney General
1300 I Street
Sacramento, California 95814

State Solicitor General



Courtney Joslin